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THE
FEDERAL REPORTER.

VOLUME 78.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 78.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
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¹Deceased November 17, 1896.²Commissioned December 15, 1896.³Resigned May 16, 1896.⁴Commissioned May 18, 1896. Confirmed same date.⁵Deceased October 28, 1896.⁶Resigned.⁷Deceased August 8, 1896.⁸Commissioned August 31, 1896. Confirmed February 18, 1897.⁹Deceased August 9, 1896.¹⁰Commissioned December 15, 1896.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

DEMING v. ORIENT INS. CO.

(Circuit Court, N. D. Iowa, E. D. December 31, 1896.)

COURTS—JURISDICTION—INSURANCE COMPANIES—SUITS IN DIFFERENT STATES.

The fact that an insurance company, after the adjustment of a loss in Iowa, and the assignment by the insured of his claim for the amount thereof, has been garnished in a suit brought in an Illinois court by a creditor of the insured, does not deprive a federal court in Iowa of jurisdiction of a suit against the company by the assignee of the claim to recover the amount of the loss.

Suit on policy of insurance issued by defendant company upon property of the Ryan Packing Company, tried to the court without a jury.

Henderson, Hurd, Lenehan & Kiesel, for plaintiff.

D. E. Lyon, Wm. H. Barnum, Schuyler & Kramer, and Bates & Harding, for defendant.

SHIRAS, District Judge. By written stipulation, duly filed, it was agreed by the parties to this suit that the case should be tried to the court without a jury, and, the evidence having been submitted, the court has made a finding of facts, the substance of which is as follows:

That on the 7th day of December, 1895, the defendant insurance company issued a policy of insurance to the Ryan Packing Company, a corporation engaged in business at Dubuque, Iowa, for the sum of \$2,500, upon the buildings owned and occupied by the company at Dubuque. That on the 27th day of June, 1896, and during the lifetime of said policy, the property insured was destroyed by fire. That due proofs of loss were furnished the company, and thereupon an adjustment of the amount of the loss was had on the 27th day of August, 1896, by which it was ascertained and established that the sum for which the company was liable upon the policy was \$2,108.93. That on the 3d day of July, 1896, and after the fire had happened, the Ryan Packing Company and Stephen Douglas Ryan, in writing assigned and transferred to J.

K. Deming, cashier of the Second National Bank of Dubuque, Iowa, all claim and demands held by the packing company against the defendant company and several other insurance companies upon the policies issued upon the property which had been burned; this assignment being made to secure the payment of a debt due to the said Second National Bank of \$40,000; this debt being for money advanced by the bank from time to time to the Ryan Packing Company for use in its business conducted at Dubuque. That when this assignment of the claims arising under the policies was made for the purpose named, the plaintiff had no notice or knowledge of any adverse claims, nor of any equities in favor of the insurance companies or any one else to or against the claims assigned as above stated. That on the 9th day of November, 1896, one Thomas J. Ryan brought an action in the circuit court of Cook county, Ill., against the Ryan Packing Company, Stephen D. Ryan, and Thomas Duffy, claiming damages in the sum of \$30,000, and, on the ground that the defendants were nonresidents of the state of Illinois, procured the issuance of a writ of attachment against their property, which was returned as served by garnishing the defendant and other insurance companies, notice being given to the local agents of the companies representing the companies at Chicago, Ill. That on the 23d day of December, 1896, notice of the pendency of said suit having been given by publication in a newspaper, a default was entered against the defendants in the attachment suit, but no assessment of damages was had, nor was a judgment for any sum then awarded. The suit now before this court was filed November 17, 1896, and the defendant company appeared thereto, and in its answer admits the issuance of the policy, the happening of the fire, and the adjustment of the amount due on the policy; but denies that the claim against it had been lawfully assigned for value to the plaintiff, and then sets up the proceedings had, as above stated, in the circuit court of Cook county, Ill., as grounds why this court has not jurisdiction over the subject-matter of the controversy, and as reasons why this court should not entertain the case out of comity to the court of Illinois. The evidence in the case clearly shows that the claim arising under the policy had been legally assigned to plaintiff as security for the debt due to the Second National Bank, and therefore there can be no question that under the provisions of the Code of Iowa (section 2546) the action can be maintained in the name of the assignee. *Carter v. Insurance Co.*, 12 Iowa, 287.

The main contention on part of the defendant is that the service of the notice of garnishment in the case pending in the circuit court of Cook county, Ill., brought within the jurisdiction of that court the debt due from the insurance company upon the policy, in such sense that it deprived all other courts of the right to entertain suits dealing with the question of this indebtedness. In support of this contention it is claimed that in Illinois a chose in action is not assignable, so as to vest the legal title in the assignee, and that by service of a notice of garnishment the property or funds in the hands of the garnishee are appropriated from that time to the payment of all creditors who may, under the laws of the state

of Illinois, make themselves parties to the suit, and participate in its benefits. *Reeve v. Smith*, 113 Ill. 47; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401. Based upon these rulings as to the effect of a garnishment in Illinois, it is then claimed that the subject-matter of the controversy between the plaintiff herein and the insurance company has been taken into the jurisdiction of the circuit court of Cook county, Ill., so that this court cannot obtain jurisdiction in this case; or, if that be not absolutely true, that nevertheless this court should not proceed to judgment in order to avoid a possible conflict between the process of the courts, acting under different sovereignties, under the rule laid down in *Gates v. Bucki*, 4 C. C. A. 116, 53 Fed. 961; a case decided by the court of appeals for the Eighth circuit. As I understand the rulings of the supreme court of Illinois, they are to the effect that a chose in action is not assignable, so as to cut off defenses that exist against the assignor, but that the assignee stands in the shoes of the assignor, having no greater rights than the assignor in the claim or demand assigned; and, further, that when a notice of garnishment is duly served, the property or funds of the debtor in the hands of the garnishee are from that time appropriated to the payment of creditors who may be entitled to share in the property of the debtor. In the case before the court the question is not as to the effect of an assignment of a chose in action under the law of the state of Illinois, but as to the effect of an assignment of a chose in action made in Iowa, between citizens of Iowa, and of a claim growing out of an Iowa contract, and out of acts happening in Iowa. Under the statute of Iowa the assignee of a chose in action takes it subject to all defenses existing in favor of the debtor, and therefore in this court, as well as in the courts of Illinois, it is open to the defendant insurance company to plead any facts showing that it is not liable upon the policy of insurance.

The company admits that there is due and owing from it upon the policy issued to the Ryan Packing Company the full sum of \$2,108.93, and the issue is narrowed down to the question whether the plaintiff is entitled to demand and receive payment of the sum admitted to be due. This issue is not now pending before the court in Illinois, but, as I understand the contention of the defendant, it is claimed that the garnishment process had the effect of bringing the fund within the jurisdiction of the court in Cook county, and therefore this court is debarred from entertaining or proceeding with this suit. There are cases in which the service of garnishment process may have the effect claimed for it in this instance. Thus, if it appeared that the defendant insurance company, when the garnishment was served, had in its possession any property, such as notes, bonds, or the products of the packing house business, placed in its hands by the Ryan Packing Company, it might well be claimed that the service of the garnishment brought this property within the jurisdiction of the Cook county court, so that no other court would permit its process to be levied thereon. In the supposed case it would be the duty of the garnishee to hold the

property in its possession subject to the judgment of the court issuing the process, and that court would have the right to direct the disposition to be made of the property thus held by the garnishee; and this right ought not to be interfered with by process issued from a court created under another sovereignty. When, however, the garnishee has not in possession any property, but simply is indebted upon an obligation existing against it, there is no fund or property which passes into the jurisdiction of the court from which the garnishment process issued. All that the court can then do is to render a personal judgment against the garnishee for the sum due. If the proceedings are carried to judgment in the Cook county court, the utmost that court can do will be to render a personal judgment against the insurance company; but this judgment would not be a lien upon any property belonging to the Ryan Packing Company, nor upon any property previously brought within the jurisdiction or under the control of that court. If this court now gives judgment against the defendant insurance company for the amount due on the policy issued to the Ryan Packing Company, this judgment will not be a lien upon any property in Illinois, or within the jurisdiction of the circuit court of Cook county. The jurisdiction of this court in this case is not dependent upon control over any property, but has been acquired by personal service of the defendant company; and the same is true of the jurisdiction of the Cook county court over the insurance company as garnishee. Its jurisdiction depends upon the question whether the process of garnishment was duly served upon the defendant company, and thus it appears that the real point to be decided is whether the pendency of a proceeding in the circuit court of Cook county, Ill., which is, in effect, a suit to recover the sum due from the defendant insurance company, on behalf of Thomas J. Ryan, is a bar to this court taking jurisdiction over a suit brought by the plaintiff to recover the same claim against the insurance company.

In *Stanton v. Embrey*, 93 U. S. 548, and *Gordon v. Gilfoil*, 99 U. S. 168, it is held by the supreme court that the pendency of a prior suit in a state court is not a bar to a suit in a circuit court of the United States for the same cause of action, and therefore, if it be held that the proceedings now pending in the circuit court of Cook county, Ill., are tantamount to a suit on behalf of Thomas J. Ryan against the insurance company to recover the sum due upon the policy of insurance issued upon the property of the Ryan Packing Company, the pendency of that proceeding in a foreign jurisdiction is not matter of bar or abatement to the suit in this court based upon the same cause of action. But if it should be held that the service of the garnishment upon the defendant company in the case pending in Illinois had the effect of bringing a fund or res within the control of that court, it does not follow that the jurisdiction of this court over the present suit is defeated. In that event the rule laid down by the supreme court in the leading case of *Buck v. Colbath*, 3 Wall. 334, would be applicable, in which it was held that in cases wherein, by attachment, property had been levied on by the marshal, a state court could not rightfully issue

process to take possession of the property at the suit of a third party, but that it was open to such third party to sue the United States marshal in a state court in trespass to recover damages for the wrongful taking of the property; it being pointed out that each suit could be carried through to its final termination without bringing the process of the courts into conflict. As already said, this court can proceed to judgment against the defendant insurance company, and can collect the judgment from the property of the defendant company within the state of Iowa, without in any manner interfering with the control of the circuit court of Cook county over the proceedings pending in that court, or over any fund or property within the jurisdiction of that court. The plaintiff in this case is not seeking to establish a right to or lien upon any specific property or fund, but is seeking a personal judgment against the defendant company.

In argument it was claimed that the ruling of the circuit court of appeals for this circuit in the case of *Gates v. Bucki*, 4 C. C. A. 116, 53 Fed. 961, fully sustained the contention made against the jurisdiction of this court, but a careful reading of the opinion in that case shows that it supports the jurisdiction of the court in the present case. Thus it is therein said:

"When the jurisdiction of the courts in cases between the same parties involving the same issues, and seeking identical remedies, is dependent upon personal service of the original process upon the defendant, had within the limits of the territorial jurisdiction of the courts, then it is possible to proceed with each case without bringing about an unseemly conflict of jurisdiction. In some cases each court can proceed to final judgment without conflict. In others the first judgment rendered may be available to the prevailing party as a plea in bar to the action still pending. When, however, the proceedings are in rem, or are of that kind wherein jurisdiction is based solely upon the possession or control of property, and in which the final judgment of the court can only be enforced against the property taken into possession or under the control of the court, then a different rule applies."

Thus it appears that the court in *Gates v. Bucki* expressly recognized the distinction existing between cases resting upon personal service upon, and jurisdiction existing over, the person of the defendant, and cases wherein jurisdiction was rested solely upon possession of or control over property, and wherein no personal judgment could be rendered. The portions of the opinion cited and relied upon by counsel for defendant deal with cases coming under the definition of proceedings in rem, but were not intended to apply to cases wherein jurisdiction existed over the person of the defendant, and wherein a personal judgment could alone be entered.

The facts of this case show that on the 3d day of July, 1896, a legal and valid assignment of the claim existing against the defendant insurance company was made by the Ryan Packing Company to the plaintiff, as cashier of the Second National Bank, to secure a debt then justly due and owing to the said bank for moneys previously borrowed from the bank. This assignment transferred this claim to the plaintiff, and from its date the plaintiff had the right to demand and receive payment thereof, and, if not paid within the time named in the policy, had the right to enforce payment by suit at law. The company did not make payment when due, and

the plaintiff brought this action to collect the sum due, and the company answers that on the 9th day of November, 1896, fully four months after the claim had been legally transferred to plaintiff, the company had been garnished in an action brought in the circuit court of Cook county, Ill., by Thomas J. Ryan against the Ryan Packing Company. It is not averred or shown that there is pending in the circuit court of Cook county any proceeding to test the validity of the transfer of the claims to the plaintiff. All that has been done to reach the sum due from the defendant company is the service of the notice of garnishment thereon. If a final judgment in favor of Thomas J. Ryan against the Ryan Packing Company should hereafter be entered, and the garnishee shall be called upon to answer, it would be made to appear to the Cook county court that the garnishee had not in its possession any property belonging to the Ryan Packing Company; that it had become indebted to that company upon the policy of insurance issued by reason of the fire which took place on the 27th day of June, 1896; that this claim existing against it had been legally transferred to the plaintiff herein on the 3d day of July, 1896, four months before the process of garnishment had been served on the company, and that suit had been brought in the circuit court of the United States in Iowa, and judgment had been recovered against the company by the assignee of said claim for the full sum due from the company. Upon such showing it would clearly appear that there was no liability on part of the garnishee. It is well settled that an attaching creditor does not acquire any greater right against the garnishee than the defendant in the attachment suit possesses, and that the garnishee is not to be placed in a worse position than if the action against him was enforced by the defendant in the attachment suit; and, furthermore, a valid assignment by the defendant, which transfers the legal or equitable title to the claim due from the garnishee, and which is executed before service of garnishment process, will discharge the garnishee from liability. It thus appears that the garnishee has an effectual means of defense against any claim based upon the garnishment proceedings in Illinois, and no good or sufficient reason is shown why this court should not proceed to judgment in this case. If the theory advanced should be adopted,—that is, that this court, out of consideration for the garnishee, should not proceed in this case,—the same appeal, and with even greater force, could be made to the court in Illinois on behalf of the garnishee, to the effect that the garnishee had been directly sued upon the claim, by an assignee thereof, in the circuit court of the United States in Iowa, and that protection to the garnishee required that it should not be required to answer finally to the garnishment until the suit in Iowa had been disposed of, and thus action in both courts would be arrested, and the insurance company would not be held to account in either court.

It appearing that the defendant company is justly indebted upon the policy of insurance issued upon the property of the Ryan Packing Company, and that the claim thus existing has been duly assigned to the plaintiff, such assignment being made on July 3, 1896, and it

being admitted that no defense exists to this claim on behalf of the insurance company, it follows that the plaintiff is entitled to judgment for the amount admitted to be due.

DARRAGH v. H. WETTER MANUF'G CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1897.)

No. 766.

1. FEDERAL COURTS—ENFORCEMENT OF RIGHTS CREATED BY STATE STATUTES.

Rights created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the national courts either at law, in equity, or in admiralty, as the nature of the rights or remedies may require.

2. SAME—EQUITABLE RIGHTS.

An enlargement of equitable rights by the statutes of the states may be administered by the federal courts as well as by the courts of the states.

3. SAME.

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals." *Davis v. Gray*, 16 Wall. 203, 221.

4. SAME—CREDITORS' BILL—STATE STATUTES.

A contract creditor, who has not reduced his claim to judgment, may maintain a bill in equity in the federal court, under the statutes of the state of Arkansas (sections 1425-1428, Sand. & H. Dig.), for the appointment of a receiver and the sale of the property of an insolvent corporation of that state, and for the distribution of its assets among its creditors.

5. INSOLVENT CORPORATIONS—RECEIVERS—RIGHTS OF STOCKHOLDERS.

A stockholder of an insolvent corporation, whose stock is worthless, and cannot be made of any value by the granting of the relief prayed in his bill, cannot maintain a suit to set aside an order appointing the receiver and a decree directing a sale of the property of the corporation, on the ground that its officers and directors fraudulently colluded with the complainant in the proceeding, to enable it to obtain the order and decree.

6. EQUITABLE RELIEF—PARTIES ENTITLED.

Courts of equity do not attempt to right wrongs at the suit of those who have not suffered from them, or to grant decrees that can give their suitors no relief.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This is an appeal from a decree dismissing a bill in equity filed in the court below by the appellant, Thomas J. Darragh, against the H. Wetter Manufacturing Company, the Dickinson Hardware Company, and the W. W. Dickinson Hardware Company, three corporations, to set aside an order appointing a receiver of the property of the Dickinson Hardware Company, and a decree for its sale, made by the court below in a suit between the H. Wetter Manufacturing Company and the Dickinson Hardware Company. The bill alleged the existence of these facts:

The Dickinson Hardware Company was a corporation engaged in the mercantile business at Little Rock, in the state of Arkansas, in the month of November, 1895. Its business had been affected by the general depression, but it had at all times met its maturing obligations, and none of its commercial paper had gone to protest. Its capital stock was \$100,000, \$68,500 of which had been subscribed and paid for. Of this the appellant owned \$29,000, W. W. Dickinson \$29,000, J. H. Martin \$8,000, and G. H. Lyon \$2,500. The directors of the corporation were W. W. Dickinson, J. H. Martin, and G. H. Lyon, and Dickinson was its president and Lyon its secretary. These directors formed a conspiracy to wreck the cor-

poration, to defraud its creditors and stockholders, and to obtain its property for themselves. Thereupon they induced the H. Wetter Manufacturing Company to file in the court below a bill in these words:

"United States Circuit Court, Eastern District of Arkansas, Western Division.

"H. Wetter Mfg. Co. vs. Dickinson Hardware Co.

"Original Bill.

"To the Judges of Said Court, in Chancery Sitting: Your orator states that it is a corporation created and doing business under the laws of the state of Tennessee, while the defendant is a corporation created and doing business under the laws of the state of Arkansas, and an inhabitant of this district. Said defendant is indebted to your orator, for goods sold and delivered, in the sum of twenty-eight hundred forty-two and 90-100 dollars, and is insolvent, but that the distributive share going to your orator upon a distribution of its assets will exceed the sum of two thousand dollars. Your orator therefore prays for process of subpoena against the defendant; that it be required to answer this bill; that a receiver be appointed to take possession of its assets, and to administer the same; that they be reduced to money and distributed among the creditors entitled thereto; and for all other proper relief.

Rose, Hemingway and Rose."

The debt of \$2,842.90 mentioned in this bill was a simple debt upon contract, and no part of it had ever been reduced to judgment. \$1,880.30 of it was not due, and \$1,110 was for goods that were never received or accepted, but were returned, by the Dickinson Hardware Company. The bill was filed on November 1, 1895. At the time of its filing the H. Wetter Manufacturing Company made a motion for the appointment of a receiver of the property of the Dickinson Hardware Company, and W. W. Dickinson, its president, appeared in court, without the issue of a subpoena, and consented to the appointment of his brother-in-law as the receiver. The court at the same time made the appointment, and made an order that all creditors of the Dickinson Hardware Company should present their claims to the court or to the receiver within 90 days. On December 20, 1895, a meeting of the St. Louis creditors of the Dickinson Hardware Company was held, and that meeting appointed a committee of three to investigate and report the financial condition of the corporation. They went to Little Rock, and examined its assets. The inventory of the receiver, which had been filed, disclosed the fact that the face value of those assets was \$244,230.93, and that the liabilities of the corporation were \$153,949.08; but the committee reported on December 31, 1895, that the actual value of these assets was only \$117,278.42, and recommended that a proposition to pay the creditors 40 per cent. of their claims in full settlement thereof, which had been made by the corporation through Dickinson, its president, be accepted. The report of this committee does not fairly show the value of the assets of the corporation, which was in reality \$175,917.42. The directors of the Dickinson Hardware Company were indebted to that corporation in the following amounts, viz.: W. W. Dickinson, in the sum of \$19,070.93; J. H. Martin, in the sum of \$3,272.28; and G. H. Lyon, in the sum of \$2,338.18. The appellant was at Hot Springs, Ark., when the receiver for this company was appointed, and had no notice of such action or contemplated action; but immediately after a conference between W. W. Dickinson and the creditors in St. Louis, at which the offer of settlement was submitted, Dickinson notified him that, unless he would consent to the forgiveness of the debts of the directors to the corporation, he (Dickinson) would proceed no further with the compromise. The appellant refused to consent to this, and Dickinson then notified him to look out for his own interest. Thereupon, on January 21, 1896, Dickinson, pursuant to a resolution of the board of directors of the corporation, appeared in the court below, and consented, on behalf of the Dickinson Hardware Company, to a final decree in the suit of the H. Wetter Manufacturing Company against it, which was then rendered. This decree recited that some of the merchandise shown by the inventory of the receiver had been converted into money, and that some of it had been delivered upon orders by the court to intervening claimants, and directed that all the property of the corporation be sold in bulk by the master, after four weeks' published notice, and that the money in the hands of the receiver should pass to the purchaser with the other property. It provided for the distribution of the proceeds of the sale among the creditors, share and share alike. The directors of the

Dickinson Hardware Company, together with Fannie R. Dickinson, the wife of W. W. Dickinson, and John W. Dickinson, his brother, then organized a new corporation under the laws of the state of Arkansas, styled the W. W. Dickinson Hardware Company. The shares of the stock in it were \$25 each. W. W. Dickinson, J. H. Martin, G. H. Lyon, and John W. Dickinson each took one share, and Fannie R. Dickinson 285 shares. Instead of proceeding further with the compromise of the claims of the old corporation, W. W. Dickinson obtained assignments of the claims against it to this new corporation for 40 per cent. of their face value, one-half of which was to be paid in cash, and the other half in secured notes, maturing in 6 and 12 months. He had these assignments deposited with an agent in Little Rock, to be delivered to this new corporation whenever the cash and the notes should be paid over for them. When the bill of the appellant was filed, he had thus procured the deposit with this agent of assignments of claims to the amount of more than \$100,000, ready to be delivered to the new corporation whenever the payments should be made. Meanwhile, W. W. Dickinson, J. H. Martin, and G. H. Lyon were in the employment of the receiver, and perfectly familiar with the amount and value of the assets of the old corporation. The sale was advertised, and was about to take place. Dickinson, to prevent competition at the sale, and with the intent to purchase the property for his new corporation, represented to inquirers that nearly all the debts owing to the old corporation that could be collected had been paid, and at the same time he was writing to the debtors not to pay until after the sale. There was \$20,000 cash in the hands of the receiver that would go to the purchaser. Dickinson, who was the general manager of the receiver, and his other employes gave evasive and unwilling answers to those who inquired as to the amount and value of the property to be sold, and no one but these employes could ascertain its quantity and value. The decree and all these proceedings under it were designedly made and taken to prevent competition at the sale, to conceal the value of the property, and to enable Dickinson's new corporation to buy it at a price far below its actual value. The appellant had demanded that the directors of the Dickinson Hardware Company should apply to the court to have the decree of sale and the order appointing the receiver set aside, and had demanded that they should make a proper defense to the claim of the H. Wetter Manufacturing Company, and they had refused to comply with this request. Thereupon, on February 28, 1896, the appellant filed this bill, in which he set forth, much more at length and in detail than we have done, the facts we have recited, and prayed the court below to set aside the decree for the sale of the property of the Dickinson Hardware Company and the order appointing a receiver thereof, to permit him to answer and defend against the claim of the H. Wetter Manufacturing Company, and ultimately to dismiss its bill and to direct the receiver, after the allowance and payment of his just charges, to turn the property back to the Dickinson Hardware Company. The court below entered a decree dismissing this bill, and the appeal challenges that decree.

John McClure, for appellant.

W. E. Hemingway (U. M. Rose and G. B. Rose with him on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

A motion to dismiss this appeal has been made by the appellees on the ground that under the order appointing the receiver, and under the decree directing the sale of the property of the Dickinson Hardware Company, which the appellant attacks in his bill, he has accepted substantial benefits, and is thereby estopped from challenging them. The motion is founded on this state of facts: The appellant, before the receiver was appointed, held the note of the Dickinson Hardware Company, secured by certain collateral notes which he had placed in the hands of G. H. Lyon, one of the employes

of that corporation, for collection. When the receiver was appointed, on November 2, 1895, he wrongfully took possession of these collateral notes, as a part of the property of the hardware company, and collected some of them. After the decree for the sale of the property of that corporation had been made, and on February 8, 1896, the appellant filed a petition in that suit, in which he set forth these facts, and prayed for the possession of the collateral notes that were not collected, for the payment to him of the amount collected from them by the receiver, and for the payment of his claim, pro rata with the other creditors, out of the amount realized from the other assets of the corporation. An answer was made to this petition, which denied that the debt of the corporation was more than \$1,026.19, and averred that the appellant was not entitled to recover anything upon his claim, because his note and the assignment of the collaterals were usurious. After the property of the hardware company had been sold under the decree, and after the master had received the proceeds of the sale, and on April 18, 1896, a hearing was had upon this petition of the appellant, and the court found that the hardware company was indebted to him in the sum of \$927.02, that the receiver had collected from the collaterals pledged for the payment of his debt more than this amount, and ordered the master to pay him the \$927.02 out of the moneys in his hands. The appellant accepted the payment, and it is upon this fact that the appellees base their motion for the dismissal of this appeal.

It is sometimes the case that one who accepts benefits conferred upon him by a decree, which he could not have secured without the decree, cannot be subsequently heard to challenge it. He may not select and accept the advantageous terms of a decree, and reject and successfully attack those that cast a burden upon him. *Albright v. Oyster*, 19 U. S. App. 651, 9 C. C. A. 173, and 60 Fed. 644. But it is difficult to find anything of this character in the action of the appellant in this case. He neither sought nor obtained any benefit from the order appointing the receiver, or from the decree of sale which he seeks to attack in his bill. He was wrongfully deprived of the possession and benefit of his collaterals under this order and decree, and he appealed to the court whose action had unwittingly inflicted the injury upon him to right this wrong. The court properly granted his prayer, and, as far as possible, restored him to the situation in which he was before he was wronged. In all this, the appellant neither expressly nor impliedly admitted that the order and decree under which his property had been taken were either right or wrong, and he accepted no benefit from them that he would not have had if they had never been made. If they had not been made, his collaterals would never have been taken from him. His position in his intervention was that the court, through its receiver, had wrongfully taken property from him that was pledged to secure him as a creditor. His position now is that it has wrongfully taken and disposed of other property, in which he had an interest as a stockholder. The two contentions are perfectly consistent, and the acceptance of the benefits of the successful maintenance of the one in no way estops the appellant from sustaining the other. *Embry*

v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25; Gilfillan v. McKee, 159 U. S. 303, 311, 16 Sup. Ct. 6. The motion to dismiss the appeal is denied.

Upon the merits, these two questions are presented for consideration: Had the circuit court of the United States, sitting in Arkansas, jurisdiction to appoint a receiver and enter a decree of sale of the property of an insolvent corporation of that state, at the suit of a creditor who had not reduced his claim to judgment pursuant to the provisions of the statutes of the state of Arkansas? If so, do the facts stated in the bill of the appellant warrant the granting of any relief to him? The statutes of the state of Arkansas under which the bill for the seizure and sale of the property of the Dickinson Hardware Company, for the distribution of its proceeds among its creditors, and for other relief, was filed, are as follows:

"Sec. 1425. No preferences shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employees.

"Sec. 1426. Any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporations, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors after paying the wages and salaries due laborers and employees.

"Sec. 1427. Every preference obtained or sought to be obtained by any creditor of such corporation, whether by attachments, confession of judgment, or otherwise, and every preference sought to be given by such corporation to any of its creditors, in contemplation of insolvency, shall be set aside by the chancery court, and such creditor shall be required to relinquish his preference and accept his pro rata share in the distribution of the assets of such corporation; provided, no such preference shall be set aside, unless complaint thereof be made within ninety days after the same is given or sought to be obtained." Sand. & H. Dig.

In the statement which precedes this opinion, we have set forth the entire bill upon which the proceeding under this statute was founded. It is a model of clearness and brevity, worthy of imitation. It states, without a useless word, the facts conferring jurisdiction upon the federal court, and the existence of every condition required by the statute of Arkansas to entitle the complainant to the relief it prays. If it had been filed in the chancery court of that state, a glance at the statute and the bill would have satisfied any court of its sufficiency. But the appellant contends that it cannot be maintained in a national court, because it does not allege that the claim of the complainant had been reduced to judgment, and that an execution upon it had been returned nulla bona. In support of this position, he cites *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Atlanta & F. R. Co. v. Western Ry. Co. of Alabama*, 1 C. C. A. 676, 50 Fed. 790; *Morrow Shoe Manuf'g Co. v. New England Shoe Co.*, 6 C. C. A. 508, 57 Fed. 685. These decisions are based upon the equity rule embodied in sec-

tion 723 of the Revised Statutes, which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." Thus, in *Whitehead v. Shattuck* the court held that a suit in equity against a defendant in possession of real estate, to quiet the title to and recover the possession of it, under a state statute, could not be maintained, because the remedy by ejectment was plain and adequate. In *Scott v. Neely and Cates v. Allen* the supreme court held, for the same reason, that, under state statutes which authorized creditors to maintain such suits in the state courts without reducing their claims to judgments, a creditors' bill could not be maintained in the national courts to set aside fraudulent conveyances and subject the property conveyed to the payment of the debt of the complainant. It is worthy of note, however, that Mr. Justice Brown and Mr. Justice Jackson dissented from the opinion and decision of the majority in the latter case, and Mr. Justice Brown delivered a vigorous dissenting opinion, in which he expressed the same views and cited the same authorities which he subsequently presented in the unanimous opinion of the supreme court in the later case of *Cowley v. Railroad Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127. In *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, the supreme court held that a simple-contract creditor could not maintain a bill in equity in the national courts to set aside a fraudulent mortgage, or to have the property of a corporation seized, sold, and its proceeds distributed among its creditors, and that, in order to maintain such a suit, he must first reduce his claim to judgment. In that case there was no state statute authorizing such a proceeding in the courts of the state, and all that is said in the opinion as to the effect of such a statute is obiter dicta. Mr. Justice Brown and Mr. Justice Jackson again dissented. If these cases can still be said to state the rule of law upon the question under consideration, in view of the authorities to which we are about to refer, they may perhaps be distinguished from some of them by the fact that the provisions of the state statutes which they ignore neither created a new right nor provided a new remedy, but simply changed the rules of practice in equity which governed the enforcement of rights in the state courts, which were well established when the judicial system of the federal government was adopted. The right to maintain a bill in equity to quiet the title to land existed before the national government was established, but the practice required that the complainant should be in possession, and that his title should have been established at law. The statute considered in *Whitehead v. Shattuck* dispensed with these prerequisites in the state courts, and thus modified the equity practice in the enforcement of a recognized right. In the same way the statutes considered in *Scott v. Neely and Cates v. Allen* dispensed with the rule of practice in equity, so far as the state courts were concerned, which required a creditor to reduce his claim to judgment, and obtain the return of an execution unsatisfied, before he could enforce the established right, which he had had long anterior to the foundation of this government, to maintain a bill in equity to set aside a fraudu-

lent conveyance. The decisions in these cases go no further, in any event, than to hold that these particular state statutes did not dispense with these rules of practice in equity in the national courts. On the other hand, in *Ex parte McNeil*, 13 Wall. 236, the supreme court sustained a libel in the federal court to recover half pilotage, which was given by a statute of the state of New York, and said:

"This principle may be laid down as axiomatic in our national jurisprudence: A party forfeits nothing by going into a federal tribunal."

In *Davis v. Gray*, 16 Wall. 203, 221, that court said:

"A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals."

And in the case of *Broderick's Will*, 21 Wall. 503, 520, it declared that:

"Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state."

In *Clark v. Smith*, 13 Pet. 195, 202, a suit in equity in the federal court, under a state statute, was maintained by a party in possession of real estate to cancel a junior patent, although this statute dispensed with the rule in equity that the title of the complainant must first be established at law. In *Holland v. Challen*, 110 U. S. 15, 25, 3 Sup. Ct. 495, a bill to quiet title to land in Nebraska, brought in the federal court by a complainant out of possession, was maintained under a statute of that state, although that statute dispensed with the equity rule that one must have established his title at law, and must be in possession, in order to maintain such a suit. In *Cummings v. Bank*, 101 U. S. 153, 157, the statute of a state had given to property holders the right to enjoin the payment of an illegal tax; and, in discussing the right of the complainant to maintain a suit in the national courts for that purpose, Mr. Justice Miller said:

"We have also held that, where a statute of a state created a new right or provided a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires."

In *Gormley v. Clark*, 134 U. S. 338, 348, 10 Sup. Ct. 554, the supreme court sustained a suit in equity brought in the federal court under chapter 116, Rev. St. Ill., commonly called the "Burnt Records Act," by one out of possession of real estate, to establish his title, and to recover the possession of the property of the defendant, and granted the relief he sought, notwithstanding the earlier decision in *Whitehead v. Shattuck*. In this case the supreme court again declared that:

"An enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the state, and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction."

Finally, in *Cowley v. Railroad Co.*, 159 U. S. 569, 582, 16 Sup. Ct. 127, a case is reported in which a suit had been brought in one of

the courts of Washington territory to set aside a judgment of that court, for fraud, under a territorial statute which authorized the territorial court to vacate its judgments in original suits of this character brought for that purpose. The suit was transferred to the federal court, and there tried, but the circuit court dismissed the bill on the ground that it was not according to equity practice to vacate or act directly upon a judgment at law, that the complainant should have applied by petition or motion to set aside the judgment in the original cause, and that his remedy at law was plain and adequate. The supreme court reversed that decree. Mr. Justice Brown delivered the unanimous opinion of the court, in which he announces the same rules and cites the same authorities which he had so vigorously presented in his dissenting opinion in *Cates v. Allen*, 149 U. S. 451, 461, 13 Sup. Ct. 883, 977. In speaking of this suit, he said:

"Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence. * * * While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains, in substance, a proceeding under the statute, with the original rights of the parties unchanged."

Upon a careful review of all these authorities, and especially in view of the decisions in the last two cases to which we have adverted, it may, we think, be safely said that the following rules relative to the jurisdiction and power of the federal courts to enforce rights created, and to administer remedies provided, by state statutes for enforcement and administration in the courts of the states, have been firmly established in the jurisprudence of the United States: Rights, created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the federal courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. *Ex parte McNiel*, 13 Wall. 236; *Cummings v. Bank*, 101 U. S. 153, 157; *Trust Co. v. Krumseig* (decided by this court at May term, 1896) 77 Fed. 32. An enlargement of equitable rights by the statutes of the states may be administered by the national courts as well as by the courts of the states. *Case of Broderick's Will*, 21 Wall. 503, 520; *Clark v. Smith*, 13 Pet. 195, 202; *Holland v. Challen*, 110 U. S. 15, 25, 3 Sup. Ct. 495; *Frost v. Spitley*, 121 U. S. 552, 557, 7 Sup. Ct. 1129; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213; *Chapman v. Brewer*, 114 U. S. 158, 170, 171, 5 Sup. Ct. 799; *Gormley v. Clark*, 134 U. S. 338, 348, 349, 10 Sup. Ct. 554; *Bardon v. Improvement Co.*, 157 U. S. 327, 330, 15 Sup. Ct. 650; *Cowley v. Railroad Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127. "A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Ex parte McNiel*, 13 Wall. 236; *Davis v. Gray*, 16 Wall. 203, 221; *Cowley v. Railroad Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127.

Tested by these rules, the jurisdiction and power of the circuit court of the United States to seize and sell the property of this insolvent corporation, at the suit of a simple-contract creditor, under

the statutes of the state of Arkansas, is not doubtful. Creditors and stockholders had no right, without such a statute, to have a receiver of a corporation appointed, to have its property sold, and to have its proceeds distributed pro rata among its creditors, simply because it was insolvent. The statute created that right. But that was not all. It deprived every creditor of the right to collect his debt of an insolvent corporation by an action at law, an attachment, or a judgment. It made every lien he obtained according to the course of the common law void, if it was attacked within 90 days after it was "sought to be obtained." If a creditor of another state could not proceed to wind up an insolvent corporation in the state of Arkansas without a judgment and an execution returned unsatisfied, under this statute, a stockholder of such a corporation certainly could, and the effect of such a holding would be to give a stockholder of an insolvent corporation a right to the sequestration of its assets superior to that of a creditor. Moreover, if a creditor were first required to obtain a judgment and a return of an execution nulla bona before he could proceed under this statute in the federal court, he would, in effect, be deprived of the right to proceed at all. His execution could generally be levied upon sufficient property of the insolvent corporation to satisfy his debt, so that he could not obtain a return nulla bona, and therefore could not proceed in equity. Yet his judgment and execution would be futile, because some other creditor or some stockholder would certainly proceed under the statute to vacate his judgment, and thus he would be deprived of all remedy against an insolvent corporation in the national courts, either at law or in equity. We should hesitate long before holding that the statute of Arkansas had such an effect. The result is that the bill of the H. Wetter Manufacturing Company was sufficient to invoke the jurisdiction of the federal court, and to authorize it to grant the relief there prayed. It must be sustained (1) because the complainant in it had no plain, adequate, and complete remedy at law against the insolvent corporation, in the face of the state statute which declared any judgment against such a corporation void if attacked within 90 days after it was sought to be obtained; (2) because the state statute created a new right, properly enforceable in equity; and (3) because its bill was sufficient in the state court, and it lost no right or remedy by its choice of the federal court for its forum.

A single question remains: Does the bill of the appellant state facts sufficient to entitle him to a vacation of the decree for the sale of the property of the Dickinson Hardware Company, for the discharge of the receiver, and for the ultimate return of its property to that corporation? He is not a creditor of the corporation. He is a stockholder. Conceding that the acts of the president and directors of the corporation were intended to and did wreck the business of the company and defraud its creditors, so that they received but 40 per cent. of their claims, when they should have received much more, how is the appellant injured thereby? It is not alleged that he incurred any personal liability by his ownership of his stock. Was his stock in any way depreciated in value by the acts of the ap-

pellees? It is difficult to read the bill of the appellant without reaching a settled conviction that the hardware company was really insolvent and unable to continue its business when the receiver was appointed. It is true that this bill contains allegations that none of the commercial paper of the corporation had gone to protest, that it had at all times met its maturing obligations, and that its assets were really worth \$175,917.42, while its liabilities were but \$153,949.08. But we cannot close our eyes to the facts that the bill admits that the business of the corporation had been, to some extent, injured by the general depression which affected the whole country from the year 1893 down to the date of the appointment of the receiver; that it shows that the shrewd and intelligent creditors who examined its assets for the purpose of collecting their claims in December, 1895, reported that these assets were worth only \$117,278.42, and recommended to its creditors that they should accept 40 per cent. of their claims in preference to their distributive shares of the proceeds of the property of the corporation; and that more than \$175,000 worth of merchandise, accounts, and bills receivable would surely have been required in Little Rock in November, 1895, to realize and pay \$153,000 in cash. There is no allegation in this bill that the stock of the appellant was of any value when the order appointing the receiver was made, and, in view of the facts to which we have referred, we have been forced to the conclusion that it could not have been. Moreover, if the court below had granted the prayer of the bill when it was filed, and had turned the property back to the corporation, it is perfectly clear that it could not then have paid its debts, and the stock of the appellant would have been worth no more. For these reasons, we think this bill cannot be maintained. If the creditors were injured by the fraudulent acts of the appellees, they make no complaint. The appellant who seeks relief here shows by his bill that his stock was worthless when the acts of which he complains were committed, so that he could not have been injured by them. He shows that no relief that the court below could have given could possibly have made it of any value. Courts of equity cannot attempt to right wrongs at the suit of those who have not suffered from them, or to grant decrees that can give their suitors no relief. The decree below must be affirmed, with costs, and it is so ordered.

KUHN v. MORRISON et al.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 539.

ESTOPPEL IN PAIS—MORTGAGES.

One G. owned two tracts of land, of 100 and 75 acres, respectively. He sold the 100-acre tract to one C., and took a mortgage for part of the purchase money. Afterwards he sold the 75-acre tract, and both tracts finally came into the hands of one M.; and, he being unable to make the required payments for the land, G. instituted suits against the various parties liable. M. then entered into negotiations with the plaintiff for a loan, and plaintiff agreed to lend \$10,000 if secured by a first mortgage on the two tracts of land. G. knew of these negotiations, and of the plaintiff's requirement of a

first mortgage. He was present at the consummation of the loan, and indorsed upon the mortgage, in which M. covenanted that he was seised of the land, and that it was unincumbered, an acknowledgment of the receipt of \$5,389.08 on account of his claims, and a release of his liens on the 75-acre tract, and he took the money. None of the parties, except G., knew of the mortgage on the 100-acre tract, although it was recorded, and G. did not disclose its existence when the mortgage was made to plaintiff; but, when plaintiff sought to foreclose his mortgage, G. set up the mortgage to him on the 100-acre tract as a prior lien. *Held*, that G. was estopped by his silence, when permitting plaintiff to take his mortgage, to set up the mortgage to him, as against plaintiff.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a suit by William S. Kuhn, trustee, against Robert Morrison, Carrie P. Morrison, S. E. Green, Edward Scott, Moses H. Clift, J. T. Williams, John X. Dickert, and W. T. Page, for the foreclosure of a mortgage. A demurrer to the bill was sustained in part, and, on final hearing, a decree was made for the foreclosure of the mortgage, subject to a lien held by defendant Green. 75 Fed. 81.

Foster V. Brown and Frank Spurlock, for appellant.

W. H. Payne, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. William S. Kuhn, trustee, the appellant, brought suit against Robert Morrison and others, appellees, to foreclose a mortgage on 175 acres of land in Catoosa county, Ga., executed by the appellee Morrison and others, to secure the payment of a note for \$10,000. The land consisted of two adjoining tracts, one containing 100 acres, and the other 75 acres. Together they were known as the "Spring Lake Place," which was only a few miles from the city of Chattanooga. There was a lake on the 100-acre tract of land, and a small mill on the 75-acre tract of land, which was propelled by water from the lake. The Spring Lake place had belonged to the father of appellee Samuel E. Green. In January, 1887, after the death of their father, Samuel E. Green and his co-heirs sold the 100-acre tract of land to M. L. Chapman, trustee for himself, Robert Morrison, W. E. Baskette, John A. Hart, and M. and H. W. Grant, partly for cash, but mostly on a credit, for which credit payment three separate notes were given. The deed retained a vendor's lien. It bore date January 13, 1887. On January 24th, M. L. Chapman executed to Green a mortgage upon the land, to secure the three notes given for the deferred payments on the purchase money. Subsequently, Green sold the 75-acre tract, partly for cash, and partly on credit, and, by dealings between the different vendees, the tracts both came into the control and ownership of appellee Robert Morrison. Without having taken any steps to foreclose the mortgage lien on the 100-acre tract, Green filed his bill in the chancery court of the state of Tennessee, against all the parties claiming under his deed to Chapman, and praying for an injunction against them to restrain

them from selling the land in Catoosa county, Ga., until the purchase money was fully paid, alleging in that bill that, if they made such sale, their vendees would take title, to the exclusion of his lien for the purchase money. After the maturity of the purchase money for the 75-acre tract, the amount remaining unpaid was put in judgment in Catoosa county, Ga., and judgment was obtained in the suits in Tennessee against the makers of the notes, for the payment of all of which appellee Robert Morrison had become bound. An execution on the Tennessee judgments was put in the hands of the proper sheriff, and was being pressed against all of the makers of the notes for the unpaid purchase money of the 100-acre tract. Robert Morrison's affairs had fallen into embarrassment, and he found himself unable to protect those whose obligations he had assumed. In this state of affairs, he opened negotiations with the appellant for a sale of the Spring Lake place, pending which the appellant agreed to loan him \$10,000 on the 175 acres of land, provided he could get a first mortgage thereon, and also took an option to purchase the land if, after a full examination of the capacity of the spring to furnish water, he should desire to purchase it. The testimony is conflicting as to details, but it appears that Green had notice of the pendency of some negotiations between Kuhn and Morrison, and that he gave more or less attention to its progress, and that he consented that in case the loan was effected, and the money was turned over to him, he would suspend for a specified time the enforcement of the execution against the others who were bound in the Tennessee judgments. There were different parties who claimed some interest in this land besides Morrison, and there had been some payments made by different ones to Green on the judgment debts. Some delay was experienced in adjusting the figures, and ascertaining the balance that was due, and the proportions that had been paid.

The mortgage was drawn up to be executed by Morrison and the other parties in interest, which recited upon its face, among other things, as follows:

"And we, Robert Morrison and Edward Scott, do covenant with said W. S. Kuhn, trustee, and his successor or successors in trust, and bind ourselves and our heirs and representatives, that we are lawfully seised of said lands, and have a good right to convey them; that they are unincumbered; and that we will warrant and forever defend the title thereto."

Various interviews and conversations are alluded to in detail in the testimony, in which Green either participated, or at which he was present; and, on the day when the loan was concluded and the money paid, Wingfield (the representative of the plaintiff), W. L. Eakin (who prepared the mortgage), Robert Morrison (who was the principal debtor), the appellee Samuel E. Green, and perhaps others, were present in the lawyer's office, and the transaction was pretty generally discussed between the other parties present, and in the hearing of Green, who said nothing or little, bearing upon it. It is clear from the testimony that all of the other parties understood that the plaintiff was to loan his money upon a first mortgage on the land, and that he would not part with it except on

that basis. Language of this import was uttered in the hearing of Green, and all the conduct of the parties on the occasion expressed the same views.

Before the payment of the money, Green executed and acknowledged his signature to the following memorandum, indorsed on the mortgage above mentioned:

"I, Samuel E. Green, do hereby acknowledge the receipt of five thousand and three hundred and eighty-nine eight-hundredths dollars, in full satisfaction of a judgment I recovered in the superior court for the county of Catoosa, in the state of Georgia, together with costs in said cause against Edward Scott and Robt. Morrison, and agree that the lien I now have on the second tract of land described in the foregoing mortgage, and containing seventy-five acres, more or less, and situated in Catoosa county, Georgia, is thereby discharged.

"Witness my hand and seal, this 4th day of March, 1892.

"This payment includes a note dated the 10th day of December, 1888, due at three years, executed by Edward Scott and Robert Morrison, for the sum of two thousand and three hundred and thirty-three and $33\frac{1}{3}$ dollars, payable to us in part consideration of the second tract of land conveyed in the foregoing mortgage, to secure which note and other notes a mortgage was executed to me on said second tract of land described in said mortgage by Robert Morrison and Edward Scott, which is satisfied and discharged by the payment, and is in full payment of all the consideration for said tract of land to the said Robert Morrison and Edward Scott, and warrant the title thereto against the lawful claims of all persons claiming by or through me by virtue of said mortgage or any other mortgage, and not further or otherwise.

"In testimony whereof, I have hereunto subscribed my name, and affixed my seal, this, the 4th day of March, 1892. S. E. Green, Executor."

The remainder of the \$10,000 was paid to Green on the Tennessee judgments. He took from Morrison a lien on all his interest in the option that was provided for in the instrument of mortgage, and from other parties bound in the Tennessee judgments a stipulation that the extension of time on those judgments should not affect their lien or the levies that had been made thereunder. It clearly appears that at this time neither the plaintiff, nor any representative of his, nor Robert Morrison, had any knowledge of the existence of the mortgage given by Chapman to Green on the 100-acre tract, and it does not appear that Green made any mention of that mortgage to any of the parties interested in these recent transactions until about the time of the maturity of the \$10,000 loan, and when he had reason to believe that the plaintiff would not accept the option to purchase, above mentioned. The mortgage from Chapman to Green had been duly recorded in Catoosa county, Ga., and on the 17th day of February, 1893, Green filed his petition in the superior court of that county against Robert Morrison, M. L. Chapman, W. E. Baskette, M. Grant, and H. W. Grant, to enforce that mortgage.

In this suit the appellant contends that the conduct of Green at the time of the negotiations between appellant and Morrison for the \$10,000 loan misled the appellant and his agents, to their hurt, and to Green's manifest advantage; and that, having been silent then, when he should have spoken, he cannot now be heard to claim, as against appellant, any right under the Chapman mortgage. The learned chancellor who heard this cause at the circuit went through the evidence with care, but did not feel justified in adjudging an

estoppel against Green as to the priority of his mortgage. He expressed some doubt on this branch of the case, but, considering that estoppels are not favored by the courts, he passed his decree foreclosing the appellant's mortgage, subject to the lien of Green's prior mortgage on the 100-acre tract. We find from the evidence that the appellee Morrison was indebted to Green in large amounts, which Green had put in judgment; that he was using intelligent diligence to obtain the satisfaction of these judgments; that he had such interviews, conversations, and dealings with the parties pending the negotiation for, and at the consummation of, this loan as charged him with notice that his debtor, Morrison, was obtaining the loan on what purported to be a first mortgage on both the 75-acre tract and the 100-acre tract described in the mortgage; that he was present when the appellant parted with his money, the whole of which he (Green) received; that what occurred and what was said in his presence and in his hearing touching this transaction, in which he had so direct and comprehensive an interest, was sufficient to charge any person of ordinary intelligence with the knowledge that all of the participants in the transaction, except himself, believed that the release which he indorsed on the mortgage cleared the land of all previous incumbrance; that he knew he held the Chapman mortgage on the 100-acre tract; and he had reason to believe that, if the appellant or his representatives had notice of that fact, the appellant would not make the loan. In this state of the case, Green kept silent, and got the appellant's \$10,000.

We need not halt at the word "estoppel," or, if it is an odious term, we need not use it. The common conscience, untrammelled by technical refinements, will not tolerate such silence as Green kept under the circumstances stated. The first principles of fair dealing charged him with the duty of giving the parties notice, before he took their money, that he held an unsatisfied mortgage on the 100-acre tract of land. The fact that his mortgage was duly recorded in the county where the land is situated did not relieve him from this obligation; nor did the fact (if such was the fact, about which there is direct and sharp conflict in the testimony) that the lawyer who drew the mortgage from Morrison to Kuhn, and who was then advising Kuhn's agent as to the validity of the instrument as a first mortgage on all the land, had, at a time long previous, been informed and had knowledge of the existence of the Chapman mortgage, excuse Green's silence. When, under such circumstances, one hides his claim in silence, to his own advantage, and to the hurt of another, acting plainly in ignorance of it, courts of justice, at law or in equity, will not afterwards admit the claim against the person thus injured. The court will require satisfactory evidence that the claimant had knowledge of his right to claim, and that he had good reason to believe that the other person did not then have information of the claim of right, and was about to act on the belief that no such adverse right or claim did exist, and was taking, or about to take, such action as he would not take if he had any actual knowledge of the existence of the adverse interest. A preponder-

ance of evidence is required to support an affirmative finding on any issue of fact.

The case of *Brown v. Davis*, 10 C. C. A. 532, 62 Fed. 519, was in some of its features and issues similar to the one we are now deciding. In that case the complainant contended that when the respondent, knowing the purpose of the complainant to secure a prior lien on the property, received the amount of his vendor's lien, it was his duty to make known the fact that he held also a duly-recorded deed of trust on the land, which would be prior in rank to the complainant's mortgage, and that, by his silence under the circumstances shown in that case, the respondent was estopped in equity from asserting his trust deed as against the trust deed taken by the complainant, on which this court said: "This view of the case is strongly supported by the authorities, although there are some qualifications;" and, further on in the opinion, said: "If this were a case in which the complainant had come into court with a fair presentation of the facts, evincing a disposition to assert his equities, without injury to others, and had presented the matter of estoppel upon the real facts of the case as above stated, we are inclined to the opinion that he would not have been turned out of court without consideration of his right to assert the estoppel in question."

We think our views are supported by *Pickard v. Sears*, 33 E. C. L. 257; *Niven v. Belknap*, 2 Johns. 573; *Chapman v. Chapman*, 59 Pa. St. 214; and by the text and citations in *Bigelow, Estop.* (4th Ed.) c. 18; and by the text and citations in *Herm. Estop. & Res Jud.* c. 12.

We conclude that the portion of the decree of the circuit court complained of on this appeal should be reversed; and it is ordered that so much of the decree in the circuit court as adjudged that the appellant have foreclosure of his mortgage, subject and subordinate to the lien of the mortgage held by S. E. Green on the 100-acre tract, is reversed, and this cause is remanded to the circuit court, with the direction to enter its decree in accordance with the views expressed in this opinion.

HILL et al. v. RYAN GROCERY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 22, 1896.)

No. 498.

1. CONSTRUCTION OF INSTRUMENTS — FRAUDULENT CONVEYANCES — ASSIGNMENTS FOR CREDITORS AND DEEDS OF TRUST.

Whether two instruments, in any case, shall be considered as one, and construed together, depends on the nature of the transaction; the relation of the writings to each other; the time of, and the circumstances attending, their execution; and, as applied to deeds of trust and assignments, executed pursuant to the Mississippi statutes, whether the one was made in support of the other, and had the taint of actual or constructive fraud.

2. FRAUDULENT CONVEYANCES—ASSIGNMENT FOR CREDITORS.

Where a deed of trust was accepted by the grantee as security for an actual indebtedness, in good faith, and in ignorance, until some hours later, of an assignment for benefit of creditors made by the grantor about the same time, *held*, that the two instruments were to be regarded as separate and distinct, and that the trust deed was valid.

3. SAME—RETENTION OF CHATTELS BY GRANTOR.

A deed of trust upon farming implements, teams, cotton, and crops for the ensuing year, to secure a debt in excess of their value, *held* not void, as hindering and delaying other creditors, merely because it provided for the retention of the implements and teams of the grantor until the new crops could be made.

4. SAME—EXTENSION OF TIME OF PAYMENT.

The fact that a deed of trust given to secure an existing debt extends the time of payment for a year does not, in Mississippi, make the instrument void as hindering or delaying other creditors, for they may at any time proceed to sell the equity of redemption.

5. EQUITY PRACTICE—AFFIRMATIVE RELIEF TO DEFENDANT—PLEADING.

A court of equity has no power, merely upon an answer, and in the absence of a cross bill, to make a decree granting affirmative relief to the defendant.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

The appellants, Hill, Fontaine & Co., complainants in the circuit court, filed their bill against A. L. Crow, R. L. Armstrong, D. O. Andrews, and the Ryan Grocery Company to set aside and have canceled certain instruments which, it is alleged, were made by Crow to hinder and delay his creditors. On December 1, 1891, Crow was indebted to appellants in the sum of \$3,900.59. And it is alleged that on the ——— day of November, 1891, Crow, intending to delay, hinder, and defraud his creditors, conspired with the Ryan Grocery Company and Andrews to effectuate his fraudulent purpose, and, in pursuance thereof, executed a deed of trust in favor of the grocery company, in which Andrews was named trustee; conveying thereby certain lands, live stock, cotton, cotton seed, farming implements, and crops to be raised on the farm during the year 1892. It is charged that the trust deed was made to secure a pretended and largely fictitious indebtedness due by Crow to the Ryan Grocery Company. And, further, it is alleged that, at the time of the making of the trust deed, Crow executed a bill of sale for a quantity of corn, worth \$400, and delivered to the grocery company a number of notes and accounts, as collateral, to secure the indebtedness. The bill charges that, contemporaneously with the execution of the instruments above mentioned, Crow executed a deed of assignment to appellee Armstrong, conveying his stock of goods, wares, and merchandise, and certain notes and accounts; and, as to all these transfers, it is alleged they were in fact fraudulent and void as to Crow's creditors, and that Andrews, Armstrong, and the grocery company each had notice of the fraudulent character of the trust deed, of the bill of sale, of the transfer of the collateral, and of the deed of assignment. It is further alleged that on the 1st day of December, 1891, the complainants sued out a writ of attachment, and had the same levied upon "said stock of goods, wares, and merchandise, and said horses and mules," and other property, which the bill specifically describes. It is not necessary to enumerate this property, as there is a stipulation in the record that the property levied on by the United States marshal, and afterwards sold by the receiver, was the property embraced in the deed of trust executed by Crow to Andrews, trustee. The bill further alleges that the attachment was prosecuted to judgment against Crow; that in the proceeding a claim was propounded by Armstrong, assignee, for the stock of goods, and the notes and accounts garnished, and upon the trial the assignment was declared fraudulent and void, and the property condemned to pay the debt of appellants. It is further charged that the Ryan Grocery Company and Andrews propounded a claim for other personal property levied upon, but the claim was withdrawn without adjudication. The remainder of the bill is given in the words of the pleader: "The Ryan Grocery Company and the said D. O. Andrews, trustee, claim and pretend that the bill of sale and the trust deed vested good title in them to the property therein described, when in truth and in fact both of said instruments were fraudulent and void; but, remaining of record and in existence, they cast a cloud, and invest with doubt and suspicion the title of A. L. Crow to said property described in said instrument. In order, therefore, that the property may sell for fair price, and in order that it may sell for enough to pay the balance due on complainants' debt now in judgment, and which it will not do if said cloud remains over said title, complainants pray, first, that said D. O. An-

draws, trustee, the Ryan Grocery Company, A. L. Crow, R. L. Armstrong, assignee, may each and all of them be made parties defendant to this bill, and served with proper process here, and that upon the hearing upon this cause the court may decree that said trust deed be canceled, as fraudulent and void, and that said bill of sale be declared void; that the transfer of said collateral be declared fraudulent, and that said deed of assignment be held void, and all of said property be declared subject to the payment of complainants' debts, clear of all doubts, clouds, and suspicions; that in the meantime a receiver of this court be appointed to take possession of all of said personal property now remaining in the hands of the marshal, and sell the same, and hold the proceeds subject to the further orders of this court. And, for such general relief as may be proper in the premises, complainants, as in duty bound, will ever pray." All the parties defendant filed answers, which need not be set out. Nor is it necessary to insert here copies of the deed of trust and assignment. The record is somewhat obscure, but it appears that a receiver was appointed by the court, and that he sold the property delivered to him by the marshal. The cause was heard on the pleadings and proofs, and a decree rendered dismissing the bill, ordering the receiver to pay over to Andrews, trustee, the sum of \$666, as proceeds of sale of the property, and further ordering "that an execution do issue in favor of the C. R. Ryan Grocery Company against the said Hill, Fontaine & Co. for the sum of two hundred and fifty (\$250) dollars, the same being the value of said 500 bushels of corn used by and fed to said live stock levied upon under said attachment." From that decree, Hill, Fontaine & Co. prosecute this appeal.

W. V. Sullivan, for appellants.

Wm. C. McLean, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). Appellants claim there was error on the part of the circuit court in the following particulars:

"(1) The court erred in not construing the deed of trust and the deed of assignment as one instrument. (2) The court erred in not holding the instrument, thus construed, fraudulent and void, both in law and in fact. (3) The court erred in not holding the deed of trust fraudulent and void because it appeared that at a time when A. L. Crow, the merchant debtor, defendant, was insolvent, he stipulated for the retention of the greater portion of his assets for a period longer than, by the ordinary process of law, plaintiffs could have made their debt on execution. (4) The court erred in holding that the deed of trust was valid, when taken in connection with the bill of sale of corn and other property, because it affirmatively appeared that a large part of the property to be retained was consumable by its use. (5) The court erred because the proof was not sufficient to justify or sustain the decree."

The first and second specifications of error may be disposed of together. Whether two instruments should, in a given case, be held as one, and construed together, depends upon the nature of the transaction, the relation that the one bears to the other, the time of, and circumstances attending, their execution, and, as applied to deeds of trust and assignments executed pursuant to the statutes of Mississippi, whether the one was made in support of the other, and had the taint of actual or constructive fraud. Employing the language of the court in *Sells v. Commission Co.*, it is said:

"In *Mayer v. McRae*, this court held that 'where one makes an assignment of part of his estate for the benefit of creditors, intending at the time to convey the remainder of his estate to another creditor in payment of his debt to such other, the assignment and conveyance do not constitute a general assignment, under chapter 8 of the Code; nor is the assignment, alone, such general assignment,

to be dealt with under the Code provisions.' We approve and adhere to the principle announced in this decision. All these matters must be governed by the statutes, jurisprudence, and policy of the state where the acts are done; and here, wherever two or more instruments are held as one, it has been where one was executed in support of another, and had the taint of actual or constructive fraud." 72 Miss. 606, 17 South. 238.

The case of *Mayer v. McRae*, cited above, will be found reported in 16 South. 875.

Whether the deed of trust to Andrews, trustee, was made in support of the assignment executed by Crow to Armstrong for the benefit of Crow's creditors, and whether the transaction bears the taint of fraud, are questions of fact, which could only be developed by proof aliunde the instruments themselves. And, owing to the manner in which they were presented at the hearing, the circuit court was clearly warranted in considering the two deeds as separate and distinct instruments. The bill of complaint does not waive an answer under oath. There were two joint and several answers,—one by Crow and Armstrong, and the other by Andrews and the Ryan Grocery Company. Both answers were duly sworn to,—the first by Crow and Armstrong, and the second by Andrews and T. R. Waring; the last named, a member of the Ryan Grocery Company. The answers denied specifically and in detail the charges of fraud and collusion contained in the bill, and set out circumstantially the facts in reference to the execution of both instruments. It is averred that the debt due by Crow to the Ryan Grocery Company was a valid, subsisting indebtedness on the 30th day of November, 1891, the date of the execution of the two instruments, no part of which was fictitious, and that the trust deed and transfer of divers claims against tenants were made in good faith to secure the same. As to the 500 bushels of corn alleged in the bill to have been delivered to the grocery company in pursuance of a pretended sale, the answers aver that it was sold by Crow in good faith to the grocery company at 50 cents per bushel, and the indebtedness of Crow was thereby extinguished, to the extent of \$250. It is claimed in the bill that:

"The bill of sale, the trust deed, and transfer of the collateral, the execution of the deed of assignment,—each and every one of these acts and transfers,—were, as to A. L. Crow, in fact fraudulent, and the conveyances void as against complainant and the other creditors of the said A. L. Crow; that the said Andrews and Armstrong and the Ryan Grocery Company each had notice of the fraudulent character of the trust deed, of the bill of sale, of the transfer of the collateral, of the deed of assignment."

Replying to this charge of knowledge on the part of Andrews and the grocery company as to the character of the assignment, it is averred in their answer that:

"They were not parties to it, had nothing to do with its execution, and the same was an independent transaction, and, so far as these defendants are concerned and informed, had no connection with the trust deed and agreements made with these defendants, and they are in no manner to be prejudiced in their rights by reason of the general assignment made to R. L. Armstrong; and the defendants positively deny having any knowledge as to the terms of the said assignment made to said R. L. Armstrong at the time when said trust deed was executed and made on the 30th of November, 1891; and they deny having any knowledge of any fraudulent intent or purpose upon the part of said Crow."

With these positive, circumstantial, and unequivocal averments of the answers, denying the charges and material allegations of the bill, confronting the complainants, they took no testimony to meet the denials of the sworn answers, save that of Neely, clerk of the circuit court of Tallahatchie county. And the cause was heard, on the part of complainants, on the bill, the deed of trust, the deed of assignment, and Neely's testimony; and, on the part of the defendants, the several answers to the bill and the testimony of A. L. Crow and J. N. Harris were relied upon. The case of the complainants derived no support from the testimony of Neely, as it was mainly of a negative character, he having no knowledge of the transactions between the parties, and was ignorant of the circumstances and conditions which induced the execution of the instruments. Beyond the fact that the deed of trust and assignment were acknowledged by Crow before him, Neely appeared to know comparatively little of importance. With only one witness, therefore, whose testimony was scarcely material, supplemented by the written instruments, which upon their face negative the case made by the bill, the complainants were without proofs to outweigh or impair the force of the positive denials of the answers, which, under such circumstances, must be taken as true. *Tobey v. Leonards*, 2 Wall. 430; *Seitz v. Mitchell*, 94 U. S. 582; *Voorhees v. Bonesteel*, 16 Wall. 30; *Collins v. Thompson*, 22 How. 253. Hence the court was clearly justified in declining to construe the two deeds as one instrument, and in refusing to invalidate the preference secured by the Ryan Grocery Company under its trust deed, unless the testimony of Crow and Harris, to which complainants have the right to resort, should establish their theory of the case. Looking to the testimony of Crow and Harris, we find nothing that will benefit the complainants. Both testify pointedly that Harris, who represented the Ryan Grocery Company in effecting the settlement with Crow, was ignorant of the existence of the deed of assignment when the trust deed was executed, and that he knew nothing of the assignment until several hours afterwards. They both affirm the honesty and validity of Crow's indebtedness to the grocery company, and deny that, in the execution of the deed of trust to secure such indebtedness, there was any intention on the part of either to delay or defraud other creditors of Crow in the collection of their claims. They both testify to their good faith as to the bill of sale of the corn, and the transfer of claims to secure the grocery company. It is also worthy of mention that the grocery company is not a party to the deed of assignment, and claims no rights under it. A careful examination of the testimony of Crow and Harris discloses some discrepancies, but they are of such an immaterial nature as not to require comment. The answers of the defendants and the testimony of the witnesses show that the transaction between Crow and the Ryan Grocery Company was an honest one, and that Harris knew nothing of the assignment until some hours after its execution. The two instruments, therefore, should be regarded as separate and distinct; and the circuit court, in so holding, committed no error.

By the third assignment, appellants attack the validity of the trust deed on the ground that Crow, the grantor, who was insolvent at the date of the execution of the deed, "stipulated for the retention of the greater part of his assets for a period longer than, by the ordinary process of law, plaintiffs could have made their debt on execution." Was the delay one of which the complainants had the right to complain? On the 30th day of November, 1891, A. L. Crow was indebted to the Ryan Grocery Company in the sum of \$9,447.44, then past due. In consideration of the extension of time for the payment of the indebtedness, and of \$1,000 to be advanced by the Ryan Grocery Company to enable Crow to make a crop for the year 1892, that he might thereby be better enabled to meet his obligations, Crow executed the trust deed to secure the existing indebtedness of the grocery company and the advances to be thereafter made. The claim of the grocery company was evidenced by three notes of \$3,149.08 each, due, respectively, one day after date, November 1, 1892, and December 1, 1892. The property conveyed in the deed of trust embraced lands (incumbered by mortgage), horses, mules, farming implements, cotton, cotton seed, and crops for the year 1892. By the stipulations of the deed the grocery company was required to take immediate control, or as soon as practicable, of the cotton, and prepare the same for market, and apply the proceeds, when sold, as a credit on the notes. The grocery company was also directed to sell the cotton seed, and make a similar application of the proceeds of sale. In the event of failure on the part of Crow to pay either of the three notes at maturity, the grocery company was authorized to take possession of all the property then on the farm, including crops, sell the same, after giving 20 days' previous notice, and, upon paying the expenses of sale, to apply the remainder of the proceeds on Crow's indebtedness; the surplus, if any, to go to Crow. It was further provided by the deed that Crow was to pick, gin, and prepare the cotton produced on the place for market, and ship the same to the grocery company, which was to sell it and credit the proceeds resulting on Crow's notes. There is no pretense that the property embraced in the deed of trust was in excess of the debt secured. On the contrary, it is shown by the testimony that the Ryan Grocery Company collected on their indebtedness only \$2,524.23, leaving a balance due of more than two-thirds of their original claim. It is thus seen that the property retained by Crow consisted simply of stock and farming implements necessary to carry on the farming operations, and the resulting product, under the terms of the deed, was directed to be paid over to the grocery company. We perceive in this no wrong, and no effort to delay or defraud creditors; nor can such a stipulation be held to mean a reservation of a benefit to Crow. Using the language of the supreme court of Alabama:

"If the crops to be produced are, with the existing property, to be devoted to the payment of the secured debts, it has not been supposed such a stipulation is a reservation of a benefit to the debtor, though thereby the residue, which must revert to him, may be increased." *Trust Co. v. Foster*, 58 Ala. 514; *Estes v. Gunter*, 122 U. S. 450, 7 Sup. Ct. 1275.

But it is insisted that the time of payment of Crow's debt to the Ryan Grocery Company was extended 12 months,—a period beyond the law day. The extension, however, did not, and could not, in the eye of the law, prejudice the rights of Crow's general creditors, for they could have proceeded at any time to sell his equity of redemption. A similar question came before the supreme court of Mississippi in the case of *Taylor v. Watkins*, and, discussing it, Mr. Justice Woods observes:

"In the case of *Barkwell v. Swan*, 69 Miss. 907, 13 South. 809, the doctrine contended for by the learned counsel for appellant, and found in the cases referred to in [*Henderson v. Downing*] 24 Miss. 106, and [*Bank v. Douglass*] 11 Smedes & M. 469, was declared to be modified by subsequent statutes, which now permit a sale of the grantor's equity of redemption in the mortgaged property. If Bell, in this case, sought to protect his estate from attacks of creditors by conveying it, prodigally and excessively, to secure preferred creditors, and by giving himself undue extension of time for payment of the secured debt, there was and is nothing which precludes his general creditors from proceeding to sell his equity of redemption to satisfy their demands." 13 South. 813.

The third assignment is therefore not well taken.

The fourth specification of error, when considered in connection with the facts of this case, is without substantial merit; and we content ourselves with a reference to *Hooker v. Sutcliff*, 71 Miss. 792, 15 South. 140, as decisive of the question.

What we have said in reference to the first and second assignments applies with equal force to the fifth, and it requires no further consideration.

After a careful examination of all questions raised by appellants, our conclusion is that the deed of trust is a valid instrument, and, hence, that the circuit court properly dismissed their bill. There, however, appears in the record a manifest error, which, although unassigned (rule 11 of this court, 11 C. C. A. cii., 47 Fed. vi.), will necessitate a reversal of the case. The conclusion of the decree orders the issuance of execution in favor of the Ryan Grocery Company against appellants "for the sum of two hundred and fifty (\$250) dollars, the same being the value of said 500 bushels of corn used by and fed to said live stock levied upon under said attachment." The pleadings involve no issue upon which the judgment against appellants for \$250 can stand. The Ryan Grocery Company filed no cross bill praying affirmative relief, and the only prayer of its answer is "to be hence dismissed with costs." It may also be said that there was nothing in the proofs which could even remotely sustain a moneyed judgment such as was rendered in this case. "It is hardly necessary to repeat," says the supreme court, "the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly, without the aid of a cross bill, the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills." *Railroad v. Bradleys*, 10 Wall. 302. In *Chapin v. Walker*, 6 Fed. 795, 796, Judge

McCrary says: "It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross bill, and can never be granted upon the facts stated in the answer." And by the supreme court of Alabama it is held that "a defendant cannot, by answer, pray anything but to be dismissed by the court. If he has any relief to pray, he must do so by a bill of his own." *Cummiag's Heirs v. Gill's Heirs*, 6 Ala. 564; *Cullum v. Erwin*, 4 Ala. 461. The court erred in ordering execution to issue in favor of the Ryan Grocery Company against appellants for the sum of \$250. In other respects the decree is correct. For the error indicated the decree of the circuit court will be reversed, and the cause remanded, with directions to enter a decree in conformity with the views above expressed. The costs of the appeal will be divided equally between appellants and the appellee the Ryan Grocery Company,—the appellants to pay the costs incurred in the circuit court,—and it is so ordered.

COLORADO PAV. CO. et al. v. MURPHY.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1897.)

No. 849.

1. PUBLIC OFFICERS—BREACH OF DUTY—RIGHTS OF CITIZENS.

One who seeks relief from the courts for a breach of a duty imposed upon public officers by statute must show that he has a vested right to the discharge of that duty, and that the statute which imposed it was enacted for the benefit of himself and others in a like situation.

2. SAME—ACTION FOR BREACH OF DUTY.

If the duty was imposed for the benefit of another person or class of persons, and the complainant's advantage from its discharge is merely incidental, and not a part of the design of the statute, no such right is created as forms the subject of an action at law or of a suit in equity.

3. MUNICIPAL CORPORATIONS—LETTING CONTRACTS—RIGHTS OF LOWEST BIDDERS.

The usual provision in city charters that contracts for public work shall be awarded to the lowest reliable and responsible bidders was not enacted to furnish employment for contractors, or to benefit a bidder for such work, but with the design to benefit and protect the property holders and taxpayers of the municipalities.

4. SAME—RIGHTS OF TAXPAYERS—INJUNCTION.

Taxpayers and property holders whose rights of property will be injuriously affected by the fraudulent or arbitrary violation of this and similar provisions of city charters may maintain a suit to enjoin such action by public officers whose duty it is to comply with them.

5. SAME—RIGHTS OF LOWEST BIDDERS—INJUNCTION.

But the lowest reliable and responsible bidder for a contract for public work has no such vested or absolute right to a compliance with such provisions of the statutes as will entitle him to maintain an injunction against their violation by public officials, because these provisions of the statutes were not enacted for his benefit, or for the benefit of his class.

6. SAME.

The presentation by a reliable and responsible bidder of the lowest bid for a contract for public work to officials whose duty it is, under the charter of a city, to let the contract to the lowest reliable and responsible bidder, but who have the right, under the statute, to reject all bids, and who have given notice in their advertisement for bids that they reserve the right to reject any and all bids, does not constitute an agreement that they will make a contract for the work with such a bidder; nor does it vest in him such an absolute right

to the contract as will authorize a court of equity, at his suit, to compel the officials, or the municipality they represent, to enter into a contract for the work with him, when they are about to award, or have awarded, it to a higher bidder.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

- A. B. Seaman and James H. Brown (Frederick A. Williams and G. Q. Richmond with them on the brief), for appellants.

W. H. Bryant (C. S. Thomas and H. H. Lee with him on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal taken by the mayor and the members of the board of public works of the city of Denver and the Colorado Paving Company, a corporation, from an order of the court below enjoining them from paving, and from entering into any contract for paving, a street named "Broadway," in that city, until the final hearing upon the bill of complaint in this suit. The appellee was the complainant in this bill, and he bases his right to this injunction and to other relief upon the sole ground that he was the lowest reliable and responsible bidder for this paving, and therefore entitled to this contract, under the provisions of the charter of the city of Denver. He alleges that the Colorado Paving Company, a corporation, and F. O. Blake & Co., a co-partnership, and the board of public works of the city of Denver, entered into a conspiracy and agreement to the effect that the paving company and Blake & Co. should bid extravagant prices for the paving contracts in the city of Denver; that the specifications for the contracts and the awards of them should be so manipulated that the bids of all others should be excluded and rejected, and all the contracts should be divided between the paving company and Blake & Co. He alleges that the board of public works performed its part of this agreement, and that in order to do so it violated many provisions of the charter of the city of Denver. He avers that, in violation of a provision of that charter that the board, before ordering any improvement, shall adopt full details and specifications for the same, permitting and encouraging competition (Sess. Laws Colo. 1893, p. 202), it restricted the sources from which the material for paving this street might be obtained to asphalt lakes and mines whose output was controlled exclusively by the two favored contractors, and arbitrarily excluded from use upon it an asphalt of equal standard and quality, called "Alcatraz Asphalt," which the complainant offered to and could furnish, and that in violation of a provision in the city charter that such a contract shall be let to the lowest reliable and responsible bidder, after a public advertisement of not less than 10 days, in which the board shall reserve the right to reject all bids, and, upon rejecting all bids, may again advertise (Sess. Laws Colo. 1893, p. 218), the board reserved in its advertisement for bids for this work the right to reject any and all bids, and then awarded the contract

for paving this street to the Colorado Paving Company, notwithstanding the fact that the complainant was the lowest reliable and responsible bidder, and made an offer to pave this street with Alcatraz asphalt for \$12,000 less than the amount for which the paving company offered to do the work. The appellee alleges that he incurred considerable expense in preparing his bid, that he deposited a certified check for \$5,000 as a guaranty that he would enter into the contract if it was awarded to him, and that he would have made a profit of more than \$2,000 if his bid had been accepted and he had performed the contract. He prays for the decree of the court that the board shall canvass and accept his bid and award him the contract, and that it be enjoined from contracting for the paving of the street with any other party. None of the appellants answered this bill, but the motion for the preliminary injunction was heard upon affidavits. Each of the members of the board of public works made an affidavit in which he denied that he had entered into the conspiracy and agreement charged in the bill, and stated that he had investigated the standard and quality of the various asphalts, and had come to the conclusion that Alcatraz asphalt was inferior to the asphalt accepted, and was unfit for use for paving purposes in the city of Denver. He also stated that, in excluding it for use there, he had acted solely in the interest of the public. The overwhelming weight of the testimony was, however, that Alcatraz asphalt was equal in standard and quality to the accepted asphalts for paving purposes; and the testimony tended strongly to show that the Colorado Paving Company and F. O. Blake & Co. had agreed to divide the paving contracts of the city of Denver between them, and that they were not, in reality, competitive bidders. Upon this state of facts the court below issued a temporary injunction.

The record presents a preliminary question which demands decision before we can enter upon the consideration of the weight and effect of the testimony it contains. The question is this: Has the lowest, but unsuccessful, bidder for municipal work, any such vested right to or interest in the contract for it as will enable him to maintain a suit to compel its award to him, and to enjoin the successful bidder and the municipality from entering into a contract for the performance of the work because that contract has been awarded to a higher bidder in violation of the usual provision in city charters that such work shall be let to the lowest reliable and responsible bidder? In other words, has the lowest bidder the legal capacity to maintain such a suit as that at bar? That taxpayers, whose taxes are to be increased and whose property is to be depreciated in value by the fraudulent or arbitrary violation of this provision by the officers of a municipality, may maintain a bill to enjoin their proposed action, is a proposition now too well settled to admit of question. *Times Pub. Co. v. City of Everett* (Wash.) 37 Pac. 695; 1 Beach, Pub. Corp. §§ 634, 635; 2 Dill. Mun. Corp. § 922; 2 High, Inj. §§ 1251-1253; *Davis v. Mayor, etc.*, 1 Duer, 451; *Crampton v. Zabriskie*, 101 U. S. 601; *Mayor, etc., v. Keyser*, 72 Md. 106, 19 Atl. 706; *People v. Dwyer*, 90 N. Y. 402. These suits, however, stand upon the ground that the statutes on which they are based were enacted, and the du-

ties there specified were imposed upon the public officers, for the express benefit of the property holders and taxpayers who bring the suits. The appellee pays no taxes for this paving. He has no property that will be injured by the violation of the provisions of the charter relied upon, and no one who has is here to complain of their violation. So far as the purpose of its enactment is concerned, the complainant is a stranger to the statute,—one whose interests were not considered or intended to be conserved by its enactment. He is a mere bidder for some of the public work of this city,—a contractor, or one who desires to be a contractor. His interest and that of his class, the contractors with municipalities for public work, is to get the highest price for their work and materials. It is obvious that this statute was not enacted for their benefit. If it had been, the legislature would have provided that the contracts should be awarded to the highest, rather than to the lowest, bidders. In reality this suit is nothing but a contest between rival contractors for the patronage of the city of Denver. One of them has obtained the award of a contract from that city, and the other is in this court asking a decree that the city be enjoined from making a contract with his rival, and be compelled to make it with him, because some of the public officers of that city have violated certain provisions of the city charter enacted for the sole benefit of its property holders and taxpayers. It is plain that, in the absence of these provisions in the charter, the officers of this city would have had the right to award this contract to any bidder, high or low, and the complainant would have had no cause for complaint. There is no doubt that these provisions were enacted for the benefit of the property holders and taxpayers of the city of Denver, and not in the interest or for the benefit of bidders or contractors for municipal work. How, then, can this bidder maintain a suit for their violation? He cannot. It will be soon enough to consider the effect of such a violation when some of those for whose benefit these statutes were enacted complain of it. Until then, the courts must withhold their hands. The rule of law which governs this case, and points unerringly to this result, is unquestioned; and it is nowhere stated more clearly than in *Strong v. Campbell*, 11 Barb. 135, 138, where Judge Johnson says:

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

It is upon this principle that it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him. *High*, Extr. Rem. § 92; *State v. Board*, 24 Wis. 683; *Com. v. Mitchell*, 82 Pa. St. 343, 350; *Kelly v. Chicago*, 62 Ill. 279; *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Douglass v. Com.*, 108 Pa. St. 559; *Madison v. Harbor Board* (Md.) 25 Atl. 337. And the courts hold that he cannot maintain an action at law for damages for their refusal to enter into the contract. *Talbot Pav. Co. v. City*

of Detroit (Mich.) 67 N. W. 979; *Gaslight Co. v. Donnelly*, 93 N. Y. 557. This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief. Nor is this an unjust or inequitable result. One who offers to contract to do work for a city that he knows has the right to reject his bid ought not to have the power to compel that city to enter into a contract with him simply because it decides to make a contract for the same work with his rival. He knowingly puts the labor and expense of preparing his bid at the hazard of the city's action. It is admitted that, if the city rejects all bids, he has no rights, no equities; and we fail to see how its acceptance of another's bid can give to the unsuccessful bidder any greater right than he would have had if all bids had been rejected.

It is insisted, however, that this suit can be maintained as a suit for the specific performance of a contract, and that the issue of the injunction can be maintained as ancillary to that suit. It is argued that the filing by the complainant of his bid and his certified check for \$5,000, as a guaranty that he would enter into the contract if awarded to him, concluded a contract between him and the board that he should have the contract if he was the lowest reliable and responsible bidder. But this argument overlooks the fact that it takes two to make a bargain. The complainant may have agreed to this, but it is very evident that the board did not. The board had passed a resolution, of which the complainant had notice before he made his bid to pave this street with Alcatraz asphalt, that in its opinion that kind of asphalt was not of the standard of quality required by its specifications, and that bids based upon it would not be accepted. It gave notice in its advertisement for bids that it reserved the right to reject any and all bids. Under these circumstances, the complainant offered to pave the street with Alcatraz asphalt for \$12,000 less than the Colorado Paving Company offered to pave it with one of the asphalts called for in the advertisement, and his bid was rejected. It is difficult to see how these facts indicate a meeting of the minds of the members of the board and the complainant on the proposition that he should receive the contract if his bid was the lowest. To our minds, they seem to prove clearly that there was no such contract. As there was no contract, no specific performance of a contract can be decreed in this suit. Since the complainant failed to get the contract, through the violation by public officers of duties imposed upon them by statutes that were enacted for the benefit of others, and not for his benefit, he cannot compel the award of the contract to himself on account of this violation. He stands, therefore, where the bidder for a contract whose offer is rejected usually stands. It is true that he has not gained the profits he hoped to make if his offer was accepted, but it is also true that he has lost nothing that he did not willingly risk on the chance of its acceptance, and he has no cause of action either at law or in equity against the party to whom he made his offer. Since the complainant cannot obtain this contract himself, the injunction which restrains the city from making a contract for the same work with his

rival contractor can give him no relief, and it must be dissolved. Let the order granting the preliminary injunction be reversed, with costs, and let the case be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

McMASTER v. NEW YORK LIFE INS. CO.

(Circuit Court, N. D. Iowa. W. D. January 4, 1897.)

1. LIFE INSURANCE—POLICY—AMBIGUOUS PROVISIONS.

Ambiguous provisions in a policy of life insurance must be construed most favorably to the insured.

2. SAME—CONSTRUCTION OF CONTRACT—FORFEITURES.

A contract of life insurance should be so construed as to avoid a forfeiture, when it may be fairly done.

3. SAME—LIFE POLICY—CONTINUING CONTRACT.

A life policy, delivered upon payment of the first year's premiums, is a continuing contract for the life of the insured, subject to be forfeited for nonpayment of premiums, and not merely a contract for a year, renewable by payment of subsequent premiums.

4. SAME—CONSTRUCTION OF POLICY BY AGENT—STATUTE.

Under a statute providing that any person procuring applications for insurance shall be held to be the soliciting agent of the company issuing a policy thereon, a construction placed upon a clause in the policy by the soliciting agent, as an inducement to the insured to enter into the contract, is binding upon the company.

5. SAME—CONTRACT OF AGENT—NONPAYMENT OF PREMIUMS—FORFEITURE FOR.

Defendant's agent, in soliciting the insurance, called attention to a provision in the policies that, after they had been in force three months, "a grace of one month shall be allowed in payment of subsequent premiums," and represented that, if the insured should pay the first year's premiums upon delivery of the policies, they could not be forfeited for nonpayment of premiums for 13 months. The statute (Laws Iowa, 1880, c. 211) governing the contract provides that any person procuring applications for insurance shall be held to be the soliciting agent of the company issuing a policy thereon. The policies were dated December 18, 1893, and were delivered on December 26th, but they contained a provision, inserted without the knowledge or consent of the insured, that subsequent premiums should be paid on December 12th of each year. The first year's premiums were paid upon delivery of the policies, and none were afterwards paid. The insured died on January 18, 1895. *Held*, that the policies were in force at his death.

6. SAME—REFORMATION OF POLICY.

In such a case, even if it be conceded that the company might declare the policies forfeited before the expiration of 13 months from their delivery, the facts would entitle the representatives of the insured to a decree reforming the policies to correspond with the contract as made between the agent and the insured.

Bill to reform five policies of insurance, issued upon the life of Frank E. McMaster.

F. E. Gill, for complainant.

Park & Odell and Swan, Lawrence & Swan, for defendant.

SHIRAS, District Judge. From the evidence submitted in this case it appears that the New York Life Insurance Company, whose home office is in the city of New York, in the year 1893 was engaged in the business of life insurance at Sioux City, Iowa; that in the month of December, 1893, five contracts of insurance were entered

into between the company and one Frank E. McMaster, then a resident of Sioux City; that the conditions attached to and forming part of the policies the company was then issuing contained, among other provisions, the following:

"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary, or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company."

"After this policy shall have been in force three months, a grace of one month shall be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace, the unpaid premium, with interest, as above, remains an indebtedness due the company, and, in the event of the death during the said month, this indebtedness will be deducted from the amount of the insurance."

It further appears that in December, 1893, one F. W. Smith was engaged in soliciting insurance on behalf of the defendant company at Sioux City, and was the person who secured the application for insurance from F. E. McMaster; and in his testimony he says that, when soliciting the insurance, he called McMaster's attention to the 30 days' grace that was allowed in payment of premiums, and further stated to him that the payment of the premium on the delivery of the policy would carry his insurance over a period of 13 months; and this witness further testified that when McMasters signed the application which was filled out by the witness nothing was said therein about the date of the policy, but that subsequently the witness, without the knowledge of the applicant, inserted therein the words, "Please date policy same as application"; that this was done because the company was paying an extra bonus of seven dollars per thousand for all insurance obtained in the year 1893, and it was desirable to have the policy bear date of that year, in order to secure the bonus to the agent obtaining the insurance. The application bears date December 12, 1893, but the policies, when issued, were dated December 18, 1893, and each reads as follows:

"The New York Life Insurance Company, by this policy of insurance, doth promise and agree to pay one thousand dollars at its office in the city of New York to the insured's executors, administrators, or assigns, immediately upon receipt and approval of proofs of death, during the continuance of this policy, of Frank E. McMaster, of Sioux City, in the county of Woodbury, state of Iowa (herein called the 'insured'). This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. * * * The benefits and provisions placed by the company on the next page are part of this contract, as fully as if recited over the signature thereto affixed."

The provisions thus referred to contain, among others, those already set forth at length. It further appears that the first year's premium of \$21 on each of the five policies was paid by the insured on the 26th day of December, 1893, and the policies were then delivered to him. It also appears that no further payments of premiums

were made; that Frank E. McMaster died at Sioux City on the 18th day of January, 1895; that the present complainant was duly appointed administrator of his estate; that, upon demand made, the defendant company refused to pay the amount called for by the policies, upon the ground that the policies had lapsed for nonpayment of the second premiums thereon; that thereupon the administrator brought an action at law in this court upon the policies, which is still pending, and afterwards filed the present bill to procure a reformation of the policies, by changing the date of payment of the second and subsequent premiums from December 12th to December 18th, on the ground that the date named in the policies, to wit, December 12th, is an error, and does not correctly represent the actual contract existing between the parties. The action of complainant in filing the present bill was doubtless brought about by the intimation given by the court when the law action was before the court upon demurrer,—that in that action the date of the payment of the second premiums must be held to be in fact that named in the policies, and that, no matter what the facts were, a court of law must construe the contract of insurance as it was written, and that, if it did not correctly represent the contract of the parties, resort must be had to a court of equity for the reformation thereof.

The questions presented upon the record have been very fully and ably argued by counsel, and, with the assistance thus afforded, I have examined the contract of insurance, and have reached the conclusion that the right of recovery is not dependent upon the date when the second year's premiums are made payable by the terms of the policies. In determining the true construction of the contract between the company and the insured, regard must be had to all of its provisions, and furthermore, if there is uncertainty and ambiguity with regard to some of the provisions of the contract, resulting from the language used in different clauses thereof, that construction most favorable to the insured must be adopted, upon the familiar principle that, as it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company. *National Bank v. Insurance Co.*, 95 U. S. 673; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466. The contract is not one which, by its express terms, is to terminate at a given or named date. It is provided, in the conditions annexed to the policy proper, that if the insured should be living on the 12th day of December, 1913,—that is, 20 years after the date of the policy,—and should have made due payment of the premiums, then the insured could convert the policy into cash, or into a paid-up policy, or into an annuity. Until this date, however, should be reached, the continuance of the policy is made dependent upon two contingencies, to wit, the continuance of the life of the insured, and the payment of the premiums called for by the terms of the policy. When the first year's premiums were paid, and the policies were delivered to the insured, they constituted contracts for the life of the insured, subject to be forfeited by nonpayment of premiums according to the terms of the policies, or, after the lapse of 20 years, to be

converted as already stated. Thus, in *Insurance Co. v. Statham*, 93 U. S. 24, it is said:

"We agree with the court below, that the contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums."

In construing the contract of the parties and their acts in connection therewith, the rule is to avoid forfeiture when it may be fairly done. Thus, in *Insurance Co. v. Norton*, 96 U. S. 234, it is ruled by the supreme court that:

"Forfeitures are not favored in the law. They are often the means of great oppressions and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in the *Statham Case*, 93 U. S. 24, that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the contract in favor of avoiding a forfeiture."

In *Insurance Co. v. Eggleston*, 96 U. S. 572, it is declared:

"Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Thompson v. Insurance Co.*, 104 U. S. 252, it is said:

"We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy or may not, according to the circumstances. It is always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

To the same effect are the rulings in *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, and *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671.

Bearing these principles in mind, let us now consider what the contract was which the parties entered into, and whether the same was in force at the date of McMaster's death. In the application signed by McMaster it is stated that the sum to be insured was \$5,000, the premium to be payable annually on the ordinary life table. As already stated, when the solicitor for the company was seeking to induce McMaster to apply for the insurance, he called his attention to the clause in the provisions annexed to the policies issued by the company, wherein it is provided that after a policy has been in force three months, then a month's grace is allowed in the payment of the next premium, and thus, when the first annual payment is made in full, the assured is protected for the period of 13 months. There can be no question, therefore, that when McMaster signed the application for the insurance in question he understood that, if he paid the first annual premium in full, the policies that he would receive would continue in force for the period of 13 months from their

date; that is, that the same could not be forfeited by a failure to pay a premium within that time. The testimony of Smith, the solicitor of the company, further shows that the understanding had with McMaster when the application was signed was that the first annual premiums were to be paid in full when the policies were delivered, and, in fact, the first premiums were so paid. Therefore, when McMaster signed the application, his understanding of the proposed contracts of insurance, which he contemplated securing, was that the first annual premiums were to be paid in full when the policies were delivered, and that these payments, when made, would secure him against a forfeiture on part of the company for a period of 13 months. The provision in the policy is that, "during the said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This clause clearly points to a month of grace not covered by the premium already paid, and fully justified McMaster in the assumption that, if he paid the first annual payment in full, he would be entitled to one year's protection, and also to one month of grace to be added thereto, or, in other words, to a period of 13 months, during which the policies could not be declared forfeited by the company. If there exists some question touching the meaning to be given to this clause, it must be solved against the company; and, furthermore, the evidence shows that the company, through its soliciting agent, construed the clause in question to mean that the payment of the first annual payment would protect the insured against a forfeiture for the period of 13 months, and used that construction as an inducement to secure the insurance from McMaster, and the company ought not to be permitted to now construe the clause in the policy in a manner different from that which it relied upon when soliciting the insurance.

The evidence in the case shows that the insurance was solicited, the application was signed, the first annual payments were paid, and the policies were delivered, at Sioux City, Iowa, the place of residence of the insured, and therefore the relation of the solicitor, Smith, to the parties, is controlled by the statute of Iowa upon that subject. *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822; *Indemnity Co. v. Berry*, 1 C. C. A. 561, 50 Fed. 511. By the Acts of the 18th General Assembly of the State of Iowa (chapter 211, p. 209) it is declared that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." In *Cook v. Association*, 74 Iowa, 746, 35 N. W. 500, the supreme court ruled that the above section applied to all kinds of insurance companies, including those engaged in life insurance. Therefore, when the solicitor, Smith, represented to McMaster that by paying one annual payment on the policies about to be issued he would secure a period of 13 months during which the policies could not be forfeited, by reason of the clause in the policies giving a full month of grace, Smith, as agent of

the company, put a construction upon the clause which is now binding upon the company. The facts of this case bring it fully within the ruling of the supreme court of the United States in *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87. In that case it appeared that the application required the applicant to state whether he had any other insurance on his life. The fact was, he was a member of various co-operative associations, and by reason thereof he had insurance on his life to the amount of \$12,000. The applicant stated the facts fairly to the soliciting agent of the company, who took the view that co-operative insurance of the kind held by the applicant was not insurance within the meaning of the question in the application, and therefore wrote "No" as the proper answer to the question. The supreme court held that, under the statute of Iowa, the solicitor was agent of the company, and that the company was estopped from claiming that the insurance held by the applicant in co-operative companies was in fact insurance within the meaning of the application, or, in other words, held that the interpretation put upon the question by the soliciting agent when the insurance was applied for bound the company when suit was brought to recover upon the policy. Therefore, it is made clearly to appear that McMaster was induced to apply for and take the insurance upon his life in the defendant company upon the understanding that, if he paid the first annual premiums upon each policy, he would secure contracts of insurance which could not be forfeited within a period of 13 months. The first annual premiums were paid, the policies, bearing date December 18, 1893, were delivered, and the insured died within 13 months from the date of the policies; and the company refuses payment and denies liability on the ground that the second year's premiums had not been paid at the date fixed in the policy or within a month thereafter, and therefore the policies have been forfeited. The date fixed in the policies for the payment of the second and subsequent premiums is the 12th day of December, and it thus appears that the second premiums were made payable in advance of the termination of the first year for which the premiums were paid when the policies were delivered. If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company, after using the month's grace as an argument to secure insurance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies. The argument on behalf of the company is that there was nothing said in the application with regard to the date of the second and subsequent payments, and therefore the company had the right to fix the date, and the insured, by receiving the policies without objection, and paying the first premium, agreed to the date named in the policies, and is bound thereby.

Assuming that at law the parties are bound by the date thus fixed for the second payment of the premiums, the question still remains whether, from the fact that the second and subsequent premiums are made payable on the 12th of December, it necessarily follows that the policies could be declared forfeited by the company until after the expiration of the 13 months from the date thereof. At law, the question would seem to turn upon the proposition whether McMaster, by paying the first annual premium in full, became entitled to a contract of insurance which could not be forfeited until after the expiration of 13 months, because, if that was the contract, then the court would be justified in so construing the clause with regard to the forfeiture for nonpayment of subsequent premiums as to hold that the same did not become applicable and in force until after the expiration of the 13 months period. There can be no question, under the facts of this case, that when McMaster signed the application for the insurance he understood, and the company, then represented by its soliciting agent, understood, that, if the officers of the company at the home office accepted the risk, by paying one year's premium in full McMaster would secure contracts of insurance which could not be forfeited until after the expiration of 13 months. The company accepted the risk, and issued policies for the required amount, dating the same December 18th; and the defendant, in its answer, avers "that on or about the 25th day of December, 1893, the said policies were delivered to the said Frank E. McMaster, who received the same, and paid the first year's premiums thereon." If the policies had not antedated the time for the payment of the second and subsequent premiums, making the same payable in advance, there would be no question of the liability of the company, because, it being admitted that the first year's premiums were paid in full, then the insured became entitled to a month's grace; and the insured died within the month of grace, thus entitling the company to deduct from the face of the policy the amount of the second premium, with interest thereon. When the policies were delivered to McMaster upon payment of the first year's premiums, there were then created valid contracts of insurance upon the life of McMaster, not for one year, but continuing contracts extending over the life of the insured, which could not be forfeited for nonpayment of premiums, so as to deprive the insured of the protection thereof during any period of time covered by the payments already made. Therefore, at law, the question is, for what period of time were the policies rendered nonforfeitable by the payment of the first year's premiums? It is admitted that the contracts of insurance did not take effect until December 26, 1893, when the first year's premiums were paid, and the policies were delivered to the insured. If these policies did not contain the clause allowing one month's grace, the payment of the premiums would certainly have prevented a forfeiture for one year from December 26, 1893. Unless a period of a month be added thereto, the insured is deprived of the benefit of the period of grace which was promised him. If this period is allowed, then the policies were in force at the date of Mc-

Master's death. Upon what theory or principle can the insured be rightfully deprived of the benefit of this period?

It cannot be questioned that if the company had followed the usual rule, and had made the time for the payment of the second and subsequent premiums to count from the date of the policies, there would be no doubt of the liability of the company. The policies are dated December 18, 1893. If the second and subsequent premiums had been made payable on December 18th in 1894 and subsequent years, then the month's grace would date from December 18th, and the policies would not be forfeited until after January 18th following. The defense of the company is rested on the fact that it made the second and subsequent premiums payable on December 12th in 1894 and subsequent years. It is not claimed that this date was agreed upon between McMaster and the company. There is no evidence showing that, when the policies were delivered, his attention was called to this date, or that he in fact knew that December 12th had been named in the policies as the time for the payment of the subsequent premiums. In the answer filed by defendant it is expressly averred that "no directions were ever given or request made by the deceased, or any agreement made, that the premium should be made payable on any specified date." The evidence justifies the conclusion that the defendant company agreed with McMaster to insure his life, and to issue to him contracts of insurance to take effect when the first year's premiums thereon were paid, and to be nonforfeitable for a period of 13 months; that the company issued policies for the amounts agreed upon, and delivered the same on December 26, 1893, receiving, at that time, payment of one year's premiums in full, and thereby became bound to pay the agreed sums, provided McMaster died while the policies were in force; that by the terms of the contract of insurance the policies could not be forfeited until 13 months had elapsed; that, it being admitted by the defendant that there was no agreement between McMaster and the company with regard to the time when the second and subsequent premiums should become payable, the company could not, by its own act in antedating the time of payment of the subsequent premiums, deprive McMaster of the protection of the contracts of insurance during the period of 13 months from the date of the first payment. If it be true that the payment of the first year's premiums made the policies nonforfeitable for a period of 13 months, then at law the court is justified in holding that the forfeiture claimed by reason of the nonpayment of the second premiums could not be availed of by defendant until the period of 13 months had elapsed, and would not be a defense to a claim based upon the death of McMaster within the period of 13 months from the taking effect of the contracts of insurance. If, however, it should be held at law that the policies are so worded that they can be declared forfeited because the second premiums had not been paid on the 12th day of December, 1894, or within a month thereafter, then it is clear that the policies should be reformed so as to correspond to the real contract of the parties. As already stated, the evidence shows that it

was the agreement of the parties that the policies were to take effect upon delivery, and that they were not to be delivered until the premiums were paid; and it also clearly appears from the evidence that McMaster expected to receive, and the company contracted to deliver, policies which would be nonforfeitable for a period of 13 months; and it now appears that the company, although it admits that there never was any agreement authorizing it to antedate the time for the payment of the second premium, of its own motion did so antedate the time for such payment, and claims that by so doing it has deprived McMaster of protection during the full period of 13 months, during which period it had previously agreed the policies should be in full force and nonforfeitable. Although, as herein indicated, the proper legal construction of the policies shows that they were in force when McMaster died, yet as the defendant company is insisting that the policies, as written, had then been forfeited by reason of the fact that the second premiums had been made payable on the 12th of December, it being admitted that this was done without the consent of the insured, and as it is clear that it was not the contract of the parties that the 13-months nonforfeitable period should begin to run on the 12th of December, 1894, there is ground upon which the complainant can rest in asking a decree of reformation, and such decree will therefore be granted in favor of complainant†

DAVIS v. BEAN et al. (FORD et al., Interveners).

(Circuit Court, N. D. Iowa, E. D. January 4, 1897.)

1. COLLATERAL SECURITY—EVIDENCE OF SURRENDER—SUFFICIENCY.

The only evidence that an assignment of a decree of foreclosure given by B. to D., as security for a note, had been surrendered to B. upon renewal of the note, was the fact that it was found among B.'s papers after his death, pinned to the old note, the new note being yet unpaid. It was shown, however, that B. administered on D.'s estate, and had charge of all his papers, and that the assignment was not canceled. The correspondence between B. and D. relative to the renewal contained no reference to the assignment, the renewal being offered by D. "on the same terms" as the original loan. *Held*, the evidence did not show a surrender of the assignment.

2. EQUITABLE LIEN ON LAND—PRIORITIES.

A note executed by B. to S. provided that, upon the death of S., the money should be repaid to certain heirs of S. Nothing was said as to B.'s investment of or accounting for the money, the transaction being an absolute loan on real-estate security. B. loaned the money, taking as security a mortgage on land, which he afterwards foreclosed, assigning the decree of foreclosure to D., who had no notice of any claim by S. While the assignment was outstanding, B. had the land sold under the decree, and became the purchaser. *Held*, that the right of the heirs of D. to a lien on the land was superior to that of the heirs of S.

W. J. Knight, for complainant.

Henderson, Hurd, Lenahan & Kiesel, for defendants and interveners.

SHIRAS, District Judge. In the bill filed by complainant, it is averred that on June 1, 1887, one Edwin Bean, then residing in Chicago, Ill., borrowed of Joseph B. Davis, then residing at Oshkosh,

Wis., the sum of \$10,000, giving his promissory note therefor, payable in one year from date, and, as security for the repayment of the sum thus borrowed, Bean assigned to Davis a decree foreclosing a mortgage upon certain realty in Decorah, Iowa, the assignment reading as follows:

"District Court, County of Winneshiek and State of Iowa.

"Edwin Bean vs. A. Addicken et al.

"Decree of Foreclosure of Mortgage, Sept. 7, 1883, for \$10,357.15.

"I hereby assign the above decree and all benefits to be derived therefrom to Joseph B. Davis, as collateral security for the payment of my note to him for ten thousand dollars, of even date herewith, and due one year after date. I to be allowed to collect the interest on said decree, but in no event to reduce the same to a less sum than may be due on my said note which this assignment secures.

"Chicago, June 1st, 1887.

Edwin Bean."

It is further averred by complainant that the loan thus made to Bean was not paid at the end of the year, but, at his request, an extension thereof for one year was granted by Davis, a new note for the amount being executed by Bean, and delivered to Davis, bearing date June 1, 1888; that in September, 1888, Joseph B. Davis died, testate; that, under the terms of his will, his widow (the complainant herein) took the title to, and became the owner of, the claim against said Bean; that it now appears that on March 3, 1888, Bean caused execution to be issued from the district court of Winneshiek county, Iowa, upon the foreclosure decree assigned as security to Joseph B. Davis, and a sale to be had of the property covered thereby, and at such sale the greater part of the property was bid in by Bean, and a sheriff's deed was executed to him therefor; that thereupon Bean sold a part of the premises to William Kreutler, for the sum of \$150, and to Catherine Kreutler, for the sum of \$300, which amounts are in possession of Levi Bullis, who acted as attorney for Bean, and has had charge over the property since the sale thereof. It is further averred that on October 9, 1890, Edwin Bean died, at Chicago, Ill., and by will, duly executed and probated, his widow, Jennie Y. Bean, became vested with the title to and ownership of all property, real and personal, left by Edwin Bean; and that George A. Follansbee was duly appointed administrator with the will annexed of the estate of said Bean, by the probate court of Cook county, Ill. It is further averred in the bill that the debt due from Bean to Davis remains unpaid, and it is prayed that it be declared that Bean purchased said realty, covered by the mortgage decree assigned to Joseph B. Davis, in trust for said Davis; that the amount found due from said Bean be declared a lien upon the realty in question, and, if the debt be not paid, that the property be sold to pay the same. To this bill, Jennie Y. Bean, George A. Follansbee, administrator of Edwin Bean's estate, and Levi Bullis, are made parties defendant, and have answered the bill, admitting the borrowing of the money by Bean of Davis, as charged, but denying that the decree of foreclosure against Addicken had been assigned as security for such loan, and denying, therefore, that the realty is equitably chargeable with a lien for the amount due from Bean to Davis.

By leave of court, Lucia D. Ford, Margaret J. Harwood, Charles J. Burton, and Edward A. Burton were allowed to appear in the case as interveners; and, in the bill filed by them, it is averred: That the interveners and one Mary E. Blair are the children and heirs of one Stephen Burton. That on or about April 6, 1881, the said Stephen Burton, at Chicago, Ill., placed in the hands of Edwin Bean the sum of \$12,500, to be accounted for by said Bean as provided for in a written instrument of the following tenor:

"Received of Stephen Burton twelve thousand five hundred dollars, on which sum I agree to pay him interest at the rate of six per cent. per annum so long as he shall live, interest payable annually; and, within eighteen months after the death of said Stephen Burton, I agree to pay said principal sum in manner following: Twenty-five hundred dollars to Lucia D. Ford or her heirs; twenty-five hundred dollars to Mary E. Blair or her heirs; twenty-five hundred dollars to Margaret J. Harwood or her heirs; twenty-five hundred dollars to Charles J. Burton or his heirs; twenty-five hundred dollars to Edward A. Burton or his heirs,—together with interest on said several sums of money last mentioned at 6 per cent. per annum from the date of the last installment of interest to Stephen Burton until paid. Interest and principal payable at my office, in Chicago, Ill.

"Chicago, April 6, 1881.

Edwin Bean."

—That \$10,000 of this sum, so paid to Bean by Stephen Burton, was immediately loaned by Bean to the Addickens, of Decorah, Iowa, and a mortgage taken to secure such loan, being the mortgage upon which Edwin Bean obtained a decree of foreclosure in the district court of Winneshiek county, Iowa, and which complainant claims under the assignment hereinbefore recited. It is further averred that Stephen Burton died December 30, 1889, and that the sums payable to the heirs of said Burton under the agreement aforesaid have not been paid, either by Bean during his lifetime, or by his administrator since his death; and it is claimed on behalf of said interveners that the money received by Bean from their father, Stephen Burton, was a trust fund, and that they are entitled to follow it into the property in which it was invested, and that their equity thereto is superior to the claims, if any, of the complainant herein.

It thus appears that the first question to be determined is whether there is now existing and in force a valid assignment, by Edwin Bean to Joseph B. Davis, of the mortgage foreclosure decree which it is admitted had been rendered in favor of Bean by the district court of Winneshiek county, Iowa, and against Addicken and others. On behalf of defendant and interveners, it is denied that the assignment was ever in fact delivered to Davis, and is averred that, if delivered as security for the first note executed by Bean to Davis, it was surrendered up when the extension of the loan was had, and the second note was executed and delivered to Davis.

Owing to the fact that Bean and Davis, the parties to the original transaction, are both dead, the facts with regard to the loan between them and the terms thereof must be sought in the correspondence had between them, and in the papers executed by them. It appears in the evidence that Edwin Bean and Joseph B. Davis and family were on intimate and friendly terms, and, upon the death of Joseph B. Davis, Bean was appointed the administrator of his estate, and took charge of the papers belonging thereto. The first reference to the

loan of \$10,000 from Davis to Bean appearing in the correspondence of the parties is found in a letter from Davis to Bean, written at Oshkosh, Wis., under date of May 28, 1887, and reading as follows:

"Dear Sir & Friend: Your esteemed favor of the 23d inst. was duly received, and would have received earlier attention, but I was away from home. I arrived home from Chicago on the morning of the 21st, and left home on that day, in answer to a telegram, and just got home last night. That is the reason that I did not write you on my return home, as I promised I would. In regard to the money matters we talked of, I will say I can let you have ten thousand for one year. Can't you come up, and bring the papers with you, and get the money, and stay long enough to eat one strawberry short cake dinner with us, if not more. If you can't come, send the assignment of the mortgage you spoke of, and I will send you the money. My better ½ wishes to be kindly remembered to you.

"Your Friend,

Joseph B. Davis."

From this letter it appears that Davis had been in Chicago about the 20th of May, 1887; that a loan of \$10,000 from Davis to Bean had been talked about; and that, as security therefor, Bean had proposed to assign to Davis a mortgage held by him; and the letter shows that, on Davis' return to Oshkosh, he concluded to make the loan to Bean on the terms proposed. The evidence shows that on June 1, 1887, four days after the date of the above letter, Bean executed his promissory note for the sum of \$10,000, payable to the order of Joseph B. Davis, and on the same date executed the written assignment of the mortgage foreclosure decree then standing in his name in the district court of Winneshiek county, Iowa; it being stated in the assignment that it was transferred as collateral security to his note to Joseph B. Davis, of even date, for the sum of \$10,000. That the money was forwarded to Bean, and the loan completed, is clearly evidenced by the fact that Bean executed his note for the sum of \$10,000, payable to order of Joseph B. Davis, in one year from June 1, 1887; and there is in evidence a letter from Bean to Davis, dated May 31, 1888, in which the former writes:

"I returned to my office last night, and found your favor of 20th inst. Inclosed I hand you my check, No. 519, for \$400, to pay interest due 1st prox.; also new note for \$10,000, one year. Please return the old note."

It is also shown in the evidence that, after the death of Bean, there was found among his papers the first note given for \$10,000, with his name obliterated thereon; and it is also proved that he executed a second note for \$10,000, dated June 1, 1888, and payable in one year, to the order of Joseph B. Davis, being the note sent to Davis in the letter dated May 31, 1888, as above cited. It is thus made to appear that in the latter part of May, 1887, Joseph B. Davis agreed to loan to Edwin Bean the sum of \$10,000 for one year, such loan to be secured by the assignment by Bean to Davis of the decree held by Bean foreclosing the Addicken mortgage in the district court of Winneshiek county, Iowa; that Davis sent the money to Bean, who executed and sent to Davis his promissory note for the sum of \$10,000, dated June 1, 1887, payable in one year from date, and secured payment of the debt thus created by assigning to Davis the foreclosure decree in the district court of Winneshiek county against Addicken et al., and by this assignment Davis became entitled to the claim represented by the assigned decree. And it further appears that the time of payment of

this debt to Davis was extended to June 1, 1889, a new note therefor being executed, bearing date June 1, 1888, and the old or first note was returned by Davis to Bean.

On behalf of the defendants and interveners, it is further claimed that though it may be true that Bean in fact executed and delivered the assignment of the foreclosure decree against Addicken and others, as security for the first note, yet, when the extension of the loan was had, the collateral security was surrendered up by Davis to Bean, and is therefore no longer in force. The only fact in support of this claim that is relied on is that the witness Johnson, who is attorney for the defendant Follansbee, administrator of Edwin Bean's estate, testifies that he found the assignment of the decree, pinned to the first note given by Bean, in an envelope, marked "Private," which was in the vault connected with Bean's office; and from this circumstance it is sought to draw the inference that, when the loan was extended, and the old note was sent by Davis to Bean, the collateral security was also surrendered. In the correspondence had between Bean and Davis with regard to the extension of the loan, there is not a word found to indicate that it was the understanding of the parties that the collateral security, evidenced by the assignment of the foreclosure decree, should be surrendered up. Thus, under date of May 20, 1888, Davis writes to Bean as follows:

"Dear Sir & Friend: Yours of the 16th inst. is received, and, in reply, I will say if you wish the money for my note for another year, on the same terms, you can have it. Will it be necessary to renew or alter the present note?"

To this letter, Bean replied, under date of May 31, 1888, as follows:

"Dear Sir & Friend: I returned to my office last night, and found your favor of 20th inst. Inclosed I hand you my check No. 519, for \$400, to pay interest due 1st prox.; also new note for \$10,000, one year. Please return old note."

To this letter, Davis replied, under date of June 17, 1888, acknowledging receipt of the new note and check, and concluding: "Inclosed find the old note."

Thus, it will be seen that the proposition was to continue the loan on the old terms, and, in carrying out the agreement for the extension, the only paper sent or exchanged was the new note from Bean to Davis, and the return of the old note by Davis to Bean. There is nothing, therefore, in the correspondence with regard to the extension of the loan that supports the theory that Davis surrendered up the collateral in question; and it cannot be assumed without good evidence that, when Davis agreed to extend the time of payment of the loan, he, as a mere free gift, sent back the collateral security which he had demanded, and relied upon in making the loan originally. Furthermore, if it was part of the agreement for the extension that the security should be returned, would not Bean have referred thereto in his letter sending the new note, and in which he asks Davis to return the old note, and would not Davis have mentioned the assignment as one of the inclosures, when he returns the old note, if he had in fact included it with the note? There is nothing, therefore, in the correspondence between the parties, or in the acts by them done, which lends the slightest color to the theory that

when the loan was extended, about June 1, 1888, the collateral security was delivered up by a return of the assignment of the decree of foreclosure held by Davis.

The fact that the assignment was found among the papers of Edwin Bean, after his death, has no significance, since it appears in the evidence that Bean was appointed administrator of Davis' estate, and in that capacity took possession of the papers of the estate, including the second note by him executed and sent to Davis. The testimony of the witness Johnson shows that both notes for \$10,000, as well as the assignment of the decree, were found among Bean's papers; and it is not questioned by the defendants that complainant is the owner of the second note, and that the same remains unpaid. Some reliance seems to be put upon the testimony of the witness Johnson that he found the assignment of the decree pinned to the first note, and in an envelope not containing the second note, as evidence tending to show that the security had been surrendered up by Davis when the second note was given, as evidence of the extension of the loan. As already stated, the fact that the second note and the assignment of the foreclosure decree were found among Bean's papers after his death cannot be taken as evidence that the same had been paid, released, or given up during Davis' lifetime, for the reason that Bean became his administrator, and, as such, took possession of all papers belonging to the estate. Any disposition Bean made of the papers thus coming into his possession, in the way of pinning them together, or placing them in particular envelopes, cannot be considered evidence in favor of his estate; and there is nothing in the evidence to show that Davis sent them, thus pinned together, to Bean, or that he, in fact, ever returned the assignment to Bean for any purpose. Furthermore, if any consideration can be given to the fact testified to by the witness Johnson, that he found the assignment of the foreclosure decree pinned to the first note given by Bean to Davis, as evidence of the loan of \$10,000 by the latter to the former, it does not necessarily tend to show that the assignment had been given up as no longer in force, but rather the contrary. Johnson testifies that the first note, to which the assignment was pinned, was canceled, in that several pen marks were drawn across the signature thereto, but the assignment remained intact and not canceled in any mode. Edwin Bean was a lawyer of years' experience. He, doubtless, well knew that when a loan of money is made on security, and subsequently the time of payment is extended, and a new note is given as evidence thereof, the security remains pledged as before for the debt, now evidenced by the new note, and is not released or discharged by the mere fact that a second note has been executed as evidence of the debt. If he received back the assignment of the decree from Davis as a release of it as security, why was it not canceled as well as the note? Instead of canceling or destroying it, thereby preventing any question about the fact of its continuance, existence, and force, he carefully preserved it along with the original note. If he had destroyed the original note, and had placed the assignment with the second note, it would not have appeared that the note and assign-

ment had any necessary connection. The assignment was made a year before the date of the second note, and in terms refers to the first note only. By pinning the first note and the assignment together, there was preserved the evidence of the loan as originally made, with the security given therefor; and the cancellation of the first note would be explained by showing that a second note had been given for the purpose of extending the time of payment of the original loan, leaving the security unimpaired. The extracts already given from the letters of Davis and Bean clearly show that Davis sent the first note only to Bean, and did not inclose or forward the assignment; and the act of pinning the one to the other must have taken place after Bean came into possession of the assignment as part of Davis' papers, coming into his hands as administrator; and, instead of proving that Bean understood that the security had been given up and released, it rather tends to show that Bean carefully preserved the written assignment, as being in force, and that he pinned it to the original note, in order to preserve the written evidence of the transactions between Davis and himself, touching the \$10,000 loan.

It must, therefore, be held that it appears that in the latter part of May, 1887, Edwin Bean contracted to borrow from Joseph B. Davis the sum of \$10,000, for the period of one year, and agreed to give, as collateral security for the loan, an assignment of the foreclosure decree rendered in his favor in the district court of Winneshiek county against the Addickens; that, in pursuance of this agreement, Davis sent the money to Bean, who executed his note for the named sum, and signed and delivered the assignment of the foreclosure decree as collateral security therefor; that the loan thus made and secured was afterwards extended for one year, and a new note was executed by Bean, and delivered to Davis, as evidence thereof; and that under the provisions of the will of said Joseph B. Davis, deceased, the complainant is now the owner of said note, evidencing said loan, and, as such, is entitled to the benefits of the mortgage foreclosure decree held by Bean, and by him pledged as security for the named loan, as against the defendants representing his estate.

In considering and deciding the issues arising between the complainant and the defendants, who are the representatives of the estate of Edwin Bean, it will be noticed that the conclusions reached are based wholly upon the evidence showing the acts of Edwin Bean and Joseph B. Davis, including the letters passing between them, and of which the originals are introduced in evidence, thus leaving out of consideration all matters and testimony offered touching which any question affecting its admissibility has been made; it being proper, however, to say that the matters offered in evidence, and objected to, if considered, would tend to support the conclusion reached as herein stated.

Upon behalf of the interveners, as already stated, it is claimed that the money loaned to the Addickens by Bean formed part of the money placed in his hands by Stephen Burton, which became a trust fund in such sense that the trust attached thereto in any

investment made thereof by Bean, and enables the beneficiaries to follow it so long as it can be identified. The evidence shows that, when Burton placed the money in the hands of Bean, he required and received from him security on realty situated in Chicago; and it is clear that Burton did not place the money in Bean's care for the purpose of having him invest it safely for Burton and his heirs. In the instrument executed by Bean to Burton, there is nothing said about the investment of the money, nor is there any provision for an accounting by Bean for the investment or its proceeds. The money became Bean's, so that he could invest it as he saw best; and, if the investment was unfortunate, the loss would fall upon Bean, and, if it was profitable, the profit would belong to Bean. The obligation assumed by Bean was not that of safely investing the money, and duly accounting for the profits; but it was an absolute agreement to repay the sum loaned him, in the manner pointed out in the written obligation delivered to Burton, with interest thereon; and this obligation exists without regard to the question of whether Bean made a profit on the investment of the money or not. It is entirely clear that Bean had the right to invest or loan the money as he deemed best, and to take the investment in his own name; and it is not claimed, nor could it rightfully be claimed, that he, in any sense, violated any duty or obligation to Burton or his children in taking the mortgage on the Decorah property in his individual name. The question for consideration is not that of the equities that may exist between Burton's heirs and Bean's estate. The proper parties for the determination of that question are not before the court, as the only issue upon the intervening bill is that presented by the answer of Elizabeth B. Davis thereto; and the court is not called upon to determine whether the Burton heirs can assert a claim to the fund represented by the Addicken mortgage, as against Bean's estate, but the sole question is whether the Burton heirs can show a paramount and superior right to the mortgage, as against the title thereto, created by the assignment made thereby by Bean to Davis, under the circumstances hereinbefore recited.

The evidence demonstrates that Davis was an innocent purchaser, for full value, of the mortgage decree in which the mortgage had been merged, and of all benefits conferred thereby; and he obtained thereby a title to the decree in question, which is superior to any equity existing in favor of the Burton heirs. The mortgage given by Addicken stood in the name of Edwin Bean, as the owner thereof; and the decree of foreclosure had been granted in Bean's name, and there was nothing in the situation to charge Davis with notice of any equity or right held or claimed by any one to the property in question; and, when he loaned his money to Bean upon the faith of a transfer of the foreclosure decree as collateral security, he took the same as it appeared of record, and free from any secret liens or equities on behalf of the parties to this proceeding. Complainant is therefore entitled to a decree ascertaining the amount due upon Bean's note to Davis, declaring the property covered by the mortgage from Addicken to Edwin Bean, and included in the foreclosure decree assigned to Davis, to be bound for the payment of the

sum found due complainant, excepting therefrom any part of the property sold by Bean to third parties; that an accounting be had of the money received by Levi Bullis from the mortgaged property as payment for any part thereof, or for rental or use thereof, and after due allowance for his services and expenditures in that behalf; the balance shall be applied in payment, pro tanto, of the sum found due complainant; that it be ordered that, if the net sum found due complainant be not paid within a time named in the decree, the property covered by the mortgage decree, and not sold by Bean, or so much thereof as may be necessary, shall be sold at the front door of the courthouse in Decorah, Winneshiek county, Iowa, at public sale, by a special master of this court, after due notice given; that the purchaser or purchasers of the property so sold shall take the title thereto free from all claims, liens, rights, equities, or titles on behalf of complainant, of the defendants representing the estate and rights of Edwin Bean, deceased, or on behalf of the estate or heirs of Stephen Burton, deceased; that said master make due report of his doings in the premises; that, upon confirmation of the sale or sales made, the proceeds realized therefrom be applied in payment of the costs, and in payment of the sum decreed due to complainant, with interest, and the balance left, if any, be paid into court, subject to further order; and that defendants be adjudged to pay the costs created by the issues by them presented, and the interveners be adjudged to pay the costs arising upon the issues by them presented.

BOUND v. SOUTH CAROLINA R. CO. et al.¹

ROSBOROUGH v. SMITH et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 187.

1. RAILROAD FORECLOSURES—REORGANIZATION AGREEMENT—PURCHASE BY COMMITTEE—NONASSENTING BONDHOLDERS.

B., a holder of second mortgage bonds of the S. Ry. Co., brought suit for the foreclosure of the mortgage. The trustees of the first mortgage filed a cross bill, asking foreclosure of their mortgage. A committee of first mortgage bondholders intervened, objecting to foreclosure of that mortgage, and persistently resisted it; but the court ultimately decreed a sale of the road free from all liens, including that of the first mortgage. The committee of first mortgage bondholders then advertised widely for bondholders to deposit their bonds under a reorganization agreement, and co-operate with them in buying in the road at the foreclosure sale, in order to protect their investment. A large majority of the first mortgage bonds were deposited. The committee bought the road at the upset price fixed in the decree and proceeded to organize a new company. The opportunity for bondholders to deposit their bonds and take the benefit of the reorganization was continued until the actual transfer of the road to a new company, and the issue of new securities and such opportunity was widely advertised. Some 16 months after the resale of the road to the new company, a first mortgage bondholder, who had not deposited his bond, intervened in the foreclosure suit, alleging that he had never seen the advertisements and that the bondholders represented by the committee had made a large profit in the transaction, and claiming a right to have his bond paid in full out of the proceeds of the sale of the road. *Held*, that the committee were not trustees for the bondholders who did not deposit their bonds under

¹ Rehearing denied February 12, 1897.

the agreement; that the course pursued by them had been fair and proper; and that the committee having, before the intervener filed his petition, settled the accounts, distributed the proceeds of the resale, and been discharged from their trust, the intervener had no claim, as against them, for the payment of his bond. 71 Fed. 53, affirmed.

2. SAME—REFUNDING BONDS.

When mortgage bonds of a railroad company have been issued for the purpose, in part, of taking up bonds of a prior issue, and a large proportion of such prior bonds have been exchanged for the new issue, the fact that, upon a subsequent sale of the road under foreclosure the remaining prior lien bonds are paid in full, while the bonds of the new issue are not paid in full, does not entitle a holder of bonds of the new issue, received in exchange for prior lien bonds, to set aside the exchange, and be restored to his former position.

Appeal from the Circuit Court of the United States for the District of South Carolina.

The petition of the appellant, Rosborough, was filed September 4, 1895, in the case of Bound v. South Carolina R. Co., alleging that he was the owner of a \$1,000 bond of said railroad company, with nine unpaid semiannual interest coupons, secured by the first consolidated mortgage of 1881; that by a decree of the said circuit court the said mortgage had been foreclosed by a sale of the railroad on April 12, 1894; that at said sale Henry W. Smith, Gustave E. Kissel, and Peter Geddes became the purchasers at the price of \$1,000,000, being the minimum price limited by the decree; that there had been an agreement between the holders of a large majority of the said first consolidated mortgage bonds with reference to bidding at the sale and buying in the railroad, and that the said Smith, Kissel, and Geddes were a committee to carry into effect said agreement, but that the petitioner had never heard of the said agreement until within a few days before filing his petition; that the said agreement between the first consolidated mortgage bondholders had the effect of chilling the bidding at the sale, so that the purchasers obtained for their bid of \$1,000,000 a property worth \$8,000,000; that the petitioner, if obliged to take his pro rata of the fund produced by said sale, would only receive about 10 per cent. of the amount of his said bond and coupons. The petitioner further alleged that his said bond had been received by him in exchange for bonds which he had held secured by a mortgage prior to the said first consolidated mortgage, known as the "Mortgage of 1868"; that one of the objects of the said first consolidated mortgage of 1881 was to take up and retire the bonds secured by the said mortgage of 1868, and the majority of them had been so retired; but that there remained some outstanding, which the holders had never surrendered, and which were by the said decree of sale declared to be a lien paramount and superior to the said first consolidated mortgage. The petitioner then asserts that, as against the purchasers of said railroad, being a large majority of the holders of the first consolidated mortgage bonds represented by their said committee, he is now entitled to surrender his first consolidated mortgage bond, and fall back upon the lien which he had to secure his original bonds under the mortgage of 1868; and he prayed that the special master be directed to pay his claim in priority to the parties to the said bondholders' agreement, or, failing in this, that the railroad might be resold, and equity be done in the premises.

Notice to show cause why the relief prayed should not be granted was served on the special master and upon the said Smith, Kissel, and Geddes.

The special master answered that he had sold the mortgaged property and franchises on April 12, 1894, for \$1,000,000, to the said Smith, Kissel, and Geddes, and had received in cash the sum of \$400,000 on account of the purchase money, of which there remained in his hands unexpended \$68,351.50, and also there remained the unpaid \$600,000 of the purchase money, making \$668,351.50, to be thereafter distributed as the court should direct.

Messrs. Smith, Kissel, and Geddes answered, stating: That on January 6, 1894, an agreement was made between certain holders of the first consolidated mortgage bonds of the South Carolina Railroad Company by which they were appointed a committee to act for all bondholders subscribing said agreement and depositing their bonds with the New York Guaranty & Indemnity Company, with power to act as the committee should consider proper in order to secure payment of the principal and interest of said bonds, and to purchase the mortgaged

property at such price as the committee might think expedient, not to exceed a sum sufficient to pay the said bonds, principal and interest, and all amounts having priority over said bonds. That the agreement provided "that said committee is not under any obligation, express or implied, to any bondholder who shall not subscribe this agreement and deposit his bonds, nor shall any bondholder not so signing and depositing his bonds have any rights or claims whatsoever under or by virtue of this agreement; but all the benefits and advantages of the same shall be confined to the persons who are subscribers thereto and who shall deposit their bonds with such guaranty and indemnity company. The time within which holders of said bonds may sign this agreement shall terminate at such time as said committee may decide; but said committee may extend such time in its discretion, and may permit any holder of said bonds, although such time has expired, to sign this agreement on the deposit of his bonds and may in that event impose such terms on any such holder of said bonds as said committee may determine." The answer states that said committee published a notice addressed to the holders of the first consolidated 6 per cent. mortgage bonds of the South Carolina Railroad Company from January 6, 1894, to March 3, 1894, in four of the most widely circulated New York City daily newspapers and in the Charleston Daily News and Courier on February 8, 9, 10, 12, and 13, 1894, and also in all the financial weekly newspapers published in New York City, to the number of 17. The notice stated that the United States circuit court for the district of South Carolina had, on November 20, 1893, decreed that the South Carolina Railroad should be sold at auction in Charleston on April 12, 1894; that the minimum bid fixed by the decree was \$1,000,000; that it was to the interest of the junior securities to purchase the property at the lowest figure, and that it was to the interest of the bondholders to whom the notice was addressed to purchase the property rather than let it be sold at less than the amount of their bonds and interest, prior liens, and charges; that the prior mortgage amounted to about \$244,000, with interest from November 23, 1892; that the committee, the said Smith, Kissel, and Geddes, whose names were signed to the notice, had for four years been acting in the interest of such of the first consolidated mortgage bondholders as they represented, and considered the property worth the amount of the first consolidated mortgage, with interest, and all prior charges; that it was essential that preparation should be made to prevent the road being purchased in the interest of junior securities at a price which would not pay the first consolidated bondholders in full; that bondholders wishing to participate in this arrangement must deposit their bonds on or before February 15, 1894, with the New York Guaranty & Indemnity Company, against negotiable receipts; that the committee were acting solely for such bondholders as should deposit their bonds under the agreement; and that all benefits and advantages would be confined to the persons who should so deposit their bonds and sign the agreement. They further answered that on March 3, 1894, they published another notice to the bondholders in the above-mentioned New York daily newspapers, and in the said 17 weekly newspapers, and continued the publication until March 10, 1894, giving notice that the holders of \$4,252,000 out of a total issue of \$4,883,000 of said first consolidated 6 per cent. bonds had signed the agreement, and that the time for depositing outstanding bonds was extended to March 10, 1894. That afterwards the committee continued to receive deposits of bonds until the day of sale. —April 12, 1894,—and that even after the sale no bonds were refused until a resale of the property was made. That the committee purchased the property for \$1,000,000, and on May 12, 1894, resold the same to the South Carolina & Georgia Railroad Company, which simultaneously mortgaged the same to secure \$5,250,000 of bonds, all of which, the committee state, they are informed have been negotiated. The committee, in their answer, further state that proceeds of the resale had been, long before the filing of the petition of Rosborough, distributed among the holders of the bonds who accepted the terms of the agreement, and the committee had been discharged from their trust, and no longer had any interest in the matter.

The petitioner, Rosborough, replied to the answer of the committee, alleging that the committee represented a syndicate which had bought up the first consolidated mortgage bonds at reduced prices with intention to manage the sale for their own benefit, and with that view had procured the court to decree a sale free from all incumbrances, and that no bid should be received less than \$1,000,000, and had resold the road at a large profit to themselves, and that, as holders of said first mortgage bonds, they claim to participate in the distribution of the

fund now in court, notwithstanding their said profit, and the petitioner claimed that they ought not to be allowed to so participate until petitioner's bond was paid, or was put on an equality with those who signed the agreement.

So much of the original petition as prayed a resale of the railroad was by leave of the court stricken out. A reference was made to a special master to take testimony. The only witnesses examined were two persons produced by the petitioner, who had held first consolidated mortgage bonds and who testified that they had received a circular from the committee, and had settled on the terms stated in it. The circular produced in evidence was signed by the committee, and was addressed to the persons who had deposited their bonds with the New York Guaranty & Indemnity Company. It notified them that the sale and transfer of the property to the South Carolina & Georgia Company had been completed, and that they would receive new first mortgage bonds of that company (total issue, \$5,250,000) bearing interest at 5 per cent. from May 1, 1894, to an amount which, at the price of 94, would equal the principal of their deposited bonds, and would also receive 10 per cent. of the principal of the deposited bonds in stock of the new company (capital, \$5,000,000) which the Central Trust Company of New York would buy prior to June 3, 1894, at 40 per cent. of its par value; that they would receive for the accrued interest on their deposited bonds from the New York Guaranty & Indemnity Company, on and after May 24, 1894, cash, less 2.35 per cent. for expenses. The notice also stated that the accounts of the committee had been duly audited by the president of the Central Trust Company, in accordance with the terms of the bondholders' agreement.

Upon these pleadings and the testimony, and the facts stated in the answer of the committee, which were admitted to be true, the matter was submitted for final hearing. The circuit court (Judge Simonton) dismissed the petition (71 Fed. 53), and the petitioner, Rosborough, appealed.

S. P. Hamilton, for appellant.

J. E. Burke, for appellees.

Before GOFF, Circuit Judge, and MORRIS, District Judge.

MORRIS, District Judge (after stating the facts). The petitioner, having abandoned any attempt to impeach the sale of the railroad made by the special master under the foreclosure decree of November 23, 1892, claims that, as the holder of one of the first consolidated mortgage bonds, he is entitled to a priority in the distribution of the fund arising from that sale over the other holders of the same issue of bonds who signed the bondholders' agreement and deposited their bonds under its terms, and who had appointed the respondents, Kissel, Smith, and Geddes, a committee to act for them, because, he says, it appears that, by a resale of the property, the bondholders who signed the agreement have obtained what is equivalent to full payment of their bonds and accrued interest. He assigns as error in the decree of the court dismissing his petition that the court should have held that the committee were trustees for all the first consolidated mortgage bondholders, whether they signed the agreement or not, and that the mortgage could not be used by the syndicate of bondholders, or their committee, to secure an unconscientious advantage over the petitioner and others in like situation. He assigns as error, also, that the court refused to hold that, as he had originally held the bonds secured by the mortgage of 1868, of which the court decreed that the outstanding bonds should be paid in full, and as he had surrendered the bonds of 1868 for the one he now holds, the other holders of like bonds should not be per-

mitted to defeat his claim, and he should be restored to his rights under the mortgage of 1868.

The contention on behalf of the appellant which has been most earnestly pressed is that, in their intervention in the foreclosure case, the respondents Kissel, Smith, and Geddes have so acted as to constitute themselves trustees for all the first consolidated mortgage bondholders, and, having used the mortgage to accomplish their ends, and having largely profited by the use of it, they cannot now, in equity and good conscience, exclude any bonds intended to be secured by that mortgage from the fruits of the foreclosure and subsequent resale. It becomes, therefore, necessary to ascertain what was done by the respondents in the foreclosure case, the history of which is set out in *Bound v. Railroad Co.*, 7 C. C. A. 322, 58 Fed. 473, the record of which case, and the record in *Ex parte Mitchell & Smith*, it is agreed, shall constitute part of the record in this case.

Bound, who filed the original bill, was a holder of second consolidated mortgage bonds, and his bill prayed a foreclosure of that mortgage subject to all priorities. Afterwards a cross bill was filed by Barnes & Sloan, the trustees of the first consolidated mortgage, alleging that under the terms of the mortgage they had declared the principal due for default in the payment of interest, and praying a foreclosure of their mortgage, and a sale clear of all prior liens. Then Messrs. Smith, Kissel, and Martin intervened, and upon their petition were made defendants. They alleged that they were themselves the holders of a large amount of the first consolidated mortgage bonds, and represented other holders, to an amount, in all, of over \$3,000,000 of said bonds. They answered the cross bill of Barnes & Sloan on behalf of themselves and all others in like situation who should come in and contribute to the expense. They alleged that the action of said trustees in declaring the principal of the first consolidated mortgage due had been improvident, and against the wishes and the interests of the great majority of the bondholders represented by them, and solely in the interest of the second consolidated mortgage bondholders and junior securities, and had been done by the trustees with the view of forcing the first consolidated mortgage bondholders to take a bond bearing a less rate of interest. They denied that the income of the road was insufficient to pay the 6 per cent. interest payable on the first consolidated mortgage bonds and they prayed that the cross bill of the trustees should be dismissed, and the property sold, as prayed by the original bill, subject to the first consolidated mortgage. Upon final hearing of the case, the court held that it was true that the trustees had acted improvidently, and not solely in the interest of the first consolidated mortgage bondholders, in declaring their bonds due, but that, during the three years' operation of the road by a receiver, it had been shown that, for the reasons stated in the court's opinion, the rights of all the claimants would be most fairly and equitably protected by a sale clear of all incumbrances; and the court so decreed. From this decree Smith and Kissel appealed, claiming that the court should have decreed a sale under the second consolidated

mortgage only. Their appeal was not sustained, and the decree of the circuit court was affirmed. 7 C. C. A. 322, 58 Fed. 473.

It appears, from these proceedings in the original case, that there were two parties among the holders of the first consolidated mortgage bonds,—those who advocated the policy contended for by Messrs. Smith and Kissel, and those who sustained the policy of the trustees of the mortgage. Smith and Kissel, and those bondholders they represented, contended that the others were favoring the holders of the second consolidated mortgage bonds, and fought them to the end. When the decree directing a sale foreclosing the first consolidated mortgage was affirmed over their appeal, they then advertised for all bondholders who were willing to join them to deposit their bonds and sign the agreement which would give them the authority and financial backing required to bid for the property, and prevent the second consolidated bondholders buying the property at a price which would subject the first consolidated mortgage bonds to a loss. They gave the fullest public notice of the terms of the agreement, and especially of the fact that by its terms the committee was acting solely for the benefit of such bondholders only as should deposit their bonds, and that all the benefits were to be restricted to those who did so deposit and who assented to the agreement. All this, it seems to us, was perfectly fair and legitimate. There was no attempt whatever to do anything secretly, or anything that was unlawful. It is evident that there was a division among the holders of the first consolidated mortgage bonds, and that the Kissel, Smith, and Geddes committee represented a policy not in harmony with that represented by the mortgage trustees and some others of the first consolidated bondholders. It was open to bondholders to join either camp, but not to remain inactive, except at their own risk. The Kissel, Smith, and Geddes committee succeeded in obtaining the support of holders of \$4,252,000 out of the whole \$4,883,000 of bonds, and so were in the end in the stronger position to protect those they represented; but, recognizing that none should be excluded who were willing to accept their services, they extended the time for signing the agreement from time to time, and did not refuse to receive any bonds tendered for deposit until the resale of the road to the new company.

It appears that the only reason why the petitioner did not deposit his bond was that he never saw the advertisement of the notice of the committee, and remained in ignorance of it until about 16 months after the resale, and after the committee's accounts were settled up and they were discharged from their trust. This was not the committee's fault. The bonds were not registered, but payable to bearer, and the committee had no means of reaching holders except by the publication of notices in the way most likely to reach them. After the full notice given by them, they had a right to presume that holders who did not join them refrained from doing so from motives of their own. They could not reasonably be expected to hold their settlements open indefinitely, after the resale of the property, for the benefit of persons who presumably were holding off from dis-

trust or inimical reasons, and who had refused or neglected to deposit their bonds, and subject them to the risks of any loss attending the attempt to bid on the property on behalf of the depositors, and to raise money on them to pay the cash required by the terms of sale.

It is urged on behalf of the petitioner that the cases of *Jackson v. Ludeling*, 21 Wall. 616, and *Florida v. Anderson*, 91 U. S. 667, are cases like this, in which the supreme court has refused to sanction similar conduct of a portion of the bondholders, by which they excluded other bondholders under the same mortgage from participation in the funds of a foreclosure. In *Jackson v. Ludeling*, the conduct denounced as fraudulent was a crafty, secret scheme by which the holder of 4 out of 761 outstanding \$1,000 bonds had, with the connivance of the president of the corporation, procured the seizure and sale of a railroad property on which \$2,000,000 had been expended, and had purchased it in the interest of himself and the directors for \$50,000. The sale was made in a remote village of Louisiana, after advertisement in a county newspaper, the bonds being held principally in other states. The parties to the scheme had, just before the sale, corrupted the agent of the holders of about 300 of the bonds into a betrayal of his trust and the sacrifice of the interests intrusted to him. In every step in the proceedings there was apparent the fraudulent design to cheat the great majority of the bondholders under the forms of law,—a design participated in by the officers of the corporation, to whom all the bondholders had a right to look for honest dealing, if not active protection. It was in commenting upon these facts that the supreme court said that one bondholder is a quasi owner, in common with the other bondholders, of whatever rights the mortgage gave, and that the community of interest involved mutual obligation, and that, if he used the mortgage to procure a sale of the security, it was his duty to make it productive of the most that could be obtained for all who were interested in it.

In the present case there was no effort by Smith, Kissel, and Geddes, committee, to procure a sale. On the contrary, they employed counsel, and became responsible for the costs of resisting it, and for the costs and expenses of an appeal from the decree deciding against them. When the sale became inevitable, they, by their representative, attended the sale, and bid for the property for the protection of the interests which had been confided to them. After the purchase they continued by notices to invite all the bondholders who were willing to do so to join with them and share the benefits of the purchase, and they continued this invitation until the property was resold, and the time came for them to make a settlement with their constituents. When a sale of mortgaged railroad property is decreed, an association of bondholders for the protection of their mutual interest is a necessity, and the appointment of a committee to act for them is advisable and customary. Those charged under the terms of such an association with the duty of acting must employ counsel and be responsible for expenses and costs. That one of the terms of being admitted to such an association should be the

deposit of the bonds to be protected is surely most reasonable. If notice of the fullest kind possible is given to all bondholders, and all are invited to come into the association upon the same terms, and the privilege is not withdrawn until there is a really valid reason for doing so, there can be no just complaint by those whose inaction has left them outside that they do not share in the benefits of those who are inside the association, and have taken the risks of its success or failure. *Wetmore v. Railroad Co.*, 1 McCrary, 466-473, 3 Fed. 177.

It is urged that the attorney of the committee who attended the sale acted in such manner as to chill competition and drive off bidders, so as to get the road at the minimum bid. Of this there is no proof. During the evening of the day before the sale, in conversation with those who were interested in the foreclosure, the attorney of the committee stated that he was prepared to bid up to a sum sufficient to pay the first consolidated mortgage bonds in full. This was a fact, and he was under no obligation to conceal it. On the contrary, as it was a fact, and not a mere pretense, the disclosure of it enabled all parties to know what they might expect, and prepare themselves. The validity of the sale is not before us. The only question before us is whether the associated bondholders, or their committee, have so acted towards this petitioner as to give him the equity he is attempting to assert against them.

The other point urged in behalf of the petitioner is that he is entitled to set up his surrendered bonds of the mortgage of 1868. The mortgage of 1868 was made to secure an issue of bonds amounting to £620,000 sterling, all of which, except bonds to the value of about \$145,000, had been surrendered and canceled, and the first consolidated mortgage bonds issued in lieu thereof. These exchanges were made in good faith, and it is difficult to see upon what ground the court below could have been asked to set aside the transaction. By the fifteenth clause of the foreclosure decree passed November 23, 1892, it was adjudged that the fund arising from the sale should be applied to the payment of costs and the two prior mortgages in full, and the balance to the payment of the first consolidated mortgage bonds in full, if sufficient, and if not, then pro rata. The petitioner, with all the other first consolidated bondholders, is entitled to that distribution, and he failed to show grounds upon which the circuit court could have granted him more.

The decree is affirmed.

YORKSHIRE INV. & AMERICAN MORTG. CO., Limited, v. FOWLER et al.

(Circuit Court of Appeals, Second Circuit. January 22, 1897.)

PRINCIPAL AND AGENT—FIDUCIARY RELATION—MORTGAGE INVESTMENT AND GUARANTY CONTRACT—INSOLVENCY.

The J. Co., which was engaged in the United States in the business of loaning money on real-estate mortgages, and selling such mortgages, and the Y. Co., which was engaged in England in the business of investing money in such mortgages, and selling its debentures, entered into a contract by which it was agreed that the J. Co. should guaranty the payment of a certain rate of interest on all mortgages sold to the Y. Co., and also on the cash balances of

the Y. Co. in the hands of the J. Co., and on all sums advanced by the Y. Co. for the purchase of mortgages, as soon as received by the J. Co. The J. Co. also guaranteed the payment of the principal of the mortgages sold to the Y. Co., within two years after maturity. The J. Co. was to have the right to substitute new securities, from time to time, for those sold to the Y. Co., and the Y. Co. might refuse any mortgage not deemed good. The J. Co. reserved the right to terminate the contract on 60 days' notice. Under this contract the Y. Co. remitted funds from time to time to the J. Co., and sent to it the maturing mortgages; being credited with such funds and with the face of the mortgages, and interest being paid on its balances, which were sometimes large. The J. Co. forwarded mortgages to the Y. Co. at its convenience,—sometimes when not in funds from the Y. Co. The mortgages were all made to the J. Co., and assigned to the Y. Co. The J. Co. kept no separate investment account for the Y. Co., but mingled the funds received from it with its other funds. The Y. Co. never inquired about the specific investment of its funds, nor about the payment of the mortgages, and did not attempt to instruct or control the J. Co. in respect to the investments. *Held*, that the relation between the two companies was not fiduciary, but merely that of debtor and creditor, and the Y. Co. was not entitled, upon the insolvency of the J. Co., to a preference in payment of the balance due it, as a trust fund in the hands of the J. Co. for investment as the agent of the Y. Co. Brown, District Judge, considered the Y. Co. entitled to the returned mortgages remaining on hand and in statu quo at the time of the receivership, and to the proceeds thereof collected by the receivers.

Appeal from the Circuit Court of the United States for the Southern District of New York.

George S. Coleman, John C. F. Gardner, and Harrie M. Humphreys, for appellant.

Arthur H. Masten and Edward Van Ingen, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges, and BROWN, District Judge.

WALLACE, Circuit Judge. On the 28th day of September, 1893, an action was commenced in the circuit court of the United States for the Southern district of New York by Benjamin N. Fowler and others against the Jarvis-Conklin Mortgage Trust Company, for the administration of the estate of the insolvent defendant, and for the appointment of receivers of its property and assets; and upon that day receivers were appointed, who took possession of the property and assets, and proceeded to execute their trust. Subsequently the Yorkshire Investment & American Mortgage Company filed a proof of claim against the insolvent company for the sum of \$155,947.48, insisting that, to the extent of that claim, they were entitled to a preference over the other creditors of the insolvent company, upon the theory of an equitable lien. The receivers filed their objections to the claim, admitting that the insolvent corporation was indebted in the sum stated, but denying that the claim was entitled to any preference over the claims of the general creditors. The issue thus raised was referred by the court to a special master. The master reported against the claim, and the exceptions to his report filed by the claimant were overruled by the court. The report of the master contains a careful summary of the facts in the case, and a very satisfactory presentation of the legal principles involved, and was adopted by the circuit

court without any further opinion. From the order overruling those exceptions, and adjudging that the claimant was not entitled to the preference, the claimant has appealed. This order is, in effect, a final decree upon matters distinct from the general subject of litigation involved in the original action, and may therefore be reviewed, although the original action may not have proceeded to a final decree. *Trustees v. Greenough*, 105 U. S. 527; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 224, 10 Sup. Ct. 736.

The theory of the lien claimed by the investment company is that the sum of \$155,947.48 consisted of moneys belonging to it which were a trust fund in the hands of the insolvent corporation, being the proceeds of securities intrusted to that corporation for collection, and moneys which had been placed in its hands to invest in securities as an agent.

A careful study of the evidence in the record has satisfied us that whatever may have been the character of the relations between the parties prior to the 1st day of January, 1888, after that time they were not fiduciary, and, as to the moneys in the hands of the Jarvis-Conklin Company, they were those of ordinary debtor and creditor. Prior to that time the two corporations had been dealing together in bonds and mortgages. The Jarvis-Conklin Company was engaged in the business of loaning money upon bond and mortgage on lands in the western portion of the United States, and selling the bonds and mortgages to purchasers; and the Yorkshire Company had been investing its money in the purchase of these bonds and mortgages, and selling its own debentures. The business between the two corporations had assumed large proportions. January 1, 1888, the two corporations entered into a written contract, wherein the Jarvis-Conklin Company was named as the party of the first part, and the Yorkshire Company as the party of the second part, which was as follows:

"This agreement * * * * *

"Witnesseth, that first party and its predecessors, Jarvis-Conklin & Company, have prior hereto sold to second party coupon bonds secured by mortgages and deeds of trust which are first liens upon real estate lying in the said state of Kansas and other states, and said parties are desirous that first party shall continue to sell and assign, and second party to purchase, such bonds, mortgages, and deeds of trust:

"Now, therefore, for and in consideration of the mutual covenants herein contained, as well as for other good and valuable consideration, the said parties agree as follows:

"First party guaranties to second party the payment of principal and interest upon all bonds, mortgages, and deeds of trust, as well upon all such as are now owned by second party and sold to it in the past, as hereinbefore set forth, as upon all such as shall be in the future, and during the continuance of this contract, sold by the first party to second party.

"The interest which the first party guaranties is at the rate of six and two-thirds per cent. per annum, payable semiannually on the first days of January and July in each year, notwithstanding the rate of interest provided to be paid by the bonds, mortgages, or deeds of trust may be at a different rate.

"First party guaranties the payment to second party of interest at the rate of six and two-thirds per cent. per annum upon all cash balances in favor of second party in the hands of first party at the date of this contract (January 1, 1888); and hereafter the payments of interest which second party shall receive on bonds,

mortgages, and deeds of trust sold them as hereinbefore provided shall be so paid that second party shall receive interest at the rate of six and two-thirds per cent. per annum upon all sums of money advanced for the purchase of such bonds, mortgages, and deeds of trust, from the date that such money is received by first party at the office of London and Westminster Bank, Limited, Lothbury, E. C., London, England.

"The guaranty herein made by first party as to the principal sum of said bonds, mortgages, and deeds of trust is that the same shall be paid within two years from the maturity thereof; and second party waives all demand, notice, and protest.

"This guaranty shall not extend to any remittances made after the expiration of sixty days from the mailing by first party to second party, postage pre-paid, at its address, 48 Market street, Bradford, England, a written notice that first party will not receive any further moneys on the above terms.

"First party shall have the privilege at any time of substituting other securities in place of those owned by second party, or renewing any loan owned by second party, provided second party shall be satisfied such substituted securities or renewals are of equal value with those for which they are exchanged.

"Second party shall at all times have the privilege of refusing any mortgages or deeds of trust which are, in its judgment, not sufficient or suitable security.

"This agreement shall be in force and effect from the date hereof to December 31, 1889; but the termination of this contract at that date shall not be so construed as to invalidate the guaranty herein made for the payment of principal and interest maturing after December 31, 1889."

Before the expiration of the year during which this contract was to continue, it was extended, with some slight modifications, for an indefinite period. Such extension agreement, so far as is material, was as follows:

"It is therefore further agreed between the Jarvis-Conklin Mortgage Trust Company of Missouri, of the first part, and the Yorkshire Investment and American Mortgage Company, Limited, of the second part, that said contract shall be continued in full force and effect, as to all its provisions, from the date hereof until such time as it shall be terminated by agreement, except that, on all money advanced after this date by second party under said contract, first party shall pay and guaranty a different rate of interest from that named in said contract, as follows:

"On the first £100,000 at the rate of six and two-thirds per cent., on the second £100,000 at the rate of six and one-third per cent., and on all further sums at the rate of six per cent., per annum."

No notice of termination was ever given, and these contracts were in force when receivers of the Jarvis-Conklin Company were appointed, on September 28, 1893. No other contracts, written or oral, were ever made between the two companies.

Under these contracts the course of business pursued by the parties was as follows:

The Yorkshire Company, from time to time, as it saw fit, would remit funds to the Jarvis-Conklin Company, without inquiry as to whether the latter had mortgages on hand for sale; and, as mortgages which it had bought were about to mature, it would send them to the Jarvis-Conklin Company. The advances, and the face of the maturing mortgages, would be at once credited, in the account between the parties, to the Yorkshire Company. The Jarvis-Conklin Company would, from time to time, send mortgages to the Yorkshire Company. These mortgages were all executed by the makers to the Jarvis-Conklin Company, and were accompanied by assignments from that company to the Yorkshire Company, and the great majority of them ranged in amount from \$300 to \$800.

Sometimes they were sent when the Jarvis-Conklin Company was not in funds from the Yorkshire Company, and in anticipation of receiving funds. Sometimes they were sent to fill orders for a specified amount from the Yorkshire Company. Sometimes, instead of new mortgages, the Jarvis-Conklin Company sent extensions of the time of payment of matured or maturing mortgages,—always without any consultation with the Yorkshire Company. As the securities were forwarded, the Jarvis-Conklin Company was credited in the account with their amount. The interest account between the two corporations was always adjusted so that the Yorkshire Company received the contract rate upon its balance of account.

The Jarvis-Conklin Company kept no separate investment account of the funds received from the Yorkshire Company, but mingled the funds with its general funds, and used them indiscriminately. No inquiry was ever made by the Yorkshire Company whether the matured mortgages were paid or not. At times there would be a large balance to the credit of the Yorkshire Company remaining for long periods. In 1891 there was a balance for several months of about \$250,000. In the summer of 1893 there was a balance of about \$450,000. On only two occasions were moneys sent by the Jarvis-Conklin Company to the Yorkshire Company, and on these occasions, although there was a much larger balance to the credit of the Yorkshire Company, the remittances were treated as made for the accommodation of the latter. Throughout the correspondence that took place during this period of five years, there were no instructions from the Yorkshire Company to the Jarvis-Conklin Company, or consultations, about specific investments, or anything indicating that the Yorkshire Company expected the Jarvis-Conklin Company to discharge any of the ordinary duties of an agent for investing its funds. There is not a scintilla of evidence in the record to indicate any understanding that the Jarvis-Conklin Company should use the moneys of the Yorkshire Company for investment in securities specifically intended for that company. The Jarvis-Conklin Company received no salary or commissions, and had no power of attorney, or written or oral authorization defining its duties or regulating its conduct towards the Yorkshire Company in any way.

These facts are wholly inconsistent with the theory that the Jarvis-Conklin Company was an agent for the Yorkshire Company. In a general sense, it was investing the funds of the Yorkshire Company. In doing this, however, it undertook no duty of fidelity towards the Yorkshire Company. The risks and the profits were its own. The contract implied that the Jarvis-Conklin Company would receive all the moneys the Yorkshire Company might advance, whatever their amount might be, and pay interest upon them, and its only protection from being overburdened was that afforded by the 60-days clause. The course of dealing between the two corporations, as well as the contract, contemplated that the Yorkshire Company should accept all mortgages the Jarvis-Conklin Company should see fit to send, to the extent of the moneys advanced by the Yorkshire Company, provided only they were good securities.

The Jarvis-Conklin Company did not undertake to procure mortgages for the Yorkshire Company in any particular time, but the contract implied that it would do so within a reasonable time; and it was obviously desirable for it to do so speedily, and thereby save the running of interest.

The case is one where an intending purchaser of securities advances money to the intending seller, not expecting to receive any particular securities, but to obtain such of a satisfactory character as the seller, from time to time, may elect to provide. Can it be doubted that the title to the money vests in the vendor as soon as as he receives it, or that his only obligation to the vendee is to provide the securities within a reasonable time?

It is absurd to suppose that the Yorkshire Company did not understand that the Jarvis-Conklin Company was using the fund for its own benefit, or that it believed that the Jarvis-Conklin Company was allowing the large balances in its hands to lie idle for the long periods of time upon which it was paying interest upon them.

The long-continued practice between the two companies, when matured mortgages were sent by the Yorkshire Company to the Jarvis-Conklin Company, of treating them as cash items in the account, and covering the amount with new mortgages, imports an understanding that they were to be regarded as sent for the purpose of being exchanged for new ones, and as representing money advanced. It was a matter of indifference to the Yorkshire Company whether they were collected or not. The Jarvis-Conklin Company was under no obligation to charge itself with the principal of these mortgages until the expiration of two years after their maturity, but when it did so, and when its action was assented to by the Yorkshire Company, it could not retract. The legal effect was to invest the Jarvis-Conklin Company with the title to the securities, and create the relation of debtor and creditor between the two corporations for their amount. We conclude that, as to the entire account between the two corporations, their relation was merely that of ordinary debtor and creditor.

It follows that the decree of the court below was right, and it is therefore affirmed, with costs.

BROWN, District Judge. I concur in the decision of this cause, except as regards the item of \$24,385.88, a part of the amount claimed. These moneys were collected by the receivers of the Jarvis-Conklin Company after their appointment on September 28, 1893, from certain matured mortgages which had been previously forwarded by the Yorkshire Company to the Jarvis-Conklin Company for collection and payment.

These returned mortgages remained in statu quo at the time the receivers were appointed. They had not been collected by the Jarvis-Conklin Company, nor had that company either paid any part of them to the Yorkshire Company, or forwarded any other mortgages in place of them. Payment of the mortgages was guaranteed by the Jarvis-Conklin Company. I do not perceive anything

in the case sufficient to extinguish that guaranty, or to take away the title of the Yorkshire Company to such of their returned and guarantied mortgages as remained in statu quo at the time the receivers were appointed. In a mortgage account kept by the Jarvis-Conklin Company these mortgages were credited to the Yorkshire Company at their face amounts as soon as received; and other mortgages when sent to the Yorkshire Company were debited. This, in my judgment, was not equivalent to turning the mortgages into cash, so as to bring those mortgage credits within the words "cash balances," in the other clause of the agreement, and thus to discharge the guaranty and take away the Yorkshire Company's title to the mortgages. The mortgage credit in the mortgage account, was, I think, merely an indispensable bookkeeping entry as to the status of the mortgage account, and of no significance as regards the guaranty, or the continued title of the Yorkshire Company, until the returned mortgages were either paid or collected by the Jarvis-Conklin Company, or new mortgages substituted therefor.

DOE v. NORTHWESTERN COAL & TRANSPORTATION CO. et al.

(Circuit Court, D. Oregon. December 21, 1896.)

No. 2,156.

1. CORPORATIONS—POWER OF DIRECTORS—SALARIES TO OFFICERS—PAST SERVICES.

The by-laws of the N. Co., as originally adopted, provided that the officers, including the president, should receive no compensation, and also provided for a general superintendent, who was to supervise the company's business generally and in detail, and was to be paid a salary. Subsequently, the by-laws were amended by reducing the number of directors, abolishing the office of general superintendent, and providing that the president should have general charge of the business of the company. The president acted under these by-laws for five years, though he paid no attention to the details of the business or its active operations, and during this time made no claim for compensation. At a meeting of the directors, at which only the president, his son, and his clerk were present, it was resolved to pay the president a salary for the future, and also for the five years during which he had already acted, and notes were issued to the president for such salary, for which new notes, secured by mortgage, were afterwards issued, upon the vote of a majority of the directors, made up of the president himself and a person to whom he had assigned most of the notes. *Held*, that the directors had no power to bind the corporation to pay for the president's services, and the notes, as between the president and the corporation, were void.

2. BILLS AND NOTES—HOLDERS FOR VALUE.

In the federal courts, one who takes negotiable paper, before maturity, as collateral security for an existing debt, is a holder of such paper for value.

3. SAME—SUSPICIOUS CIRCUMSTANCES—DUTY OF INQUIRY.

It is not the rule, in the federal courts, that one who takes negotiable paper, before maturity, with knowledge of facts which would put an ordinarily prudent man upon inquiry as to its validity, is chargeable with notice of all facts which such inquiry would disclose; but, unless he has willfully closed his eyes to facts which would show defects in the paper, he is entitled to be regarded as a bona fide purchaser.

4. CORPORATIONS—LIABILITY OF OFFICERS—NEGLIGENT MANAGEMENT.

The president of the N. Co., while in control of the corporation, sold large quantities of the coal produced by that company to a firm in which he either was a member, or was very closely interested, through his sons, who managed

it; and did not require such firm, though it sold the coal at a large advance, to pay for it, but allowed such firm to incur a very large debt to the N. Co., which was ultimately lost through the insolvency of the firm. *Held*, that such action of the president amounted to such gross negligence as to charge him with the whole amount which the corporation had thereby lost.

5. SAME—INSOLVENCY—MORTGAGES.

A creditor of a corporation is not prevented from taking a mortgage on its assets, to secure his debt, by the fact, or by his knowledge of the fact, that the corporation is insolvent; nor does such fact render the mortgage invalid.

6. SAME—CREDITOR WITH COLLATERAL SECURITY.

A creditor of a corporation, who holds collateral security for his debt, cannot be compelled to exhaust such security, before resorting to the general assets of the corporation for payment.

7. SAME—STOCK ASSESSMENTS—PRESUMPTION OF PAYMENT.

Where it appears that the full amount of the par value of the stock of a corporation has been assessed, and the time for payment of the assessments has expired, it will be presumed, in the absence of a showing to the contrary, that the full amount of the par value of the subscribed stock has been paid.

8. RECEIVER'S CERTIFICATES—PAYMENT — COURTS OF PRIMARY AND AUXILIARY JURISDICTION.

When an issue of receiver's certificates has been authorized by the court in which a suit ancillary to the principal suit in which the receiver was appointed is pending, the court of primary jurisdiction will remit to such court the matter of ordering the final payment of the certificates, and determining what sums are due on them, together with the compensation of the receiver.

9. SAME—LIEN—PRIVATE CORPORATIONS.

Receiver's certificates, issued by the receiver of a merely private corporation, are not a charge upon the assets of the corporation in preference to existing liens, as against lienors who have not consented to their issue.

R. E. Houghton and Wirt Minor, for complainant.

Thomas N. Strong, for defendant Farrell.

Alex. Bernstein, for defendant A. J. Knott.

J. W. Whalley, in pro. per.

S. H. Gruber, for defendant corporation.

J. N. Dolph and W. S. Beebe, for defendant Coulter.

GILBERT, Circuit Judge. The Northwestern Coal & Transportation Company was incorporated under the laws of the state of Oregon in the year 1885, with a capital stock of \$72,000, consisting of 720 shares of \$100 each. By the by-laws of the corporation the officers thereof consisted of a board of five directors, a president, a vice president, a treasurer, and a secretary. The by-laws provided also for a general superintendent, whose duties were prescribed. By the by-laws neither the president, vice president, treasurer, nor any of the directors were to receive any compensation for their services, and the salaries of the secretary and superintendent were to be fixed by the stockholders at a regular meeting thereof. At the time of the incorporation of the company the salary of the superintendent was fixed at \$200 per month, and so remained until December 5, 1887, when the by-laws were rescinded, and new by-laws were adopted, changing the number of the directors from five to four, vacating the offices of vice president and superintendent, and giving the president, in addition to the duties which he had theretofore exercised, the general charge and supervision of all the business of the company. From that time until the commencement of the present suit the defendant Samuel Coulter was the president

of the corporation. No mention was then or thereafter made, in any of the meetings of the stockholders or of the directors, of the salary of the president, nor was he allowed or paid any salary until the year 1893. Of date January 7, 1893, the following appears in the records of the directors' meetings:

"Whereupon Mr. Samuel Coulter stated to the board that he had for several years been performing the duties of a superintendent of the company's business, and that he deemed it but just that he be compensated for such services; that the company has paid \$200 a month to the former superintendent, but that he would ask that he be allowed only \$150 per month."

Upon this statement two resolutions were adopted, one allowing the president of the company \$150 per month as compensation for services as superintendent during the ensuing year, the other allowing him a like sum per month for services during the years 1889, 1890, 1891, 1892. In June, 1892, the defendant Farrell had indorsed a note for Coulter to the amount of \$775, and in September, 1893, had signed jointly with him two notes, one for \$6,000 and one for \$250. On October 7, 1893, at a meeting of the board of directors, at which Samuel Coulter, A. S. Coulter, his son, and W. T. Hume were present, a resolution was unanimously adopted reciting that the company was indebted to Samuel Coulter for services as superintendent for the years 1889, 1890, 1891, 1892, up to October 7, 1893, \$8,550, and for moneys advanced to pay wages of employes, supplies, and powder bills, \$1,500, and directing the president and secretary to execute and deliver to said Coulter the notes of the corporation for the total amounts so due him. Under the authority of said resolution promissory notes were issued in various sums aggregating the amount so authorized. Among said notes was one for \$1,000, which was afterwards indorsed to the defendant J. W. Whalley; and one for \$400, which was subsequently assigned to the defendant A. J. Knott. The remainder, amounting to about \$7,000, were indorsed to the defendant Farrell. On June 26, 1894, at a meeting of the board of directors, then consisting of Samuel Coulter, president, the defendant Farrell, and Wirt Minor, the defendant Farrell offered a resolution that the question of the validity of all of said notes (the same being then unpaid and due) be submitted to Mr. Joseph Simon for his opinion. Such opinion was accordingly obtained and submitted, sustaining the validity of the notes. Thereupon a resolution was offered that new notes be executed for the amounts due upon said former notes, and that mortgages be made to secure the same. Directors Coulter and Farrell voted in favor of the resolution, and director Minor against it. The new notes, secured by the mortgages upon the company's property, were executed and delivered pursuant to the resolution. The defendant Knott refused to accept the mortgage which was executed in his favor, and he brought an action against the corporation, and obtained judgment by default for the sum of \$400, with interest thereon from October 7, 1893, together with costs and attorney's fees.

The complainant's testator, John S. Doe, of San Francisco, Cal., became the owner of 559 of the shares of the stock of said corporation on or about July 5, 1888, and owned the same until the time of

his death, in the year 1894. During the same period the defendant Coulter owned 160 of said shares. The object of the present suit is to require the defendant Coulter to account for large sums of money advanced to him for the corporation by the said John S. Doe in his lifetime, and to obtain a decree winding up said corporation, and disposing of the assets thereof, and setting aside as illegal and invalid the said promissory notes and mortgages to the defendants Farrell and Whalley, and the judgment obtained by the defendant Knott.

Upon the issues made in the suit the cause was referred to the examiner of this court to take testimony, and, as a special master, to make and report findings of fact, but not conclusions of law. Exceptions are now made to the findings of fact on behalf of all the parties, and the questions for present determination are: First, which of the exceptions shall be allowed, if any, to the findings of fact? and, second, what are the proper conclusions of law to be deduced from the facts in the case? In determining whether the notes and mortgages in favor of the defendants Farrell, Whalley, and Knott are the valid obligations of the company, the first question to be considered is whether or not the company was justly indebted to the defendant Coulter on account of the salary and the disbursements which were the consideration of its notes to him. It is evident that the change in the by-laws, made in December, 1887, whereby the office of general superintendent was abolished, and the number of the officers of the corporation was reduced, was for the purpose of curtailing the expenses of the corporation, and that it was intended that thereafter the duties of the general superintendent should be discharged partly by the president, but chiefly by certain subordinate employes. The duties of the general superintendent, as defined by the original by-laws, had been—

"To take charge of all the property belonging to the company, to control and direct all labor and interests pertaining to the operation of the company, and, subject to the orders of the board of directors, to make monthly returns to the board of directors of all persons hired or employed at the mine, and of their wages, and a statement of all expenditures accompanying the same, with the necessary vouchers, duplicates of which he shall keep, and to report the general condition of business in his charge."

The duties of the president, as prescribed by the new by-laws, were as follows:

"The president shall preside at meetings of the directors and stockholders. He shall act as inspector of all elections of directors, and certify who are elected directors. He shall sign all deeds and contracts on behalf of the company, and all certificates of stock of the company. He shall have general charge and supervision over all the business of the company."

According to his own testimony, it does not appear that from and after the time of the adoption of the new by-laws the president performed the duties which had before been imposed upon the general superintendent, or that he rendered services to the corporation materially different from those which he had rendered before. He was at no time a superintendent of the active operations at the mine. The charge of the mine was intrusted to a local superintendent.

The company had an agent at San Francisco for the purpose of handling such of the product of the mine as should be shipped there. It also had a bookkeeper at Portland, who looked after the accounts, and made collections. The president exercised no supervision of the accounts of the corporation. He testified to his ignorance of the affairs of the company and of its books. He denied that he had received reports from the mine, or that he had made any reports of the condition of the business of the company, either to its stockholders or to its directors; and he testified that he had never examined the books of the corporation, and that he did not know what they contained, and did not know what the company's liability was to the complainant. He was unable to give any satisfactory account of the consideration of the notes which he received from the company. There are many things indicative of his want of good faith in protecting the interests of the company as its president. The special master has found that there was an agreement between him and the complainant's testator to the effect that the former should have a salary of \$150 a month, beginning with the year 1889. This finding is, in my judgment, against the weight of the evidence. It is supported solely upon the bare statement of the defendant Coulter that in the year 1889 he had such an understanding by parol with John S. Doe. Coulter's testimony in other matters in this case is so contradictory, evasive, and untrustworthy as to be of little value upon any subject. His evidence in this matter, moreover, is given after the death of the other party to the alleged agreement. It is rebutted by the circumstances of the case. During the whole period from December, 1887, to January, 1893, Coulter acted as president of the corporation, without making a demand for compensation, or so much as referring to the subject of salary. The books of the company during that period likewise contain no mention of the subject. It is rebutted also by Coulter's own admission. His letter to John S. Doe, of date October 22, 1889, contains these words: "I will say, in regard to the management up here, that I have lost lots of time, but never charged a cent for my time." The resolutions allowing the president's salary were adopted, not upon the ground that there had been an agreement of the two owners of the company's stock to that effect, but upon the ground that the company had received services which ought to be paid for. They were adopted at a meeting of directors consisting of Samuel Coulter, A. S. Coulter, his son, and W. T. Hume. Mr. Hume testifies that he was "more of a clerk for Mr. Coulter, as secretary of this company, than anything else"; that he knew nothing about the particulars of the business, and was simply a figurehead, and that Coulter's word to him was law. There is no evidence that John S. Doe ever knew anything about these resolutions, or the notes that were subsequently executed in pursuance thereof. Under these circumstances, the resolution authorizing the corporation to pay a salary to the president for past services was void. The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation. In *Association v. Stonemetz*,

29 Pa. St. 534, in a case where there was no express regulation or contract that the director was to serve without pay, but the by-laws were silent upon that subject, the court said:

"A resolution, passed by the corporation after the services were rendered, that such director be paid a certain sum for services rendered as chairman of a committee, was without consideration, and imposed no obligation on the corporation that could be enforced by action."

Of similar import is *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118. In *Railroad Co. v. Ketchum*, 27 Conn. 170, it was held that a director of a corporation is not entitled to compensation for services rendered to the corporation, unless the services were most unquestionably beyond the range of his official duties. In *Mather v. Mower Co.*, 118 N. Y. 629, 23 N. E. 993, it was held that, where a stockholder of a corporation becomes an officer thereof, and assumes the duties of the office, and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. The court said:

"It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and as such have the management of the corporate affairs. And to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate the fruits of corporate enterprise. It would clearly be contrary to sound policy."

To the same effect is the case of *Road Co. v. Branegan*, 40 Ind. 361. In *Wilbur v. Lynde*, 49 Cal. 290, it was held that a promissory note made by a corporation, payable to its acting trustees, is void. In *Smith v. Association*, 78 Cal. 289, 20 Pac. 677, it was held that a note made by a corporation to its president is invalid unless authorized or ratified by the board of directors, and that the payee of such a note was disqualified to vote upon such a resolution. The same doctrine is held in *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Railway Co. v. Teters*, 68 Ill. 144; *Wood v. Manufacturing Co.*, 23 Or. 20, 23 Pac. 848; and in numerous other cases which might be cited.

So far, therefore, as the notes which were made to Coulter on October 7, 1893, represented a payment to him of salary for services rendered during the years 1889, 1890, 1891, and 1892, they were without consideration, and could not have been enforced in the hands of Coulter against the company. The question, then, arises, in what attitude do the present holders of the notes stand? It being shown that the notes had their inception in fraud, so far as the back salary was concerned, the presumption arising from the possession of the notes in the hands of the indorsees that the holders did in good faith pay value therefor is overcome, unless it appear affirmatively from all the evidence, whether produced upon the one side or the other, that they are in fact innocent purchasers for value. *King v. Doane*, 139 U. S. 166, 11 Sup. Ct. 465. The special master has found, and his findings in this respect will be confirmed by the court, that the defendants Farrell, Whalley, and Knott took their respective notes before the same were due. The notes so indorsed to Farrell stand upon

a different footing, however, from the others. They were taken by him as collateral security for an existing indebtedness, and to secure him against liability upon unpaid promissory notes which he had signed as surety for Coulter. While in many of the states, and perhaps in a majority of them, it is held that the indorsee of a promissory note, transferred before its maturity, merely as collateral security for a pre-existing debt, is not a purchaser for value, but holds the note subject to any defense of fraud that might have been made by the maker against the payee, the rule in the federal court is to the contrary. In *Railroad Co. v. National Bank*, 102 U. S. 28, the court said:

"Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice."

Applying the rule to this case, it is apparent that Farrell was a purchaser of the notes for value, that he received the same in the due course of business, and that he is a bona fide holder unless he had actual or constructive notice of the defenses that the corporation might have made thereto. It is not contended that he had actual notice of any fraud or infirmity in the inception of the notes, but it is urged that the fact alone that the notes were made by a corporation, and were made payable to its president, and were used by the president in securing his individual debt, imports such notice to him of the circumstances under which they were issued as to deprive him of the character of a bona fide purchaser. In many of the states it is held that the purchaser of a promissory note who takes the same with a knowledge of the existence of such facts as ought to have put an ordinarily prudent man upon inquiry, is chargeable with the notice of all the facts that such an inquiry would disclose. In the courts where that doctrine is applied, it is held that the fact alone that a corporation note is made payable to one of its officers, and is appropriated by him to his individual use, is sufficient to put the purchaser upon inquiry. *New York Iron Mine v. First Nat. Bank of Negaunee*, 39 Mich. 644; *Cheever v. Railroad Co.*, 72 Hun, 380, 25 N. Y. Supp. 449; *Bank v. Wagner* (Ky.) 20 S. W. 535; *Davis v. Investment Co.* (Va.) 15 S. E. 547; *Cattle Co. v. Foster* (N. M.) 41 Pac. 522; *Wilson v. Railway Co.* (N. Y.) 24 N. E. 384. But in the federal courts it is the well-settled rule that the purchaser of a promissory note is not deprived of his character of purchaser in good faith by proof that he took the note with knowledge of such circumstances as ought to put an ordinarily prudent man upon inquiry to ascertain the facts. The proof must go further, and show that he had at the time of the transfer knowledge of facts that would impeach the title as between the antecedent parties to the note, or knowledge of such facts that his abstention from further inquiry will be tantamount to a willful closing of the

eyes to the means of knowledge which he knows are available, and therefore presumptive evidence of bad faith upon his part. *Goodman v. Simonds*, 20 How. 343; *Swift v. Smith*, 102 U. S. 442; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. Banks*, 21 Wall. 354; *Electric Co. v. Dick*, 3 C. C. A. 149, 52 Fed. 379; *Bank v. Holm*, 19 C. C. A. 94, 71 Fed. 489. Tested by this rule, it may be said that, while the fact that the notes in this case were for large sums, and were made payable to the president of the corporation, and were used by him to secure his individual debt, would, without doubt, be sufficient to put an ordinarily prudent person upon inquiry to ascertain the antecedent facts, and the failure to make such inquiry even amounts to gross negligence, it still falls short of proving bad faith upon the part of Farrell, and is insufficient to sustain the legal presumption of his mala fides. A corporation might, in the usual course of business, become legally indebted to its president for advances or for salary, in the amount for which these notes were drawn. There is no presumption of law that such a note is invalid. The president and the secretary of a corporation are vested with implied power to execute its negotiable paper. It is clear from the evidence that Farrell accepted Coulter's statement that the corporation owed him that amount, and that he took the notes without inquiry; and it does not appear that he willfully abstained from making the inquiry from the fear that he would discover facts which might impeach their validity. It follows, also, from the foregoing considerations that the \$1,000 note which went into the hands of the defendant Whalley is the binding obligation of the corporation. It was transferred to him in consideration of services to be rendered by him to Coulter, and was received in payment thereof. The \$400 note to Knott was transferred to him in payment of \$100 advanced at the time by him to Coulter, and to that extent he is a purchaser, and that is the extent of his interest therein. The defendant Farrell could not legally, while acting as director for the corporation, vote in favor of the execution of a mortgage to secure his own claim, but no reason is perceived why the resolution to secure the debt due defendant Whalley is not legally binding upon the corporation.

There are numerous exceptions to the statement of the account between the complainant and the defendant Coulter, as found by the special master. The special master arrived at his conclusions in the face of extraordinary difficulties, in view of the uncertainty of the testimony and the negligent manner in which the accounts of the corporation had been kept and preserved at Portland. It is impossible for the court to decide with any certainty that there were errors in the account as found by him. All the findings of fact, therefore, involved in the account will be confirmed. It appears from the books of the corporation that among its assets is a claim against the Bucoda Coal Company, a co-partnership, for \$21,541.73. It was contended by the complainant that the evidence shows Samuel Coulter to have been a member of the co-partnership, and that, therefore, he is chargeable in the account with the debt which that company owes the corporation. The defendant Coulter denies that he was a member of that co-partnership, and the special master

has found that, while there is some evidence that gives color to the contention that he was such a member, it is not sufficient to warrant a finding to that effect. The Bucoda Coal Company was organized in October, 1889, and was then composed of M. M. Wright, A. F. Flegel, and Samuel Coulter. On January 14, 1891, Wright and Flegel sold out, and made a bill of sale to S. Coulter & Sons. In the negotiations leading up to the sale, C. W. Coulter, one of the sons of Samuel Coulter, acted for the purchasers. About a month prior to that time, C. W. Coulter had been made the bookkeeper of the Northwestern Coal & Transportation Company. Mr. Newby, the bookkeeper prior to that time, was discharged. On December 4th, Samuel Coulter, president of the corporation, wrote as follows:

"Mr. Doe thinks we should best economize as much as possible. Therefore you can pay off Mr. Newby, as there is but little to do until the 1st, and to keep the mine running we shall have to run as close to the wind as possible."

Accordingly Newby was dismissed on the 6th of December, and on the following day C. W. Coulter was employed in his stead. The Bucoda Coal Company had no other business than to purchase coal of the Northwestern Coal & Transportation Company, and to retail it at Portland. At the time it sold out to S. Coulter & Sons, it had done but little business. Samuel Coulter was at that time in the complete control of the Northwestern Coal & Transportation Company. He and his son A. S. Coulter were the directors of that company, and the other director, Mr. Hume, confesses that he was but a figurehead. C. W. Coulter, the other son, was the bookkeeper. It appears also that from the time of the transfer of the business to S. Coulter & Sons on January 14, 1890, and up to April, 1891, C. W. Coulter was the active manager of the Bucoda Coal Company. Samuel Coulter and C. W. Coulter both testify that the real purchaser and owner of the business of the Bucoda Coal Company from and after January 14, 1890, was A. S. Coulter, and that he was the company. The price of the coal sold to the Bucoda Coal Company prior to January 14, 1890, was \$2 per ton. Shortly after that date it was reduced to \$1.75 per ton. That company retailed it at Portland at an average of \$4 per ton. It clearly appears that it could have paid the corporation the whole of the purchase money for the coal, but refused to do so, and was not compelled to do so by Samuel Coulter. The company is now hopelessly insolvent. It makes little difference, so far as the rights of the parties to this suit are concerned, whether or not Samuel Coulter was a co-partner in the Bucoda Coal Company. He sustained such relation to that company that his conduct in permitting its debt to his corporation to increase as it did, and in continuing to sell the output of the mine to that company in the face of the fact that it was not paying for the same, but was running up a rapidly increasing debt therefor, amounts to the grossest negligence, and is sufficient in law to charge him with the whole amount which the corporation has thereby lost. In the account between the complainant and the defendant Samuel Coulter, the latter will be charged with the amount of all the said sums so decreed to be paid to the defendants Whalley, Knott, and

Farrell; also with the amount so due from the Bucoda Coal Company to the said corporation.

It appears that at a meeting of the directors held on June 13, 1894, the attorney of the complainant in this case was authorized to ascertain the amount of a certain note of the corporation in favor of Thomas Ismay for \$3,608.80, which had been executed on the 29th day of October, 1892, and was secured by a mortgage on certain property of the corporation, and to purchase and take an assignment of said note and mortgage, and to hold therefor a claim against the corporation, as if the money had been originally advanced by the complainant in the place of said Ismay. The note and mortgage were so purchased in pursuance of said resolution, and it is found by the special master that there is due and owing to the complainant thereon the sum of \$———. It is contended on behalf of the defendants that this transaction was only a loan of funds from the complainant to the corporation, and that the complainant is an unsecured creditor to that amount. I do not so find the equities. It was plainly the intention of the resolution to substitute the complainant for Ismay as a lienholder against the corporation. And, if there had been no such resolution, the complainant would nevertheless be entitled to enforce the lien against the corporation, from the fact that he is the assignee thereof. This lien is the first in order of priority of the liens created by the corporation.

It is contended that the mortgage of the defendant J. W. Whalley is invalid, for the reason that at the time when it was executed the corporation was insolvent, to his knowledge, and that to permit it under those circumstances to prefer one creditor to others would be to disregard the well-established rule of equity that the property of an insolvent corporation is a trust fund to be held for the equal benefit of all its creditors. There are decisions that uphold this view of the rule, but it is not so held in the federal courts. In *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, Mr. Justice Field, in referring to the general doctrine that the property of a corporation is a trust fund for the payment of its debts, said:

"That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Adams v. Milling Co.*, 35 Fed. 433, it was said:

"It may be conceded that a corporation, though insolvent, has the power to prefer creditors."

The same was held in *Lippincott v. Carriage Co.*, 25 Fed. 586. In *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, the court said:

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

But it is not shown with any certainty that the corporation was insolvent at the date of the mortgage to the defendant Whalley, nor that its property was not adequate to meet all its liabilities. Various estimates were placed upon the value of its assets at that date. All that can be said to be definitely shown by the proof is that the business of coal mining as conducted by the corporation was unsuccessful, and the proceeds thereof insufficient to pay current expenses. It does not appear that the directors of the corporation at the time of executing the mortgage understood the corporation to be insolvent. The complainant's interests were at that time represented in the board of directors. Objection was made to the execution of the mortgage, not on the ground that the corporation was insolvent, or that the mortgage would operate to prefer the secured creditor, but on the ground that the note so sought to be secured was not the valid and binding obligation of the corporation. Nor is it proven that the mortgagee Whalley was aware of the insolvency of the corporation, if such insolvency then existed.

It appears from the evidence that the defendant Farrell has received from the corporation other security for his debt, and it is contended that he must first exhaust that security before receiving payment of his claim out of the general assets of the corporation. It has been held by some courts that a creditor having a lien or collateral security cannot participate in the general assets of the corporation until he has first exhausted such security, but the decided weight of authority is against the proposition. In *Lewis v. U. S.*, 92 U. S. 618, it was said:

"It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

The same was held in *Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372; *Tod v. Land Co.*, 57 Fed. 47; *New York Security & Trust Co. v. Lombard Inv. Co.*, 73 Fed. 537; *Kellogg v. Miller*, 22 Or. 406, 30 Pac. 229. The defendant Farrell, therefore, is not compelled to first exhaust his security, and thereafter present to this court his claim for a balance payable out of the proceeds of the company's property. But if it should appear that, after the payment to him of such amount or dividend as he may receive out of the assets which shall be finally distributed under the decree in this cause, the value of the security which he holds is then more than sufficient to pay the balance due him, the corporation will undoubtedly have the right to redeem said property from the lien, and the unpaid creditors herein can avail themselves of the fund thereby realized.

It is contended that neither the amount due the estate of John S. Doe, deceased, nor the amount due the complainant herein, is entitled to rank with the claim of the defendant Farrell, for the reason that it does not appear affirmatively that the liability of John S. Doe for the par value of his stock in the corporation has ever been paid. No evidence was offered directly upon this question, but it appears from the corporation records that the mining property of the corporation was taken by it in payment of 50 per centum of the liability of stockholders upon the subscribed stock, and that there-

after 11 assessments of 5 per centum each were levied upon the stock at intervals from December 8, 1885, to November 5, 1887, and that thereby the full amount of the par value of the stock was assessed. These assessments were each made payable 30 days from date. There is nothing in the records of the corporation to indicate that they were not duly paid as assessed. In the absence of a showing to the contrary, it will be presumed that they were so paid, and that thereby the full amount of the par value of the subscribed stock has been received by the corporation.

The complainant's counsel asks for an allowance of attorney's fees for conducting this suit on behalf of creditors, invoking the rule that where, by the diligence of one creditor, a fund has been discovered of which other creditors, without expense to themselves, reap the benefit, equity will impose upon the latter the burden of paying costs before they shall be entitled to share the fund. This, however, is not a case in which the rule is applicable. The complainant and his testator's estate have by far the largest claims against the corporation, and, instead of uncovering a fund, and making it available for the payment of the debts of other creditors, they have brought this suit against the other creditors, denying their right, and have compelled them to defend the same.

The attention of the court is directed to certain receiver's certificates which have been issued by the receiver appointed in this case under the authority of an order of the circuit court of the United States for the District of Washington, in a suit ancillary to this, which was instituted in that jurisdiction. Since those certificates have been issued under the authority of that court, the matter of ordering their final payment and of determining what sums are due thereon, together with the compensation of the receiver, will be relegated to that court. The question has arisen whether such receiver's certificates are entitled to payment out of the assets of the corporation in preference to the mortgage liens. The corporation in this case is a private corporation, and the reasons which have led the courts to hold that in the operation of a railroad company in the hands of a receiver the expenses of maintaining the property and preserving it pending the suit shall be a charge, not only upon the earnings, but upon the corpus, in preference to existing liens, do not apply. The defendants Whalley and Knott have not consented to the issuance of the receiver's certificates. In the absence of such consent, the liens of those defendants will not be postponed to the liens created by the receiver's certificates, or by the receivership. *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481; *Hanna v. Trust Co.*, 16 C. C. A. 586, 70 Fed. 2; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 68 Fed. 623. But the complainant has consented to the issuance of the receiver's certificates, and has thereby postponed his lien to the indebtedness so created. The decree of distribution of the property will therefore be as follows:

Out of the proceeds of the sale of the property will first be paid the costs of sale and the costs of this suit. Second, there will be paid, on account of receiver's certificates, a sum not to exceed the amount due upon the Ismay note and mortgage, now held by the complainant.

There will be paid, third, the mortgage debt due the defendant J. W. Whalley; fourth, the amount due the defendant A. J. Knott, with his costs and attorney's fees as herein allowed; fifth, the remainder of the indebtedness incurred by the receivership; sixth, the amount due the complainant on the Ismay mortgage. Out of the surplus then remaining, if any there be, there will be paid the complainant's unsecured claim as allowed herein, the interveners' claim, and the claim of the defendant Farrell, and such other unsecured creditors, if any there be, as shall, on or before the date of final distribution, have established in this court and cause their claims against said corporation. And in case the proceeds of such sale and the total assets of said corporation are insufficient to pay all of said claims in full, then that said unsecured claims be paid pro rata.

NEWARK ELECTRIC LIGHT & POWER CO. v. GARDEN.

(Circuit Court of Appeals, Third Circuit. November 30, 1896.)

No. 9.

ELECTRICITY—NEGLIGENCE—SAFE INSULATION.

An electric light company, which maintains wires carrying an electric current of high power on poles used, in common with it, by other companies for the support of their wires, owes to an employé of one of such other companies, who is lawfully upon the pole, in pursuance of the common right, the duty of exercising ordinary care to keep its wires so safely insulated as to prevent injury to such employé, though, in the performance of his work, he may enter upon a separate cross arm of the electric light company, or accidentally touch its wires. Acheson, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of New Jersey.

John O. H. Pitney, for plaintiff in error.

Aaron V. Dawes, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

DALLAS, Circuit Judge. This action was brought in the circuit court for the district of New Jersey by the administrator of the estate of James A. Mason against the Newark Electric Light & Power Company, for causing, by its negligence, the death of Mason. There were a verdict and a judgment for the plaintiff, and thereupon the defendant sued out this writ of error. The usual defenses were set up in the court below. Negligence on the part of the defendant was denied, and contributory negligence on the part of the deceased was asserted; but upon these subjects, considered separately and apart from the fundamental question, to be presently dealt with, the majority of the court has experienced no difficulty.

There is no specific criterion of care which could have been applied in this case. Neither the defendant nor Mason disregarded any determinate provision of the law prescribing what the conduct of either of them should have been, for there is no such provision.

The only rule which they, respectively, were bound to obey, is the general one which enjoins the exercise of due care,—the observance of such caution as, under the circumstances, an ordinarily prudent man would have observed. Whether either of them failed to perform this indistinctly defined obligation, assuming its existence on the part of the defendant, was a question of fact and of inference. The facts were controverted, the inference was disputed, and the evidence was not conclusive. Therefore, unless the case should have been entirely withdrawn from the jury, upon the underlying question about to be considered, no error was committed in submitting to it the issue as to negligence, both as respected the defendant and the plaintiff's intestate. The specifications, other than the third, which will be especially referred to, need not be further discussed. Although the charge of the court is, perhaps, open to some criticism, it exhibits no reversible error, if not upon the one important and quite distinctive subject to which attention is now to be directed.

There is no liability for negligence where there is no duty of care. Consequently, a plaintiff who grounds his action upon an allegation of negligence by the defendant must show, not only that the conduct of which he complains was negligent in character, but also that it was violative of some duty which was owing to him. That the conduct of this defendant was not careful, and that its lack of care, and not any negligence of Mason himself, was the cause of the death of the latter is established by the verdict; but, as we have said, the whole subject of negligence was inconsequent if, under the law and the evidence, the defendant was under no obligation to regard Mason's safety. The primary, separate, and controlling question upon this record, therefore, is: Was the defendant bound to exercise care—"ordinary care," as the court below held—to provide against the occurrence of such a calamity as befell Mason? That this inquiry may be intelligently answered, it is requisite that our investigation of the law should be based upon a correct conception of the facts to which it is to be applied; and those which are pertinent to this particular subject may be briefly stated.

The Western Union Telegraph Company was the owner of a certain telegraph pole, upon which the Pennsylvania Railroad Company rightfully maintained several electric wires, immediately supported upon three cross arms. The defendant company, also rightfully, maintained two wires, supported, one on either side of the same pole, upon a single cross arm. How this right, in either case, was acquired, is unimportant. There is no doubt that, in both, it existed, and that, in fact, the pole was lawfully used, not only by its owner, the telegraph company, and by a certain telephone company, but also by the railroad company and by the defendant. There were 12 cross arms in all, including the two temporary ones hereafter mentioned. The lowest was that which sustained the wires of the defendant, and above, at a distance of several feet, was one of those upon which were the wires of the railroad company. In the space between these two bars were those in use by the telephone company, and below the latter, and above that of the defendant company, two new ones were inserted by the railroad company, to facilitate the

transfer of its wires; and Mason was one of several men employed by that company, who, upon the occasion in question, were engaged in making that transfer, which consisted in removing its wires from the poles of the telegraph company (including the pole which has been specified) to certain other poles, which belonged to the railroad company itself. Mason ascended this pole, and placed himself finally—what he had previously done is immaterial—in the situation which he occupied when he met his death. His right foot was upon one side of the cross bar, on which there was an electric wire of the defendant. This foot, however, was not, and did not become, in contact with the wire. It rested at a point sufficiently removed from it to be free from danger. In point of fact, the accident did not result from the position of his right foot, for the fatal connection was made through his left foot, which was thrown over the next bar above, the lower of the two new bars, and was “dangling down towards the lower bar,” the one upon which was the defendant’s wire. While in the position described, a telephone wire was handed to Mason by a fellow workman, and in reaching out to grasp it, his pendent left leg was naturally, perhaps necessarily, extended towards the wire of the defendant, and, in consequence, his left foot either touched it, or came so near to it that, by reason of the thus electrically connected interposition of his body between that wire and the telephone wire, which he had seized in his left hand, he was subjected to the shock which killed him.¹ The defendant’s wire was a large one, and was highly charged. It was insulated, but the insulation was defective, and but for its exposed condition at one minute point this disaster would not have happened.

If, in view of the facts which have been narrated, it could be unqualifiedly asserted that, at the time and place of the accident, Mason was wrongfully upon the separate property of the defendant, and if nothing but that bare fact should be regarded, but one conclusion could be reached; for the law is well settled that, in general,

¹ NOTE BY THE COURT. This statement of the situation of Mason is taken, substantially, from the charge of the court below, in which it was said: “While so employed, suddenly, and without warning, he gave a groan. His body was convulsively twitched, then rigidly straightened out. His right foot was upon the lower cross bar on which were the electric wires. His left foot was thrown over the next bar above, and was dangling down towards the lower bar. His right arm was around the pin on the third cross bar, and in his left hand he had grasped a wire, known as a ‘telephone wire,’ which had been handed to him by a fellow workman.”

There is, it is true, some evidence which, standing alone, would seem to be to the effect that Mason was, though astride of the bar next above, wholly resting upon the bar used by the defendants; but, taken as a whole, we think it shows that one of his feet was, and must have been, “dangling,” as described by the learned judge, at the time when he received the shock. He was in the act of reaching out, and naturally, we think, must have had one of his legs extended in a direction opposite to that in which he was reaching. To quote the language of several of the witnesses: “He stood in this shape, one arm between his legs, and he was reaching out to the extreme end of the arm. Q. No. 2 arm? A. No. 3. Q. He had his leg over No. 2, his foot on No. 1, and he reached over to No. 3 to make a fastening at that point? A. Yes, sir. * * * He was standing on the arm this way [illustrating], and another arm between his legs, and reaching out to fasten it to the end of the arm. * * * He had to reach

the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it. This limitation of the principle that no person may lawfully use even that which is his own so as to do hurt to another is, however, not controlling in all cases; and the duty of care, which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who, technically, is a trespasser. In such a case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the locus in quo, the question of duty must be determined. "It is true that, where no duty is owed, no liability arises. * * * But, as has often been said, duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property, and its openness to accident, the rule will vary." *Hydraulic Co. v. Orr*, 83 Pa. St. 332. It makes no difference, where the circumstances give rise to duty, that the plaintiff was "technically a trespasser." *Schilling v. Abernethy*, 112 Pa. St. 437, 3 Atl. 792. The true question is: Was he "a trespasser there, in a sense that would excuse the defendant for the acts of negligence, * * * whether the owner or occupant of premises is liable under any circumstances, and, if so, under what circumstances, for injuries received by a person while on such premises, and by reason of their dangerous condition"?

In *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, the question was thus stated, and, in answering it, the supreme court held that, under the circumstances of that case, the person injured could not be regarded "as a mere trespasser, for whose safety and protection, while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision." The fact that, in all these cases,

out on account of this bottom arm was a six-foot arm, and the other arm a ten-foot arm, and he had to reach out about a foot. * * * His left foot was behind his right foot, and sometimes would be on the bar and sometimes would not." It is obvious that this testimony could be exactly comprehended only by one in whose presence it was given; and to such a one, no doubt, it was made perfectly clear by the illustrative movements of the witnesses. Therefore, we have accepted that understanding of it which the learned judge who heard it, without intimation of doubt on his own part, or of objection from either party, assumed to be the correct one. Indeed, the brief of the plaintiff in error presents the matter in a manner not materially different, viz.:

"At the time of the accident Mason was standing on defendant's cross arm on the north side of the pole facing west, his legs astride the next cross arm above, his right foot resting on defendant's cross arm, his left foot also touching it, or swinging free in the air, as his body moved. While in that position, the telephone wire was handed to him, which he took in his right hand, and was apparently about to adjust to the outermost pin on the third cross arm. As he did so his left foot came in contact with defendant's wire, and from that received, apparently, an electric shock through his body, connection presumably being made through the telephone wire in his hand."

It has been thought desirable that this note should be made, in order that it may not be supposed that the evidence on this subject has not been fully considered,—not because it is deemed to be of vital importance, for it is not.

the courts gave due weight to the circumstance that, in each of them, the person injured was a child, would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that a duty of care may, by reason of the circumstances, be due from the owner of property to one who is technically a trespasser upon it; and the youth of those most likely to suffer from a failure to discharge such duty is simply one of the circumstances which, when present, is to be considered with the rest. The opinion of the court in the case last cited cannot be read without perceiving that the matter was so viewed by the supreme court of the United States; and the supreme court of Pennsylvania, by which the two cases first cited were decided, has repeatedly held that a child may be such a trespasser as to be subject to the consequence of his trespass. It has never laid down one rule with respect to children and another respecting adults, but has many times said that the former, like the latter, when trespassers "in every sense of the word," are to be regarded as wrongdoers, to whom the owner of the premises is under no obligation. *Rodgers v. Lees*, 140 Pa. St. 475, 21 Atl. 399; *Mitchell v. Railroad Co.*, 132 Pa. St. 226, 19 Atl. 28.

It is only by liberally construing the assignment of errors that any of the specifications can be taken to raise the particular question with which we are now dealing. But two of them can be said to present it, even by implication. These are:

"(2) That, the plaintiff having rested his case, the defendant's counsel moved for a nonsuit on the ground that no sufficient negligence on the part of the defendant had been shown to maintain the action, and also on the ground of contributory negligence on the part of the plaintiff's intestate, which motion was overruled. (3) That, upon the completion of the evidence in the case, the counsel of the defendant renewed his motion for a nonsuit, and moved for a direction of a verdict for the defendant, upon the same grounds as stated in the former motion, which motion was overruled."

The refusal to nonsuit is not reviewable (*Telegraph Co. v. Thorn*, 12 C. C. A. 107, 64 Fed. 287); but the denial of the defendant's request for binding instructions is, and, that the plaintiff in error may have the utmost advantage of his exception to that denial, we will consider this specification as if he had distinctly put his request that the case should be withdrawn from the jury upon the further ground that the evidence would not warrant a finding that there was such a duty of care resting upon the defendant as was requisite to the maintenance of the action. But still we do not think that the facts of this case would have warranted the learned judge in adopting such a course. The several occupants of this pole had, by virtue of the contract under which they jointly used it, a common interest that its use should not be envired with unnecessary danger. Each of them owed the duty to take all reasonable precautions for the prevention of injury to the servants of any of the others, who might be sent there in pursuance of the common right; and we cannot agree that this duty was so circumscribed that it ceased to exist if any of these servants happened to rest his hand upon a cross bar, or, as in

this instance, to place his feet upon it. It is by no means clear that the fact that Mason was partly upon the defendant's cross arm at all contributed to the result. On the contrary, it is certain that he might have stood wholly upon it, at the point at which his right foot was placed, without incurring any hazard whatever, for at that point there was no wire; and his left foot might have been accidentally extended to it if he had been entirely upon the lower of the two new cross arms, or even upon the pole itself.

Apart from this, however, he was not a mere trespasser upon the cross arm of the defendant. There was nothing in the surroundings to inform him that he ought not to go there, or that he would incur any risk if he did. The wire was insulated, and the defect in its insulation was not readily discernible. The cross arm, apparently, presented a safe footing, and, but for the defect in insulation, it was entirely safe to stand upon it. *Railway Co. v. McDonald*, supra. It may be conceded, as was decided by the supreme court of New Jersey, in *Telephone Co. v. Speicher* (not yet reported), that the defendant was not bound to make cross bars, intended for the purpose of supporting wires, of sufficient strength to support a man; but each case of this nature must be decided on its own facts, and in this one there is no question about the strength of the bar. It was quite strong enough to sustain the weight which Mason put upon it. There was no risk involved but that which the presence of the wire created, and that was, apparently, provided against by insulation. So far as appeared, therefore, the bar was not dangerous; and, in placing himself where and as he did, this man was doing his work, as one of the witnesses said, "the same as any man would do it that works at the business"; and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy, we do not say by a trap, for there was no purpose to ensnare, but by an unknown and invisible peril, to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him. The defendant cannot be heard to say that it did not anticipate that the linemen of the other companies, as well as its own, would do their work in the way that is usual with them. It was bound to know that they might come in contact with its wire; and that it did, in fact, assume the duty of providing against the occurrence of such casualties is shown by its having insulated the wire at all. The fact that it was insulated was calculated to induce reliance upon its safety, and plainly tended to allure or entice such a man as Mason to go upon the bar on which it was stretched. It offered an obvious, and, seemingly, a protected standing place. "There was nothing to warn either child or adult that it was not to be so used." *Schilling v. Abernethy*, supra. It was, therefore, "liable to the incursions of * * * even grown men," not "from thoughtlessness, accident, or curiosity," merely, as suggested in *Hydraulic Co. v. Orr*, supra, but in the prosecution of their legitimate calling.

Finally, and upon all the facts, we are of the opinion that, even upon the assumption that the plaintiff's decedent was technically

a trespasser, the defendant, under the circumstances, owed him a duty of at least ordinary care. We are not attempting to lay down a rule applicable to all cases; but the principle which, in our judgment, is controlling in the present one, is that any person who engages in a highly dangerous occupation is bound to take such precaution in its pursuit as a sensible man would ordinarily take to avoid doing fatal or other serious injury to one who comes upon his premises, not as a mere trespasser or positive wrongdoer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there. The judgment is affirmed.

ACHESON, Circuit Judge. I dissent from the opinion of the majority of the court, and from the judgment of affirmance. According to my reading of this record, the following stated facts are conclusively established by the evidence: James A. Mason was an experienced lineman in the employ of the Pennsylvania Railroad Company, and on the occasion when he lost his life was one of a gang of that company's linemen engaged in removing the railroad company's telegraph wires from an old line of poles owned by the Western Union Telegraph Company to a new parallel line of poles of the railroad company recently erected. One of the Western Union Telegraph Company's poles stood at the southeast corner of Hamilton street and Railroad avenue in the city of Newark. There were upon the pole 10 cross arms, all carrying wires. The topmost arm belonged to the city of Newark; the second, third, and fourth cross arms from the top belonged to the Western Union Telegraph Company; the fifth, sixth, and seventh cross arms from the top belonged to the Pennsylvania Railroad Company; the eighth and ninth cross arms from the top belonged to a telephone company; and the tenth from the top, or the bottom, cross arm belonged to the Newark Electric Light & Power Company, the defendant below. The bottom cross arm was a short arm, about four feet in length from end to end. The other cross arms were considerably longer. The distance from the defendant's cross arm to the lowest cross arm of the Pennsylvania Railroad Company could not have been less than six feet.

To facilitate the removal of the railroad company's wires to their new location, that company's linemen put upon the Western Union pole two long temporary cross arms above the defendant's cross arm, between it and the lower permanent cross arm of the telephone company; and, at the time Mason was killed, he and his fellow linemen were engaged in shifting the telephone wires from their own proper arms to the two temporary cross arms. In doing this work Mason stood upon the defendant's cross arm. Immediately before he received the fatal electric shock, his legs were a-straddle of the lower temporary telephone cross arm; but he stood with both his feet upon the defendant's cross arm. Corbet Aten, a witness for the plaintiff, in response to the question, "And before you heard that exclamation from Mason, and when you saw him have the telephone wire in one hand, where was he standing or sitting, or what was he doing?" answered, "Well, he was standing. He wasn't sitting. He

had one leg over the cross arm next above, you know, and both feet down on this arm, where the electric light wires was." And Samuel A. Powell, the foreman of the gang of linemen, a witness for the plaintiff, testified thus with respect to Mason's position:

"Q. Where did he stand? A. On the bottom arm. Q. Was that the arm where the electric wires were? A. Yes, sir. Q. And was that the point from which he could perform his work? A. Yes, sir. Q. The work which you appointed him to perform? A. Yes, sir. Q. And did he perform, or attempt to perform, his labor from that position, standing on that bottom cross arm? A. Yes, sir. Q. And where was he when he was killed? A. Well, he was astride of the arm,—one arm he had his left leg thrown over, the next to the bottom arm,—and of course that threw his both feet on the bottom arm, the four-pin [arm], and he then, of course, was in between two wires, and he was working them to make a reach to the end of this ten-pin arm to put the wire onto the knob to make a fastening."

After Mason had gone up the pole, and while standing on the defendant's cross arm, he was warned by the foreman, Powell, and also by his fellow workmen, that the defendant's wires were carrying heavy currents of electricity, and were dangerous. Once Mason was observed to be actually standing on one of the defendant's wires, and was warned off by the foreman. He was repeatedly cautioned against the danger from the defendant's wires. All the foregoing appears from the testimony of the plaintiff's witnesses.

The catastrophe occurred in this wise, as these witnesses state: Three of the railroad company's linemen were on this particular Western Union pole, two of them above Mason. One of the two handed Mason a telephone wire to attach to the outermost knob of the upper temporary telephone cross arm; and Mason, having taken this wire in his right hand, which was ungloved and bare, stretched out his person so as to make the desired attachment, and, as he made this movement, his left foot came in contact with the end of the defendant's wire which was on that projection of the defendant's cross arm upon which Mason then stood, and thus he received the electric shock that killed him. The plaintiff's witnesses who afterwards examined the defendant's wire testified that there were "two bare points" at the end of the wire. It was shown by testimony which was not directly contradicted, and which practically was unshaken, that the defendant company, within 60 or 90 days before the disaster, had caused this part of its wire to be carefully and perfectly insulated in the usual and approved way. How and when the "two bare points" were made was not shown. No usage was proved, nor was positive testimony produced, tending to convict the defendant of negligence or want of due care in not causing its wire to be inspected in the short interval between the insulation, in February or March, and the date of this occurrence, in April.

In my opinion, upon the whole evidence, the defendant was entitled to a verdict, and the peremptory instruction in its favor, asked for, should have been given. Undoubtedly the Pennsylvania Railroad Company's linemen had the right to go up and down this Western Union pole, and, while they were in the exercise of this right, the defendant owed to them the duty of reasonable care to

keep its wires safely insulated. It will be noted, however, that on this occasion the linemen went up the pole securely, and all except Mason came down in safety. Mason was not injured while in the exercise of his right of going up and coming down the pole. For his own convenience, without the license, express or implied, of the defendant, Mason saw fit to take possession of the defendant's cross arm, by standing on the same, and doing his work therefrom. His work was quite unusual, and such as the defendant had no reason to anticipate or provide against. The work he was engaged in involved the removal of all the Pennsylvania Railroad Company's wires to another line of poles, and this occasioned the shifting of the telephone company's wires from their proper cross arms to two temporary cross arms, which the railroad people improvised. Again, Mason was not only an experienced lineman, and as such presumably acquainted with the inherent danger in heavily charged electric wires, even when insulated, but on this occasion he was repeatedly warned of the danger. It is by no means an improbable supposition that the two minute bare spots at the end of the wire were caused by the action of Mason's boots, or the spurs with which he was equipped. But, however this may be, the indisputable fact remains that he voluntarily, without the invitation or license of the defendant, placed himself in a position of danger by standing upon, and doing extraordinary work from the defendant's cross arm. In thus acting, Mason was a volunteer, and assumed the risk of the calamity that overtook him. He was, indeed, a mere trespasser. In principle, this case, it seems to me, is not distinguishable from the case of *Telephone Co. v. Speicher*, wherein the supreme court of New Jersey held that a telephone company was not answerable to a lineman, in the employ of a city, who, in descending one of the company's poles, supported himself by one of the lower cross arms which was insufficient to sustain his weight.

In each of the cases (cited in the opinion of the majority of the court) of *Hydraulic Co. v. Orr*, 83 Pa. St. 332, *Schilling v. Abernethy*, 112 Pa. St. 437, 3 Atl. 792, and *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, the injured plaintiff was a child, and, moreover, the circumstances were very different from those which existed here. The defendant here had no reason to apprehend danger to linemen from the situation and condition of its property. In truth, the evidence, I think, demonstrates that the defendant had taken all reasonable care to insure the safety of linemen when ascending and descending this pole. It is my judgment that the defendant had performed its whole duty to Mason, and that it is neither legally nor morally responsible for his death.

CHICAGO BLDG. & MANUF'G CO. v. GRAHAM et al.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 517.

SUBSCRIPTION CONTRACTS—JOINT AND SEVERAL LIABILITY.

The C. Co., which was engaged in the business of furnishing material and machinery for erecting plants for the manufacture of butter and cheese in localities suitable for such industry, entered into a contract with sundry persons for the erection of a butter and cheese factory at M., to cost \$5,250. The contract provided that the factory should be erected and equipped in accordance with the specifications "indorsed hereon," and also provided that, as soon as the contract price was subscribed, the subscribers should form a corporation, with a capital not less than the amount subscribed, in shares of \$100 each, to be issued to the subscribers in proportion to their paid-up interest; each subscriber to be liable to the corporation only for the amount subscribed by him. The form of the contract indicated that it was presented by the agent of the C. Co. to various persons, with a request for subscriptions to the erection of the factory, and it was signed by 42 individuals, who set opposite their names the number of shares taken, and the amount of stock after incorporation, in sums ranging from \$25 for a quarter share to \$500 for five shares. Indorsed on the contract were specifications for the factory, ending with a long sentence, which included the words, "there shall be no waiver of original and joint liability until the contract price is fully paid." *Held*, that there was no meeting of the minds of the parties on a proposition for a joint liability to the C. Co., and the contract of the subscribers was several only.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

W. A. McDonald, for plaintiff in error.

Thomas Spight, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. The Chicago Building & Manufacturing Company, an Illinois corporation, brought its action against W. C. Graham, E. H. Baker, J. L. Grace, J. J. Scott, and I. N. Dodds, citizens of Union county, Miss., on the following contract and agreement, namely:

"The Chicago Building & Manufacturing Company, of Chicago, Illinois, party of the first part, hereby agrees with the undersigned subscribers hereto, party of the second part, to build, erect, complete, and equip, for said party of the second part, a combined butter and cheese factory, at or near Myrtle, Miss., as follows, to wit:

"The factory building shall be twenty-eight feet wide and forty-eight feet long, by twelve feet high, with an addition attached, twelve feet by twenty-four feet, for office and boiler and engine room, and an ice room, 12x16. Said building shall rest upon foundations described in specifications hereon. Said factory building is to be one story high, and divided into rooms as stated above, viz. a manufacturing room, also a water-cooler refrigerator, complete with galvanized pan, with sprinkler and force-pump connection, cheese-curing room, office, boiler, and engine room. Said factory shall be equipped with the following outfit, to wit: One eight horse power Howz engine, with twelve horse power Howz boiler, with inspirator and smoke stack; heating coil for office and cheese-curing room;

also, cold air register connection from refrigerator to cheese room, to more perfectly control the temperature; one centrifugal separator, 2,000 to 3,000 pounds capacity in one hour; one improved twin 400-gallon Fairlamb cream vat, lined with galvanized iron, and relined with Welsh charcoal tin; one 600-gallon milk-heating vat; one combination heating, tempering, and cooking cheese vat, of 500 gallons capacity; one revolving box churn, of 300 gallons capacity; one covered crank suction and force pump; one 300-pounds tempering tank for separator; one Fairlamb improved gearing power butter worker, center drip; one power combination revolving curd work salting and grinding machine; one improved single-gang cheese press; fourteen galvanized iron cheese hoops; one 600-pound milk-receiving can; one 400-pound milk scales; one 600-pound five-beam platform scales; one steam washing and cleaning tank; one large water tank for supplying boiler, milk vats, churns, etc., racks and shelves in curing room for curing cheese; water and steam pipes connecting with boiler; also, one lactometer; one siphon and strainer; one gang perpendicular curd knives; one gang horizontal curd knives; six milk-testing graduates; one druggist's graduate; one milk conductor; one side pail; one dairy thermometer; one strainer dipper; one butter trier; one cheese trier; one salt sieve; one belt punch; 25 feet rubber hose to carry water to vats, churn, and tanks; office desk and chair; one 60-patron milk book; also, belting, shafting, shaft collars, adjustable shaft hangers, pulleys, piping, pipe hangers, valves, gates, cocks, couplings, ell, tees, crosses, unions, nipples, plugs, and reducers necessary for the operation of said factory; also, one mop head; one combined wrench; two brushes; one broom; two butter ladles; one dipper; one coal scoop; one Babcock milk tester. Said building shall be constructed and equipped in substantial accordance with the specifications indorsed hereon, in a workmanlike manner. The engine and boiler, and all other machinery and fixtures, shall be set up, and shall be in running order, before the party of the second part shall be required to pay for said factory. The second party agrees to select, describe, and furnish, at its own expense, within ten days from the date of this contract, suitable and reasonable level land, with good title, and water ready to connect pump to for the use of the said factory, and agrees, within the same time, to appoint an executive committee, with full authority to represent second party's interests while first party is discharging said contract; and it is further understood that, in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, the Chicago Building & Manufacturing Company, at its option, may select and furnish land and water in behalf and at the expense of the subscribers. The Chicago Building & Manufacturing Company further agrees to provide and keep hired, at the expense of the stockholders, an experienced butter and cheese maker, for one year, if desired. The Chicago Building & Manufacturing Company agrees to erect said butter and cheese factory, as set forth by the above specifications, for fifty-two hundred & fifty dollars, payable in cash when factory is completed. We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory, when completed. Said building to be completed within ninety days, or thereabout, after the above amount (\$5,250.00) is subscribed. Any portion of the amount subscribed, not paid according to contract, shall bear legal rate of interest. As soon as the above amount (\$5,250.00) is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the state, as therein provided, fixing the aggregate amount of stock at not less than the amount subscribed, to be divided into shares of \$100 each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interest herein; and it is herein agreed that each stockholder shall be liable to the corporation only for the amount subscribed by him, and no more. Subscriptions may be obtained to this agreement to any amount in excess of \$5,250.00, the price of factory proper, as above, and all subscriptions shall belong to first party until the full contract price has been fully collected therefor. The remainder of the subscription after the first party has been fully paid is the property of the second party, and may then be, by second party, also collected, and used as working capital. It is hereby understood that the Chicago Building & Manufacturing Company will not be responsible for any pledges, promises, or interpretations made by its agents or representatives that do not appear in this contract, and made a part thereof, either in print or writing. For the faithful

and full performance of our respective parts of the above contracts, we bind ourselves, our heirs, executors, administrators, and assigns.

"Executed and dated this 24th day of Dec., 1894.

"The Chicago Bldg. & Mfg. Co., the First Party,

"Per Dixon C. Williams, V. P., Special Agent.

Names of Subscribers.	No. of Shares.	Amount of Stock after Incorporation.
W. R. Higginbotham & Son.....	5	.500
J. A. Hill.....	2	.200
J. J. Scott.....	1	.100
W. H. Harwell.....	2	.200
I. N. Dodds.....	2	.200
R. L. Moore.....	1	.100
J. D. Purnell.....	2	.200
J. S. Morris.....	2	.200
W. N. Hargrove.....	1	.100
G. H. Murray.....	2	.200
P. H. Stewart.....	1	.100
W. C. Graham.....	2	.200
T. H. Baker.....	1	.100
N. A. McCallum.....	1	.100
H. P. & G. W. Cathcart.....	1	.100
J. S. Goode, M. D.....	1	.100
W. C. Anderson.....	1	.100
W. M. Spencer.....	1	.100
J. D. Kerr.....	1	.100
F. M. Spencer.....	1	.100
J. J. Robertson.....	1	.100
W. M. Watson.....	1	.100
J. A. Rowland.....	1	.100
A. J. Russell.....	1	.100
O. H. Purnell.....	2	.200
Jno. L. Grace.....	1	.100
W. M. Whittington, pr. Murray.....	1	.100
J. D. Moore.....	1	.100
A. J. Jones.....	1	.100
L. V. Fowler.....	1	.100
A. W. Hale.....	1	.100
W. L. Dodds.....	1	.100
S. C. Frazier.....	1	.100
W. D. Barnett.....	1	.100
J. W. Barnett.....	1	.100
W. H. Milam.....	1	.100
J. E. Liddell.....	1	.100
M. S. Smith.....	$\frac{1}{4}$.25
Joe M. Harrison.....	$\frac{1}{2}$.50
J. W. Hale.....	1	.100
T. F. Dorman.....	1	.100
P. H. Steward.....	1	.100
J. C. Dousby.....	1	.100
W. O. Butler.....	1	.100
W. B. Banks.....	1	.100
J. W. Norris.....	1	.100
A. J. Halloway.....	$\frac{1}{4}$.25

"Specifications.

"Foundation Walls. The foundation walls for within building to be built of stone 16 to 18 inches thick, or of brick 12 inches thick. All walls to be of sufficient height to form a grade from the building, built of good lime and sand mortar, and placed from 16 to 18 inches below the surface of the ground.

"Sills. The sills to be made of 2x8 plank, spiked together.

"Joist. Joists are to be 2x10 inches, and 16 feet long, placed 16 inches from center to center, resting on the center girder. Ceiling joist to be well bridged.

"Studding. Studding to be 2x4. The outside studding placed a proper distance apart, so that the paper covers two spaces, or about 16 inches. Partitions as per ground plan.

"Rafters. Rafters for said buildings are 2x6 inches, and placed 2 feet from center to center, with 1x6 braces, in truss form, to support the roof. Collar beams suspended from rafters, in truss form, with 1x6 braces.

"Roof and Ventilators. The entire roofs to be covered with good quality of Extra Star A Star pine shingles, laid on 6-inch sheathing. The building to be supplied with ventilators in two gable ends.

"Flooring and Ceiling. Flooring and ceilings are to be of the grade known as 'First and Second Yellow Pine,' or 'C Norway Yellow or White Pine.' Flooring, 4 to 6 inches wide. Ceiling for office and manufacturing room, 4 to 6 inches, beaded. Engine room, cheese-curing room, and refrigerator, the same as manufacturing room.

"Air Chambers. Air chambers are to be constructed as follows: The inside of studding is lined with building paper, put up and down, and nailed to studs; then nail over paper a strip $\frac{1}{2}$ x2 inches; and, with ceiling inside and siding outside, it makes the air chambers necessary to the more perfect control of the temperature.

"Siding. Outside covered with $\frac{1}{2}$ drop siding, of quality C Norway yellow or white pine.

"Cornice. The entire building to be corniced with plain cornice, projecting about 10 inches from body of building, as per plan.

"Windows. All windows to be double-glazed sash, improved frames, beveled refrigerator style. Size of glass, 12x26; 4 lights in sash, arranged stationary in frame.

"Doors. All doors are to be of the sizes and styles shown on drawings. All outside and refrigerator doors are to be beveled refrigerator style, from 3 to 4 inches thick, so as to more perfectly control the temperature. Inside doors 2 feet 8 inches by 6 feet 8 inches, 4 panels.

"Hardware. The building to be supplied with customary hardware, such as rim locks, bolts, hinges, and other fastenings needed for all doors and windows.

"Painting. Building to be painted with two coats of paint on the outside, except the roofs.

"Cold Storage. The cold storage to be the water-cooler refrigerator.

"Drains. Floors in manufacturing room to slope to drains, as on plans.

"All materials connected with the building to be good, merchantable building material, as per grades above, and put together according to the plans and specifications, in a good, substantial, and workmanlike manner, and whether occupied by second party, or its incorporation, or its successors, there shall be no waiver of original and joint liability until the contract price is fully paid."

Connected with the foregoing is this exhibit to the declaration:

"It is agreed between the parties to the adjoining contract that, as soon as the full amount of this contract is subscribed, that the party of the second part, upon notification by first party, will come together in a body, and select from their number one man as a committee, who is to be immediately taken, by and at the expense of first party, into the Elgin district of Illinois, where factories have been long established, and examine the books of the same, talk to the patrons and stockholders, and if said committee does not find, from said investigation, that factories such as the adjoined contract contemplates do pay, when well managed, from 10% to 20% per annum on the costs of the plants, and that the cows do pay, when milked, and milk taken to the factories, from \$40.00 to \$70.00 each per year, this contract shall become null and void, and be surrendered to said committee to be destroyed: but, as soon as evidence of the truth of the above statement is found and reported by said committee, then the aforesaid adjoined contract shall be considered binding and in full force as to second party. It is further agreed that, upon completion of said factory, butter and cheese shall be made before payment of purchase price is exacted; second party agreeing to furnish milk for the test when first party shall call for the same, for which milk first party shall pay at the then market price. I have found the within representation fully sustained by my investigations.

"Dec. 24, '94.

Committee, W. H. Harwell."

It is evidently a part of the contract.

The defendants demurred to the declaration on the following grounds:

"(1) Because the alleged contract sued upon shows upon its face that the subscribers thereto are not jointly bound, but are only liable severally for the amount subscribed by each one; and the largest amount thus subscribed by any one being only \$500, this court has no jurisdiction. (4) Because the declaration shows that all the subscription is the property of plaintiff, and does not show that they have made any effort to collect same, or that the same is not collectible, and is a trust fund for creditors. And for other good and sufficient causes."

The demurrer was sustained and the declaration dismissed at the plaintiff's cost.

The plaintiff concedes that, if the contract is several, the circuit court did not have jurisdiction, but insists that the contract is joint and several, and lays particular stress on certain language in the instrument, such as "hereby agrees with the undersigned subscribers hereto, party of the second part," and "We, the subscribers hereto, agree to pay the above amount," and "there shall be no waiver of original and joint liability until the contract price is fully paid." If we take in our view the whole paper, it is plain that the plaintiff is engaged in the business of furnishing machinery and material for erecting a plant for the manufacture of butter and cheese, and of constructing and putting in operation creameries, in such localities as can furnish supplies of milk adequate for the successful operation of such industry; that, to push its trade, it sends out its agents into rural districts, and to country villages, to promote the organization of associations to purchase the necessary plant, pay for its erection, and have set to work these creameries; that, in the course of their canvassing, the agents of the plaintiff introduced themselves and their business scheme to some of the defendants, at Myrtle, Miss.; that, when some of the defendants had consented to take a part in the enterprise, the body of the contract declared on was prepared by filling up a printed blank, or making a copy in writing of such a blank form, with the blanks duly filled, and was signed by, or already bore the signature of, the officer of the plaintiff company. In this body of the contract appeared the language, "Said building shall be constructed and equipped in substantial accordance with the specifications indorsed hereon." The specifications for the construction of the building and equipment were indorsed thereon, and just following these specifications appears the long sentence, the concluding line of which, separated from the rest of the sentence by a comma only, is the language, "there shall be no waiver of original and joint liability until the contract price is fully paid." As a preface to this contract and specifications, doubtless, then appeared, as it does now, the agreement to select a committee of one, who, at the expense of the plaintiff, was to visit the Elgin district, in Illinois, etc. Then, with this project for a contract and an incorporation of the subscribers,—an instrument which eminent judges have construed differently, and of which other eminent judges have said, "The question of the proper construction is one by no means free from difficulty" (Davis v. Shafer, 50 Fed. 764; Manu-

facturing Co. v. Barber, 51 Fed. 148; Id., 18 U. S. App. 476, 9 C. C. A. 79, and 60 Fed. 465),—the promoter or promoters obtained the signatures, to the aggregate number of 42, on a page or blank just under the signature of the officer of the plaintiff, and under the heading:

"Name of Subscribers.	No. of Shares.	Amount of Stock after Incorporation."
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Is it reasonable to suppose that the defendant M. S. Smith, who, under these circumstances, subscribed for one-quarter of one share (\$25), conceived the thought that he was promising to pay the plaintiff \$5,250, payable in cash when the factory is completed? It is clear to us that the minds of the subscribers did not meet the mind of the plaintiff on any such proposition as that. Dwelley v. Dwelley, 143 Mass. 509, 10 N. E. 468; Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888; Bish. Cont. § 575; Price v. Railroad Co., 18 Ind. 137; Frost v. Williams (S. D.) 50 N. W. 964; Davis v. Belford, 70 Mich. 120, 37 N. W. 919; Gibbons v. Grinsel (Wis.) 48 N. W. 255.

We conclude that the circuit court rightly sustained the demurrer on the first ground, and dismissed the declaration for want of jurisdiction. The judgment of the circuit court is affirmed

UNITED STATES ex rel. BAER v. CITY OF KEY WEST.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1896.)

No. 530.

1. MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS—MANDAMUS TO LEVY TAX.

The act of May 25, 1895, supplementary to the charter of the city of Key West, Fla., and "to extend the powers of said municipality," which gives the city power to make special levies of taxes for payment of interest on debt, and for sinking fund, removes the limit previously placed by charter upon the city's power to tax, so far as to permit it to levy a tax sufficient to pay a debt lawfully contracted; and the city may be compelled by mandamus to levy a tax, either in a single year or within a reasonable number of years, in the court's discretion, to pay a judgment against it.

2. SAME.

When a municipality has an option to pay a debt, either by levying a tax or by issuing bonds, a mandamus recognizing the option, and requiring it to do one or the other, would not be bad for uncertainty; but, if such municipality has expressly refused to issue bonds, it is not error, when a mandamus is issued, to make it require absolutely the levy of a tax.

In Error to the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee and C. D. Rinehart, for plaintiff in error.

J. M. Phipps, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. George J. Baer, a citizen of Missouri, the relator in this cause, holds a judgment against the city

of Key West for a large amount, on which he has run execution, and the execution has been returned nulla bona. On June 17, 1895, he showed this fact, by proper pleading, to the circuit court for the Southern district of Florida, and further showed that the city of Key West had no exigible property, and that he was unable to enforce his judgment by ordinary process. He showed that the city had the power to levy a tax for the payment of his judgment, and that it had the power to issue bonds from the proceeds of the sale of which it could pay this judgment, but that it had refused, and still refuses, to do either one or the other. He prayed that a writ of mandamus should issue requiring the city to levy a tax sufficient to pay his judgment, or to issue bonds sufficient to pay it. In due course of that proceeding, the application came to a hearing and decree in the circuit court, and a peremptory mandamus was issued, directed to James A. Waddell, mayor, and to B. B. Whalton, G. B. Patterson, John T. Sawyer, George S. Waite, George Hudson, J. J. Warren, W. S. Delaney, G. Ayala, and M. S. Moreno, commissioners of the city of Key West, commanding and enjoining the said board to levy, assess, and collect a tax upon the property, real and personal, subject to taxation by said city, and not less than $4\frac{1}{2}$ mills upon each dollar of said assessed valuation of said property, for the year ending December 31, 1896, and for each and every year thereafter, for the purpose of paying the judgment in the above-entitled cause, and costs and interest thereon accruing, and to apply such moneys to the payment thereof until the full amount of said judgment, interest, and costs has been paid, or until the further order of this court in the premises. From this judgment the relator prosecutes this writ of error, and assigns the following grounds:

(1) The court below erred in its order for a peremptory writ of mandamus, and in the said writ, in not commanding the defendant, the city of Key West, to assess, levy, and collect a tax for more than four and one-half mills upon the assessed valuation of the property taxable by the said city for the purpose of paying the judgment stated in the said writ, and the interest accrued and accruing thereon, on the ground that under the laws of the state of Florida, referred to in the said writ and other laws of the state, the said city is not restricted and limited to a tax of four and one-half mills upon said property for the purpose of paying the said judgment and the interest thereon.

(2) The court below erred in its order of July 3, 1896, denying the plaintiff's action, to increase the rate of taxation above four and one-half mills, for the purpose of paying said judgment and interest, upon the grounds stated in the above first assignment of error.

(3) The court below erred in its order for a peremptory writ of mandamus, and in its order of July 3, 1896, denying plaintiff's motion filed July 2, 1896, and in issuing said writ, in not requiring the mandatory part of the said writ to be in the alternative, to wit, to assess, levy, and collect a tax sufficient to pay the said judgment, or to sell bonds described in the said writ, and apply the proceeds thereof to pay the said judgment, interest, and cost thereon, on the ground that the said city had the right and the authority to sell such bonds, and apply the proceeds to pay said judgment.

Under the order of April 6, 1896, and the said peremptory writ, it will require from thirty to forty years to pay the judgment and interest thereon by taxation, at the rate of four and one-half mills per annum, and this is a denial of justice, and a deprivation of the relator's rights, without due process of law; and this is assigned as error.

On the 4th of February, 1869, the legislature of Florida passed a general act for the incorporation of cities and towns, in which it provided on the subject of taxation:

That the city or town council shall have power to raise by tax and assessment upon all real and personal estate, and by any other constitutional method of taxation, within the corporation, any and all sums of money that may be required for the use and good government of the city or town, and for the carrying out the powers, rights, and duties herein granted and imposed, and to enforce the receipt and collection thereof in the same manner as the assessments and taxes of the state are collected. But in no case shall the said city or town council have power to make discrimination in the assessment of taxes.

On March 8, 1877, there was passed an amendment to the act of February 4, 1869, which provided on the subject of taxation:

The valuation of property, as made by the officers of this state in each year for the purpose of taxation, shall be adopted by all municipal governments as the true valuation of the property within their respective corporations, and the total taxes levied upon property by any municipal corporation, in any one year, shall not exceed one per cent. upon such state valuation, but this provision is not to be so construed as to prevent the said corporation from levying sufficient tax to meet the payment of interest on its outstanding bonds, and to provide for the payment of the principal thereof when the same shall become due.

This last provision is also embodied in an amendment to the act of February 4, 1869, which was passed March 5, 1883. Sess. Laws, 1883, pp. 86, 87, § 2.

On May 16, 1889, the legislature passed "An act to establish the municipality of Key West, provide for its government and prescribe its jurisdiction and powers." The fourth section of that act is as follows:

That the commissioners aforesaid, and such officers as may be appointed, and the inhabitants within the limits of the city, as herein defined, shall be vested with all the powers and authority, rights and privileges, and charged with all the duties which are conferred on the aldermen and other officers and the inhabitants, under and by virtue of the act to provide for the incorporation of cities and towns, approved 4th February, A. D. 1869, chapter 1688, and the amendments thereto, and other acts conferring power upon municipal corporations, except as hereinafter provided, and as may be inconsistent with this act, and all ordinances in force governing the defunct city of Key West shall remain in force and extent over and embrace the boundaries of the present city of Key West, as is provided by this act, until altered or repealed by the commissioners thereof.

And the sixth section is as follows:

The commissioners aforesaid shall have power to employ a competent engineer, whose compensation shall be fixed by a majority of the board, who shall make a thorough survey of the city and draw plans and specifications for the proper grading, and grading and paving of the streets and sidewalks of said city, with a view of inaugurating a perfect system of surface drainage and underground sewerage, and in order to carry out such system of drainage, both surface and underground, and to have said streets graded, and graded and paved in accordance therewith, said commissioners shall have power and authority to borrow a sum or money not to exceed five hundred thousand dollars, at a rate of interest not to exceed five per centum per annum, for a period of thirty years; and said commissioners are hereby authorized to issue bonds for said sum of money, payable by said city of Key West at the end of thirty years, bearing said rate of interest, payable annually, but redeemable after ten years from their date at the option of said city; and in order to meet the interest upon said bonds and create a sinking fund for their ultimate redemption, the commissioners aforesaid shall have power and are hereby required to levy a special tax of not exceeding seven (7) mills upon the dollar upon

all property in said city, which special tax shall be exclusively used for the purpose of paying the interest upon the bonds aforesaid and in creating a sinking fund for their redemption.

And the sixteenth section is as follows:

All property shall be taxed as is provided in section 5, article ix. of the constitution, and the taxes to be levied upon such property in any one year shall not exceed five mills upon the dollar for general revenue tax, three mills on the dollar for waterworks, water supply and fire protection, and seven mills to pay the interest and create a sinking fund for the payment of the interest upon and the final redemption of the bonds issued under and by virtue of section 6 of this act.

Sess. Laws 1889, pp. 219, 220, 222.

The judge of the circuit court refers to an act of 1891 (not accessible to us), which permitted to be levied for general revenue 5 mills; for waterworks and fire protection, $3\frac{1}{2}$ mills; and, for interest and sinking fund on bonds, 7 mills, and no more.

On May 25, 1895, the legislature passed "An act supplementary to an act to establish the municipality of Key West, provide for its government, and prescribe its jurisdiction and powers, approved May 16, 1889, and to extend the powers of said municipality," which contains this provision:

As soon as practicable, after such approval and adoption of the assessment roll, the city commissioners shall determine the amount and fix the rate of taxation, and make the annual tax levies of the current year. Such levies shall not exceed, in any year, for ordinary municipal purposes, a higher rate of tax than one per cent. of the assessed value of the taxable property within the corporate limits of said city; the word "ordinary" is to embrace all expenses for police, streets, gas, and other illuminating material, and all other purposes strictly municipal; but special levies may be made for payment of interest on debt, for sinking fund and also for a special tax not exceeding one-half of one per cent. on the city valuation for water works and fire protection.

Sess. Laws 1895, pp. 276, 277.

When such a corporation as the city of Key West is created, the power of taxation is vested in it as an essential attribute for all of the purposes of its existence, unless its exercise be in express terms prohibited. *U. S. v. New Orleans*, 98 U. S. 393; *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 20 Wall. 660. Where special or general authority is given to incur debt, full power to tax to an amount sufficient to meet both principal and interest at maturity may be inferred, where there is nothing expressed in the act to the contrary. If, in connection with the authority to create the debt, there is a special provision naming a limited rate of taxation for its discharge, the case is brought directly within the maxim, "*Expressio unius est exclusio alterius*." *U. S. v. Macon Co.*, 99 U. S. 590. Sections 4, 6, and 16 in the act of May 16, 1889, must be construed together, and the limitation imposed by the amendments of 1877 and 1883, referred to in section 4, restrains the power to tax given by that section, within any one year, to 1 per cent. on the value of property, as shown by the assessment roll, except as provided in section 6, or limited in section 16. Section 6 provides for the proper grading, and grading and paving the streets and sidewalks with a view of inaugurating a perfect system of surface drainage and underground sewerage; and, in order to carry out such system, the city is authorized to borrow not ex-

ceeding \$500,000, for a period of 30 years, and issue its bonds for the amount borrowed, and to levy a special tax not to exceed 7 mills on the dollar upon all property in the city. The original grant of power to levy taxes sufficient to meet the legal requirements of the city is clearly limited by the act of 1877, and the limitation is continued in the act of 1883, and preserved by the reference to those amendments in section 4 of the act of 1889, and further limited in section 16. The special purpose provided for in section 6 of the act last named is circumscribed by the limit of the debt to be incurred and the limit put on the tax to be imposed to pay it. Therefore, if not affected by the subsequent legislation, it is clear to us that the relator cannot complain of the judgment he has brought up for our review.

The record shows that the judgment for debt which the relator holds against the respondent was rendered March 19, 1894, for the sum of \$114,523.71. That judgment was brought by writ of error to this court, and was affirmed January 29, 1895, and a motion for rehearing was refused February 20, 1895. As shown above, the legislature, on May 25, 1895, passed the act to extend the powers of the municipality of Key West, in which the 1 per cent. limit for taxes in any one year for ordinary purposes is preserved, and the ordinary purposes defined, "but special levies may be made for payment of interest on debt, for sinking fund," and also for a special tax not exceeding one-half of 1 per cent. for waterworks and fire protection. The circuit court held that the special levies for interest on debt and for sinking fund, authorized by this act of 1895, should be construed to mean that such special levies, to the extent only that they had been by the previous act authorized, should still be allowed. The declared purpose of the act is to extend the powers of the municipality. The power to tax is the vital power of such a body. It is true that the section does extend this power in other named particulars, and limits the rate as to those others, while in this no extent or limit of the authorized rate is literally expressed. It is to be observed that the language is not "interest on bonds and for sinking fund," while section 6 of the act of 1889 clearly authorized and contemplated a bonded debt, and the special tax in that section mentioned was to be used exclusively "for the purpose of paying the interest upon the bonds aforesaid, and in creating a sinking fund for their redemption," and section 16 made special express reference to the bonds. What the legislature had in hand in considering the supplemental act of 1895 was the then condition of the affairs of the municipality, and it must have been advised of the state of its indebtedness. The omission, therefore, of express reference to the bonded indebtedness, and the use of the more comprehensive term, must import a meaning. It is settled that the provision theretofore made for the issuance of bonds, and for their payment, could not be so changed as to prevent the enforcement of those provisions as to all such bonds as were outstanding. It is not against justice or good conscience that a municipal corporation should be given power to pay, in the only way it can pay, a debt which it had been given power

to lawfully contract. The relator's judgment debt springs out of a contract which the judgment conclusively evidences the city had lawfully made with him. We therefore conclude that, under the act of 1895, a special levy may be made by the city of Key West for payment of interest on its debt, and for sinking fund, to meet the principal of its debt, and that it is thus charged with the duty to pay the relator's judgment, which duty can be enforced by mandamus, the necessary substitute for an execution in such cases.

No authority to issue bonds has been shown except that given in section 6 of the act of 1889, and that authority is to issue bonds for a specified purpose. For some reason, the relator in this case has not, by his pleadings, opened the facts which attended and supported his judgment, further than to say that it was recovered in a suit for the breach of a valid contract made with him by the city. The circuit court whose judgment we are now reviewing rendered the judgment for debt, which the relator is unable to have executed by ordinary process, and which was affirmed by this court. It is suggested in argument that the circuit court and this court have, therefore, judicial knowledge of the facts; and it is implied, rather than urged or even clearly expressed, that the relator's judgment is for a part of the debt which the city was specially authorized to incur, and for which it could issue bonds. However this may be, it is clear to us that the relator, while in his pleadings he expresses his willingness to accept bonds at the minimum rate given in the statute, does not make, or claim to make, a case that would warrant the court in compelling the issuance of bonds. Mandamus is a very direct peremptory proceeding. Its office, when it applies, is to enforce a specific duty. In a case like this, its office is to enforce the payment of the debt. The payment of the debt will discharge the peremptory mandamus to levy a special tax for that purpose, just as the payment of any ordinary judgment will discharge the levy of an execution. Where the corporation debtor has an option to pay in money, or to fund in bonds, or to pay by sale of bonds, it should have an opportunity to exercise that option; and a writ of mandamus that recognizes that option, and commands the levy of a special tax to meet the debt, or the satisfaction of it by the sale of bonds, or other lawful means, would not be bad for uncertainty, or set aside for being alternative. In this case, however, the respondent not only does not claim such an option, but has already expressly declined to issue bonds for this debt, or for obtaining money to pay it, and insists that it has no power to do so. It was not error, therefore, to make the mandamus absolute.

As the relator's debt is all mature, and both interest and principal calling for immediate payment, which the city is in duty bound to make, and has lawful authority to raise by levy of a special tax, it would not be error in the court to require that the tax should be sufficient to meet the whole debt from the first year's assessment and collection; but out of regard to the nature of the parties, and because even warranted levies may prove unnecessarily

burdensome, the court may exercise a sound discretion in the matter, and require full satisfaction to be made by a levy for one year, or distribute the burden over a reasonable number of years. *East St. Louis v. Amy*, 120 U. S. 600, 605, 7 Sup. Ct. 739; *Commissioners v. Loague*, 129 U. S. 493, 505, 9 Sup. Ct. 327.

It is ordered that the judgment of the circuit court is reversed, and this cause is remanded to that court, to be proceeded with in accordance with the views expressed in this opinion.

CARPER v. RECEIVERS OF NORFOLK & W. R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 185.

1. MASTER AND SERVANT—RAILROAD COMPANIES—STRUCTURE ON RIGHT OF WAY—INJURY TO EMPLOYEE.

A railroad company is not responsible for the negligent construction of a cattle pen, built and used by a shipper over the road on land adjoining the right of way, although unintentionally, and without the knowledge of the railroad company, it has been extended a short distance on to the right of way; nor can such company be held liable to one of its employes, injured in an accident resulting from the escape of cattle from such pen, on the ground that its duty to provide a safe place for such employé to work required it to see that the cattle pen was safely constructed.

2. RAILROAD COMPANIES—FENCING RIGHT OF WAY—INJURY TO EMPLOYEE.

The duty imposed upon railroad companies by the Virginia statute (Code, c. 52, §§ 1257-1264), to fence their right of way "through all inclosed lands or lots," is a duty only to the owners of stock on such inclosed lands and not to the railroad employes; and the violation of the statute is no ground of recovery for the death of an employé killed by the derailling of his train by cattle which came upon the tracks at a place where the right of way through inclosed lands was not fenced.

In Error to the Circuit Court of the United States for the Western District of Virginia.

J. C. Wysor and B. L. Jordan, for plaintiff in error.

W. H. Bolling, W. L. Stanley, and R. M. Page, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The plaintiff in error, also plaintiff below, on the 10th day of January, 1896, instituted an action of trespass on the case in the circuit court of Wythe county, Va., against the defendants below, claiming \$10,000 damages. By proceedings duly taken the suit was removed to the circuit court of the United States for the Western district of Virginia. The declaration contained three counts, the first alleging that Frederick J. Kimball and Henry Fink, receivers of the Norfolk & Western Railroad Company, were, as such, operating said railroad at the time of the grievances therein set forth, and that one Edmund Newson was at said time employed by them as a brakeman on a freight train then run by them over the road, and that while so employed, in the year 1895,

through the gross negligence of the defendants, he was mangled, wounded, and injured, from which he instantly died. The negligence alleged in said count was, in substance, as follows: That said railway, in passing through the county of Wythe, in the state of Virginia, ran through the inclosed lands of one J. P. Sheffey, then leased to one George L. Carter, and that it was the duty of said Norfolk & Western Railroad Company, under the requirements of sections 1258 and 1259 of the Code of Virginia, to erect along on both sides of its roadbed, at the point where the grievances complained of were committed, on said Sheffey land, lawful fences, and keep the same in good order, but that the defendants failed in their said duty, and neglected to erect and keep in repair such fences; and also that they allowed said Carter to erect and use a cattle pen on their said roadbed for the purpose of loading cattle upon the cars, and shipping them over said railroad; and that they negligently allowed him to construct such pen in a faulty manner, and of inferior material, whereby it was entirely insufficient to restrain and keep within its bounds the large and strong cattle that Carter was in the habit of placing therein; and that on the night of ———, in 1895, a number of such cattle escaped out of said pen into the inclosed lands mentioned, and, as there were no fences as required by law, such cattle strayed upon the tracks of the railroad, and the freight train upon which Newsom was employed as such brakeman ran into the cattle, and was derailed, the cars being broken, and the said intestate so injured and killed. The second count alleges the faulty construction of said cattle pen on said roadbed by Carter with the assent and knowledge of the defendants, the placing of cattle therein by Carter with like assent and knowledge on the part of defendants, the employment of the said Newsom, the escape of the cattle, and the derailment of the train which caused the death of the intestate. The third count is the same as the second, with the additional allegations that the defendants failed to erect a good and sufficient cattle pen in which to confine Carter's cattle; and that they failed to instruct their servants in charge of said train to run it at a moderate rate of speed by said insufficient pen, so as to avoid frightening said cattle, and causing them to escape therefrom; and that the train was carelessly and negligently run, so that it could not be stopped from running into said cattle after they had so broken out of said pen; and that it was negligence in defendants not to have a watchman stationed at such point whereby the servants on said train could have been duly notified of said danger; and that the deceased, relying upon defendants to do their duty in giving all proper orders as to the running of their trains, entered their employment as such brakeman, and, while so employed, such train was so thrown from the track by the negligence of the defendants, to the plaintiff's damage as before mentioned. There was no demurrer to the declaration, but the plea of not guilty was filed, on which issue was joined. The case was tried by a jury, which rendered a verdict for the defendants. The plaintiff moved the court to set the verdict aside, as contrary to law and the evidence; but the court overruled the motion, and entered judgment

for the defendants, to which the writ of error we are now considering was sued out. On the trial of the cause, to the rulings of the court below the plaintiff asked for and had certified several separate bills of exceptions, on which the assignments of error relied upon are based.

It is insisted that the court below erred in giving the following instructions, asked for by the defendants, viz.:

"No. 2. If the jury find from the evidence that the cattle pen in question was not constructed by defendants; that the same was constructed by the occupant of the farm in question; that it was intended to be erected upon the lands adjoining defendant's right of way; and that, by mistake, the inclosure of said pen extended for a short distance on the right of way of defendants,—then the defendants were not responsible for any fault or negligence in the construction and use of said pen, and there can be no recovery in this action upon the ground of the improper or negligent construction of said cattle pen.

"No. 3. The court instructs the jury that the duty imposed by the statute upon the railroad companies to fence their railroad is a duty only to the public, and to the owner of the cattle of the inclosed lots of lands through which the railroad runs, and an employé of the company receiving a personal injury in an accident consequent upon a failure to maintain proper fences cannot recover damages of the railroad company for such injury, without showing negligence other than the failure to fence; and unless the jury should believe from the evidence that the plaintiff in this case has shown that his intestate, Edmund Newsom, was killed through some other negligent act of the defendants, their agents or servants, than the neglect to fence their roadbed at this point, they will find for the defendants, although they may believe from the evidence that the defendants were bound under the statute to fence their roadbed at this point, and had failed and neglected to fence the same.

"No. 4. The court instructs the jury that all evidence bearing upon the question as to inclosure of the lands through which the defendants' line ran is irrelevant to the case under consideration, in view of the instructions given by the court on that question."

Considering the assignments of error in the order of the instructions on which they are founded, we have first the one relating to the cattle pen built by George L. Carter, on the property under his control, adjoining the right of way of the railroad company, given as instruction No. 2. It appears from the evidence before the jury at the time the instruction complained of was given (which we must consider in order to properly pass upon the question of error insisted upon) that Carter, who had the land on which the pen was located in his possession, under a lease made by the owner thereof, in constructing the fence which formed the pen, by mistake built it for a short distance at one corner over on the land owned by the railroad company, without the knowledge of any of the agents or servants of said company. That it was unintentionally so located and built was, we think, clearly shown by the evidence; and that neither Carter himself, nor any employé of the company, was aware that it had been so constructed, until after the accident which resulted in the death of the plaintiff's intestate, when a survey then made disclosed it, is, we think, equally clear. If there was negligence in this particular, it was on the part of Carter, and the effort to hold the railroad company responsible for the same was, in the light of the testimony, under the proper instructions of the court, found to be without merit by the jury, a circumstance that we now allude to only for the purpose of showing the character of the tes-

timony before the jury at the time the court gave the instructions now being considered. The plaintiff in error insists that it was the duty of the railroad company to provide and maintain a safe roadway, and a safe place to work at, as well as safe instruments to work with; that in permitting Carter to use a defective pen, and by hauling cattle thereto, and allowing the same to be unloaded therein, the company failed in its duty to its employé, and rendered itself liable for the damages caused thereby. This is, we think, an entire misconception of the well-established principle referred to, of the duty of the employer to the employed, in the particulars mentioned; and the endeavor to apply the same to this case, in the absence of proof that the roadbed was defective, the cars unsafe, or the train unskillfully or negligently run, is, though ingeniously presented, absolutely untenable; and to hold these defendants liable for Carter's negligence, if negligent he was, would be to ignore all the authorities, and disregard the undisputed facts, as developed on the trial of this cause in the court below. The instruction given was carefully drawn, and left all questions concerning the negligence of the defendants, so far as the roadbed, cars, train, and management of the same were concerned, free for the determination of the jury, and withdrew from it simply the matter of the improper or negligent construction of the cattle pen, provided the jury found that the defendants did not construct it. The instruction asked for by the plaintiff below on this point did not correctly state the law of the case, and was properly refused. The instruction given was, under the facts shown, entirely proper, and the assignment of error relating thereto is without merit.

The assignments of error next to be disposed of refer to the instruction given by the court below, at the request of the defendants, relating to the sections of the Code of Virginia concerning the duty imposed upon railroad companies to erect fences along certain portions of their roadbed. The legislation bearing on that question is found in chapter 52, Code Va. 1887, which is here quoted in full, as follows:

"Chapter LII.

"Telegraph Offices to be Established by Railroad Companies; of Fencing Railroads.

"Sec. 1257. Railroad Companies to Establish and Maintain Telegraph Offices at Depots; Duties of Operators and Train Dispatchers.—Every railroad company doing business in this state shall establish and maintain along its line, at depots or stations not more than ten miles apart, telegraphic offices to be operated by competent persons in the employ of such company: provided however, that the board of public works may grant such company, in any special case, permission to have its telegraphic offices at a distance from each other greater than ten but not more than fifteen miles. It shall be the duty of every such operator to telegraph the arrival and departure of every train so soon as it shall leave the depot or station, to the train dispatcher or person regulating the running of trains, and if there be no such person, then to the nearest telegraphic office in the direction in which the train is going. The person receiving the telegram shall forthwith give such order or notification by telegraph as may be necessary to prevent any collision of trains. Every railroad company failing to comply with this section shall be fined not less than fifty nor more than five hundred dollars for each offence, and any such failure for three months shall be deemed a separate offence.

"Sec. 1258. To Enclose Roadbeds with Fences; Cattle Guards.—Every such company shall cause to be erected along its line and on both sides of its roadbed,

through all enclosed lands or lots, lawful fences as defined in section two thousand and thirty-eight, which may be made of timber or wire, or of both, and shall keep the same in proper repair, and with which the owners of adjoining lands may connect their fences at such places as they may deem proper. In erecting such fences the company shall not obstruct any private crossing, but on each side thereof, across its roadbed, shall construct and keep in good order, sufficient cattle guards with which its fences shall be connected. Such cattle guards may be dispensed with by consent of the owners of such private crossings, the company, in lieu of cattle guards, erecting and keeping in good order sufficient gates.

"Sec. 1259. Qualification of Preceding Section.—The preceding section, so far as it relates to fencing, shall not apply to any part of a railroad located within the corporate limits of a city or town, nor within an unincorporated town for the distance of one-quarter of a mile either way from the company's depot, nor to any part of a railroad at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock at such place; nor shall it apply to a company which has compensated the owner for making and keeping in repair the necessary fencing, but the burden of proving such compensation shall be on the company, and no report of any commissioners shall be received as proof thereof unless it shall plainly appear on the face of the report, or from other evidence in connection therewith, that an estimate was made by such commissioners for the fencing and the expense for the same entered into and constituted a part of the damages reported and actually paid.

"Sec. 1260. When Companies not Liable for Injuries.—No railroad company shall be liable for any injury to any person or property on such part of its track as may be enclosed according to the provisions of this chapter, unless it be made to appear that the person or property was thereon by express permission of the company, or through the negligence of its employees, agents, or servants; or unless the injury be willful or the result of gross negligence on the part of the company, its servants, agents, or employees.

"Sec. 1261. When Unnecessary to Prove Negligence of Company.—In any action or suit against a railroad company for injury to any property on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants.

"Sec. 1262. Construction of Cattle-Guards.—It shall be the duty of every railroad company, whose road passes through any enclosed lands in this state, to construct and keep in good order, cattle-guards sufficient to prevent the passage of stock of every kind over such land, at any point where a fence may be necessary or proper, whether it be a division fence between contiguous farms or between different parcels or tracts belonging to the same person, or a fence along a public highway. Such cattle-guards shall be constructed on request of the land owner, in writing, made to any section master or employee of the company having charge or supervision of the road at that point. If the company refuse or fail, for ten days after such request, to construct the cattle-guard at the place designated, the owner having given ten days' notice in writing to such section-master or employee, may apply to the county court of such county for the appointment of three disinterested freeholders, whose duty it shall be to go on the land and determine whether the proposed cattle-guard shall be constructed. Their decision shall be in writing, and shall be forthwith returned to and filed in the clerk's office of the county court of such county. If such decision be that the cattle-guard ought to be constructed, the company shall within twenty days thereafter construct the same. Upon its failure so to do, it shall pay the land owner five dollars for every day of such failure.

"Sec. 1263. Their Discontinuance.—Every railroad company after erecting the fences mentioned in section twelve hundred and fifty-eight may discontinue all cattle-guards enclosed by such fences, except such as are provided for in sections twelve hundred and fifty-eight and twelve hundred and sixty-two, and in lieu thereof the owners of contiguous lands may connect their fences with those of the company at such place or places as they may desire.

"Sec. 1264. Spark-Arresters.—No railroad company doing business in this state shall run on its road any locomotive not having an approved spark-arrester. Every company violating the provisions of this section shall be fined ten dollars for each offence, and each day of running such locomotive shall be deemed a separate offence."

The plaintiff in error insists that, under this legislation, a railroad company in Virginia, if it has failed to have its roadbed fenced as required therein, is liable to one of its employes for an injury done him, consequent upon such failure to fence; while the defendants in error contend that, under said sections, a railroad company is only liable for damages done to stock, caused by the failure of the railroad company to fence the roadbed along its line, where the same runs through inclosed lands and lots, and that the company is not under such circumstances liable for injuries done to employes or other such persons, because of such failure to fence. Plaintiff in error claims that the legislation in question was enacted with the object of protecting passengers and employes on the trains of railroad companies, as well as for the purpose of providing compensation to the owners for damages to their stock caused by such railroad companies, because of their failure to erect and keep in repair the fences required thereby.

In the first place, it will be conceded that, prior to the passage of the legislation quoted, railroad companies in Virginia were not required to fence their roadbeds, and that at common law such companies are not bound to provide fences for the purpose of keeping stock off of their tracks, and also that, as at common law the owner of animals is bound to restrain them, railroad companies owe no duty to such owners when their stock strays upon the tracks of such companies, except to use ordinary or reasonable care to avoid injury to said stock after the employes of the company have discovered, or by the use of reasonable diligence could have discovered, the same upon or near the tracks of the company. *Whart. Neg.* § 886; *Railway Co. v. Elledge*, 1 C. C. A. 295, 49 Fed. 356; *Cooley, Torts*, 654, and cases cited; *Shear. & R. Neg.* § 315; *Ward v. Railroad Co.*, 4 Fed. 862.

Before this law was passed, railroad companies were liable, as they are now, to passengers whom they had agreed for hire to safely transport, for any injury occasioned by the negligence or want of ordinary care on the part of the servants of said companies; and they were then, and are now, independent of such legislation, liable to their employes for injuries occasioned by such negligence, as to which such servant had not contributed, save only such risks as are incident to and were assumed by such employe at the time of his employment. What additional remedy, if any, is given by this statute to the passenger or employe upon the railroad trains in Virginia, on account of injuries caused by the failure of the railroad company to fence its roadbed? We are unable to find any. So far as the owner of the stock is concerned, the remedy is plain and adequate. Had the legislature intended to provide an additional liability on railroad companies, for injuries to persons, brought about by the failure of such companies to construct fences at the places designated in said statute, it would certainly, concerning a matter of such universal importance, have used apt and unequivocal language. Indeed, we think it quite clear from a careful study of the legislation in question—from an examination of

the original act, its title, and the recitals in the first section thereof, in the nature of a preamble—that the legislature did not intend to make any change of the common law, other than that relating to the compensation to the owners of the stock killed or injured on the tracks of railroads, not fenced as required by said statute; and, to hold otherwise, we must give to the words used a meaning quite different from that usually accorded them. It is evident that the railroad company is only required to fence along its line when the same passes through inclosed land, dividing it, and leaving part of such land of one owner on both sides of the roadbed. In such cases, the owner having already inclosed his land by lawful fences around its exterior limits, and finding his property, by virtue of the roadbed, virtually thrown open to the commons, his stock liable to stray away or be injured, or the stock of others to enter upon his premises and do him damage, the legislature says to him that the railroad company shall erect and keep in repair lawful fences along its line through his land, except that it shall not be required so to do along that part of its road located within the corporate limits of a city or town, nor within an unincorporated town for the distance of one-quarter of a mile either way from the company's depot, nor at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock, nor at any place if the company has compensated the owner of the adjoining inclosed land, through which the railroad runs, for making and keeping in repair said fencing. And so it follows, as we understand the said statute, that a railroad company can fully comply with the law, and yet, in fact, not construct a single panel of fence along its entire line. Surely, this could not be if the legislative intent was to protect the public, the passenger, and employé, as well as to guard the stock and property on the inclosed land through which the road passes. If the public and those on the trains—passengers and others—were to have additional safety provided for it and them by the enactment, why was it that the fencing was not required along the entire line? Why was one mile of the line to be fenced, provided the owner of the land through which it passed did not contract to dispense with it, and the next 10 miles permitted to be without a fence, for the reason that the land through which such part of the line passed was not inclosed? The inference is quite irresistible that the legislative mind was not considering the general public, and that it did not contemplate greater safety for passengers and employés. If the legislative intent was to change the common law in the manner referred to, as claimed by the plaintiff in error, the language employed was extremely unfortunate, and the actual result attained the most lamentable failure that has come to our attention in the history of legislative effort.

The decisions of other courts have been cited by counsel for plaintiff in error, which are seemingly in conflict with the conclusion we have reached, but, in fact, they are not, as a close examination of the same will demonstrate: *Dickson v. Railway Co.*, 124 Mo. 140, 27 S. W. 476; *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051; *Briggs v. Railroad Co.*, 111 Mo. 173, 20 S. W. 32. The Missouri and

New York statutes are radically different from the Virginia law now under consideration, and the courts of last resort in those states have held that it is the absolute and unqualified duty of railroad companies under said acts to fence the entire line of their roads. The other cases cited by the plaintiff in error refer to local statutes containing provisions not found in the sections of the Virginia Code that we have just passed upon, and consequently they can have but little weight as authority in disposing of questions raised by this writ of error.

We conclude that the instruction complained of, so far as the interests of the plaintiff's intestate were concerned, as an employé of the defendants in error, correctly interpreted to the jury the legislation to which it referred, and that the court below did not err in giving it. The rights of the deceased employé were duly guarded, and all matters pertaining to the negligence of the defendants, on all other grounds than the failure to fence, were still left for the consideration and determination of the jury. The irrelevant matter in said instruction contained was in part eliminated by the instruction afterwards given (as No. 4), in giving which it follows as a matter of course from what we have said that the court below did not err.

Deciding the questions raised by the assignments of error so far considered as we have, it becomes unnecessary, and, as the case is not to go back to the court below for a retrial, also improper, for us to dispose of the other points discussed by counsel, referring to the question of boundary, inclosure, and contributory negligence. We should not pass upon the law relating to the risks assumed by the plaintiff in error's intestate when he accepted employment of the defendants below, for the reason that neither the case made by the declaration, nor the points suggested by the assignments in error, will justify us in doing so, although counsel deemed it proper to argue the same. We must confine ourselves to the case as made by the pleadings, and disclosed by the record. In any view of the case justified by the evidence (all of which we have carefully considered), in connection with the instructions given and refused, and with reference to the pleadings, we fail to see that the plaintiff below has been prejudiced in any manner by the judgment complained of. In our opinion, a peremptory instruction by the court, directing a verdict for the defendants below, would, at least, not have been improper. We find no error, and the judgment is affirmed.

BURNHAM et al. v. NORTH CHICAGO ST. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1897.)

No. 349.

TRIAL TO THE COURT—AGREED STATEMENT—JUDGMENT—REVIEW ON ERROR.

When a case is submitted upon a stipulation as to facts, which is mainly a statement of evidence, and not of the ultimate or issuable facts, and the court thereupon makes neither a general finding nor a special finding of facts, but merely finds that the facts are as set forth in the agreed statement, a judg-

ment rendered thereon is invalid; nor can the appellate court, in reviewing such judgment, draw the inference of fact from the admitted evidence, however plain such inference may be.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Norman Williams, Charles S. Holt, and Arthur D. Wheeler, for plaintiffs in error.

John A. Rose, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The action in this case is in assumpsit; the plea, nonassumpsit. The special count in the declaration charges that at the request of the defendant in error, the North Chicago Street-Railway Company, the plaintiffs in error constructed, and delivered in Chicago, a steam tramway motor, upon the promise of the defendant to pay therefor, when requested, a sum equal to the cost of construction, estimated at the regular rate charged by the plaintiffs for similar work, and that on that basis the machine was worth, and did actually cost, \$10,000. A docket entry shows that, the cause coming on to be heard, the parties, by written stipulation, waived the jury, and submitted the cause for trial by the court "as a case stated upon an agreed statement of facts, which statement and stipulation are as follows." The stipulation set out is not in exact accord with the entry. It is "that a jury shall be, and is hereby, waived, and said cause submitted to the court for trial upon the foregoing statement of facts," and that "for the purpose of said trial the said statement shall be considered by the court to be in evidence, and as absolutely true." Another entry states that "the court, having considered, and being now fully advised, finds the defendant not guilty"; but, as such a finding is not responsive to the issue in assumpsit, it may be disregarded. It is shown by a bill of exceptions, in which the agreed statement of facts is set out, that the court, after hearing counsel, declared certain propositions of law, and refused others, which, in the view we take of the case, need not be stated, except the following: "The court further finds and holds the facts to be those set forth in the agreed statement thereof filed herein, and shown above, upon which agreed statement trial was had"; "and thereupon the court ruled that, upon the agreed facts in the case stated, the plaintiffs were not entitled to judgment against the defendants"; and "that the defendant was entitled, in law, upon said agreed facts in the case stated, to a judgment against the plaintiffs for its cost in the case incurred." Judgment to that effect was entered.

The assignment of error contains numerous specifications, the last of which only, that the court erred in giving judgment for the defendant, need be considered. It is evident that the case was submitted and tried upon a mistaken view of the so-called statement of facts, which in the main is a statement of evidence, and not of the ultimate or issuable facts. An agreed statement of facts,

it is well settled, may "be taken as the equivalent of a special finding of facts," presenting for review on writ of error only questions of law; but manifestly it is necessary that the ultimate facts be stated, and not evidence, merely, from which the facts to be established may be inferable. *Supervisors v. Kennicott*, 103 U. S. 554; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *Distilling & Cattle-Feeding Co. v. Gottschalk Co.*, 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609. The motor which the plaintiffs made for the defendant, it is admitted, was not constructed, in all respects, in conformity with the model agreed upon; but on behalf of the plaintiffs it is contended that the defendant, by the use made of the motor after delivery, and by declarations of intention in that respect, had elected to keep the motor, and that such election is deducible from the agreed statement as a conclusion of law. But the question, in our opinion, remains one of fact, or perhaps of mixed law and fact, in respect to which, as it is presented here, it is not competent for the court to declare a legal conclusion, strongly evident as, upon the facts and circumstances stated, the inference of fact may be deemed to be. It follows that the judgment rendered is invalid. It is supported neither by a general finding appropriate to the issue, nor by special finding, nor by an agreed statement of facts which can be regarded as equivalent to a special finding. The agreed statement probably contains sufficient evidence to enable a trial court to determine the disputed questions between the parties, either by a general or a special finding, but the finding that the facts are as set forth in the agreed statement is neither the one nor the other. The statement being one of evidence, the finding does not make it a statement of facts. To what extent, upon another trial, the parties shall be bound by the agreement as a statement of evidence, if that becomes a matter of dispute, will be a question for the circuit court. The judgment is reversed, and the case remanded, with direction to grant a new trial.

UNITED STATES v. FERGUSON.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. MONEY WRONGFULLY RETAINED BY FEDERAL OFFICER—CLAIM AGAINST UNITED STATES—STATUTE.

Money taken from one arrested for larceny from a post office was retained by the inspector under the erroneous supposition that it was the money stolen. *Held*, that an order by the prisoner to the inspector to pay it to a third person was not an assignment of a claim against the United States, within Rev. St. § 3477, requiring such assignments to be made in the presence of witnesses, and after the allowance of the claim.

2. SAME—RIGHT OF ACTION—ASSIGNMENT OF.

A written order to an officer to pay to a third party money belonging to the drawer, but retained by the officer without authority, is an assignment of the right of action to recover it.

3. REVIEW ON APPEAL—FINDINGS OF FACT.

Findings of fact will not be reviewed where the evidence is not in the record.

4. SAME—ASSIGNMENTS OF ERROR—SUFFICIENCY.

General assignments that the court erred in rendering judgment against the defendant, and in not rendering judgment in his favor, cannot be considered.

In Error to the District Court of the United States for the Northern District of New York.

Action by Frank C. Ferguson against the United States. Judgment for plaintiff (64 Fed. 88), and defendant appeals.

Wm. A. Poucher, U. S. Atty.

Ford & Ferguson, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and seeks to review a judgment for the plaintiff in a suit brought pursuant to the provisions of the act of congress of March 3, 1887, entitled, "An act to provide for the bringing of suits against the government of the United States." Conformably with section 7 of the act, the court below made and filed a written opinion setting forth the specific findings of fact and the conclusions of law involved in the case. There is no bill of exceptions, and none of the evidence or rulings of the court upon the trial are before us. The assignments of error are eight in number.

The suit was brought to recover a small sum of money (\$50.60) in the possession of the government, which had been received by the postmaster general of the United States from a post-office inspector. It appears from the findings of fact that the post-office inspector received the money, and afterwards forwarded it to the postmaster general, under the following circumstances: One Atwood had burglariously entered a post office and stolen postage stamps of the value of \$320.61, and money to the amount of \$50.60, belonging to the government. He was arrested the next day, and postage stamps of the value of \$127.30, and \$113.96 in money, were found upon his person. The stamps and money were turned over by the arresting officers to the post-office inspector in charge of the case. The inspector, apparently assuming that the money found upon Atwood's person was, to the extent of \$50.60, the stolen money, kept that amount in his possession pending the trial of Atwood. In fact, it was not the stolen money, or the proceeds of the stolen postage stamps. The plaintiff, a lawyer, was retained by Atwood to defend him upon the trial, and Atwood gave him a written order, directed to the inspector, for the payment of the \$50.60 in the hands of the inspector. The plaintiff presented this order to the inspector, but the latter refused to pay over the money. Thereafter Atwood was convicted of the burglary, and the inspector transmitted the money to the postmaster general. As a conclusion of law, the court found that the plaintiff was entitled to judgment for the sum of \$50.60, and interest thereon from the time of the demand and refusal.

The first and second assignments of error allege that the court erred in not finding that there was no legal and valid assignment of the money from Atwood to the plaintiff. It is argued in support of these assignments of error that the order given by Atwood

to the plaintiff was an assignment of a claim against the United States, and void by force of section 3477 of the Revised Statutes, which enacts that "all transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof." The obvious answer to this contention is that, when the money in the hands of the inspector was transferred by Atwood to the plaintiff, there was no claim against the United States. As was said in *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, the section "only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the court of claims. The section simply forbids the assignment of such claims before their allowance." At the time when the order was given the inspector had no authority, under the laws of the United States, or no color of authority, to take into his possession and assume to retain money belonging to Atwood, even though Atwood had stolen an equivalent sum of government moneys from a post office. It is not pretended that any statute, or any regulation of the postmaster general made pursuant to a statute, could sanction a transaction of that kind. So long as the money was in the hands of the inspector, or of his superior officer, the postmaster general, there was no claim against the United States, and only one against the officers of the government, who had transcended their authority, and made themselves individually liable for the consequences. No claim accrued against the government until it ratified the acts of these officers by receiving and retaining the money which had been taken from Atwood. Until then, the government could have repudiated their acts, and there would not have been the slightest foundation for an action against it. The order given by Atwood to the plaintiff, being for money then in the adverse possession of another, was but a transfer of a chose in action. It, however, operated as an assignment of his cause of action for the recovery of the money. *Hall v. Robinson*, 2 N. Y. 293; *Waldron v. Willard*, 17 N. Y. 467; *Sherman v. Elder*, 24 N. Y. 381. It is now generally the doctrine in this country that a cause of action for a conversion is assignable. See 2 Am. & Eng. Enc. Law (2d Ed.) p. 1021.

The third, fourth, fifth, and sixth assignments of error impugn some of the findings of fact made by the court. There being no bill of exceptions, we can only review errors apparent upon the record. As the evidence upon the trial is not before us, these findings cannot be reviewed.

The seventh assignment alleges as error that the court erred in rendering a judgment against the defendant; and the eighth, that the court erred in not rendering a judgment in favor of the defendant. These assignments do not comply with the rules, as they fail to point out any particular error asserted and intended to be urged. Whether they mean that a wrong result was reached because the facts were

erroneously decided, or because the court erred in applying the law to the facts, can only be conjectured. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Oswego Tp. v. Travelers' Ins. Co.*, 17 C. C. A. 77, 70 Fed. 225; *Doe v. Mining Co.*, 17 C. C. A. 190, 70 Fed. 455. As was said by the circuit court of appeals for the Seventh circuit in the first of these cases, "an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented." The court, at its option, may notice a plain error not assigned. A careful examination of the brief which has been submitted for the plaintiff in error fails to disclose any such error.

The judgment should be affirmed.

PRENTICE et al. v. UNITED STATES & C. A. S. S. CO. (two cases).

(District Court, S. D. New York. January 16, 1897.)

PRACTICE—GARNISHEE—STOCK SUBSCRIPTION—TRANSFER FROM DEFUNCT COMPANY.

In an action against a defunct company, a debtor to the defendant upon a stock-subscription note, was garnisheed. In reply to interrogatories he stated that a considerable sum was still owing by him on the note, but that the note had been transferred by the defendant company to a new company that took its assets. The garnishee was president of the defunct company. Upon motion that the garnishee be required to pay into court the unpaid amount of the note, or for other relief: *Held*, that the transfer by the defunct company was apparently void as against its creditors, and that the garnishee should pay the balance remaining due on the note, unless he elected to take a reference, on giving security for costs, to take further proofs of the facts, with further process and notice to the new company holding the note to appear thereon.

This was a libel in personam by Thomas Prentice and others, owners of the steamship *Burnley*, against the United States & Central American Steamship Company, respondent, and C. Robinson Griggs and George F. Shaver, as garnishees; also, a libel by the same parties as owners of the steamship *Arecuna* against the same respondents. This hearing was upon a motion to compel the garnishee to pay into court the balance due on a certain note, or for other relief.

Convers & Kirlin and Mr. Green, for libelants.

Francis E. Burrows and E. H. Benn, for garnishee.

BROWN, District Judge. The answers of the garnishee show that he admits owing the money upon a subscription for the defendant company's stock; but he avers that his debt is represented by a stock note given to the defendant company, payable ten days after demand, which the defendant company, about May 6, 1893, indorsed or transferred to the Central American Steamship Company, another corporation, in which the defendant company practically became merged. The garnishee was the president of the defendant company now defunct, all whose assets were transferred to the American Steamship Company.

This transfer of assets, including the garnishee's note, was evidently void as against existing creditors, among whom were the

libelants. They have a right to follow the assets transferred so far as they can be identified. Where such facts clearly appear upon the face of the garnishee's return, the authorities seem to support the right of the court to order payment by the garnishee. As, however, there may be some additional proofs affecting this right, I shall direct that a reference be taken to ascertain and report thereon, provided the garnishee within five days elect to enter an order therefor and file stipulation for costs. Further process of attachment may be issued if desired against the Central American Steamship Company, the alleged holder of the note, and a citation to appear upon such reference. Unless the above order be applied for by the garnishee, and security given within five days, an order may be entered for payment by the garnishee of the sum due upon the note, the same being less than the libelants' claim.

In re GROSS.

(Circuit Court, E. D. Louisiana. January 12, 1897.)

1. SUBPŒNAS IN PENSION CASES—CONSTITUTIONAL LAW.

The act of July 25, 1882 (22 Stat. 174), authorizing judges and clerks of United States courts to issue subpoenas, upon the application of the commissioner of pensions, for the examination of witnesses concerning pension claims, is constitutional, and under it the courts may compel witnesses to appear and testify before the officers mentioned in the act, on the subject of pension claims. *Commerce Commission v. Brimson*, 14 Sup. Ct. 1125, 154 U. S. 447, followed.

2. SAME.

While the investigations under said act need not be confined strictly to the merits of pension claims, yet they must be upon the subject of pension claims: and a subpoena issued under the act should be drawn with such certainty and precision as to show that it is within the act, and to identify the pension claim in which the testimony is required.

Benj. Armbruster, for Josiah Gross.
D. C. Mellen, Asst. U. S. Atty.

PARLANGE, District Judge. The clerk of this court received the following application:

"Department of the Interior. Bureau of Pensions.

"Washington, December 14, 1896.

"To Any Judge or Clerk of Any Court of the United States Having Jurisdiction—Sir: In pursuance of sections 184, 185, and 186 of the Revised Statutes, and the act of July 25, 1882, I have the honor to request that a subpoena may issue, commanding Josiah Gross, of New Orleans, La., to appear at the time and place named therein, and make true answers to such written interrogatories and cross-interrogatories as may be submitted to him by Mr. J. F. Fitzpatrick, a special examiner of this bureau, and be orally examined and cross-examined on the matter of certain charges made against him in connection with his prosecution of claims before the pension bureau.

"Very respectfully,

D. I. Murphy, Commissioner."

The clerk issued a subpoena to Josiah Gross, commanding him to appear before William Wright, United States commissioner for this court, to testify "in the matter of the pension claims of Celestine Washington, No. 641,346, and others." Gross appeared before Com-

missioner Wright, and was there asked whether he had signed any of the papers in the pension case of one Samuel Arsonaux. He refused to answer. He was then asked whether he had signed any of the papers in the case of Celestine Washington. He again refused to answer. The district attorney then proceeded by rule in this court, and asked that Gross show cause why he should not answer the interrogatories, or be held in contempt of this court.

I understand Gross' objections to be: (1) That the act of July 25, 1882 (22 Stat. 174), is unconstitutional, for the reason that congress has no authority to employ the courts to obtain evidence for the executive departments; (2) that, even if the act is constitutional, the testimony which may be required under it must be confined to the "merits" of pension claims, and that the questions propounded to him did not concern the "merits" of the claims. He urges that their sole purpose was to discover whether any relation or connection existed between him and certain pension attorneys, with a view to the disbarment of those attorneys. I do not understand respondent to plead that his answers would incriminate him. On the contrary, he states in his brief that he has nothing to conceal. Therefore, the question whether a witness can be compelled to incriminate himself in proceedings under section 184 et seq., Rev. St., and the act of July 25, 1882, is not before me.

Section 184, Rev. St., reads as follows:

"Sec. 184. Any head of a department in which a claim against the United States is properly pending, may apply to any judge or clerk of any court of the United States, in any state, district or territory, to issue a subpoena for a witness being within the jurisdiction of the court, to appear at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined upon the subject of such claim."

Section 3 of the act of July 25, 1882 (22 Stat. 174), reads as follows:

"That in addition to the authority conferred by section one hundred and eighty four, title four of the Revised Statutes, any judge or clerk of any court of the United States, in any state, district or territory, shall have power, upon the application of the commissioner of pensions, to issue a subpoena for a witness, being within the jurisdiction of such court, to appear, at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, or before any officer, clerk, or person from the pension bureau designated or detailed to investigate or examine into the merits of any pension claim and authorized by law to administer oaths and take affidavits in such investigation or examination, there to give full and true answers to such written interrogatories and cross interrogatories as may be propounded, or to be orally examined and cross examined upon the subject of such claims."

Judge Benedict, in *Re McLean*, 37 Fed. 648, held the act of July 25, 1882, to be null, substantially on the ground that the federal courts could subpoena witnesses only in cases pending in those courts; that the investigations contemplated by the act of July 25, 1882, were not cases in the courts, and that congress could not permit the judicial power to be invoked in aid of an executive examination before an executive department. Judge Benedict cited

In *re* Railway Commission, 32 Fed. 241, in which Justice Field had held substantially that the judicial power of the United States is limited to "cases" in the courts, and that congress cannot make the courts its instruments in conducting mere legislative examinations. Subsequently, Judge Gresham held, in *Re* Interstate Commerce Commission, 53 Fed. 476, that so much of the interstate commerce act as authorized circuit courts to enforce subpoenas issued by the commission was unconstitutional. But Judge Gresham's decision was reversed by the supreme court (*Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125), the court holding that the application of the commission to the circuit court to enforce obedience to its subpoenas was a "case" to which the judicial power of the United States extended. The principles upon which the decision in the *Brimson* Case is grounded are plainly applicable to the act of July 25, 1882, which is now before me. There can be no differentiation between the power of the courts to enforce the subpoenas issued by the interstate commerce commission and their power to enforce the subpoenas applied for by the pension bureau. It is plain to me, in the light of the *Brimson* Case, that the act of July 25, 1882, is constitutional, and that under it the courts may compel witnesses to appear and testify before the officers mentioned in the act, on the subject of pension claims. I repeat that the question whether witnesses can be compelled to incriminate themselves under the act of July 25, 1882, when their only protection in so doing would be section 860, Rev. St., is not now before me for decision.

Respondent's objection that the investigations under the act of July 25, 1882, must be confined to the "merits" of pension claims, is not borne out by that statute. It is noticeable, however, that both section 184, Rev. St., and the act of July 25, 1882, provide only for investigations "upon the subject" of the claims. While this language is not as restrictive as respondent contends, yet it is clear that congress intended to limit the scope of the investigations, and that an examination which would not be "upon the subject" of a pension claim would not be within the purview of the act. It seems to me that the application for a subpoena under the act should be drawn with reasonable certainty and precision, so that it should clearly appear upon its face to be in accordance with the act, and the pension claims in which the testimony is required should be reasonably identified. The application in this matter does not require the testimony of the respondent on the subject of any pension claim, nor does it mention any special pension claim concerning which he is to testify. But upon its face it declares that his testimony is required "on the matter of certain charges made against him in connection with his prosecution of claims before the pension bureau." On its face, then, the application shows that the primary subject of the investigation is not a pension claim, but certain charges of malpractice before the pension bureau. Doubtless, upon a proper application, the pension officers may—pretermittting the question of self-incrimination—obtain the testimony of witnesses under the act of July 25, 1882, as to all their acts affecting the claim in a pension case, and in that

way the pension officers may ascertain whether malpractice affecting the claim has been committed. But it seems to me this should be done as an incident to an investigation having primarily in view the "subject" of the claim. The application, in such a matter as this, may be considered as the foundation of the proceeding, and the subpoena issued under it should follow the requirement of the application. It is noticeable that, while the application in this matter requires respondent's testimony "on the matter of certain charges made against him in connection with his prosecution of claims before the pension bureau," the subpoena requires respondent to testify "in the matter of the pension claim of Celestine Washington, No. 641,346, and others." For aught that appears, the subpoena is not the one applied for by the commissioner of pensions. There is nothing of record to connect the subpoena with the application. How and from whom information was had as to the requirement of respondent's testimony in the cases of "Celestine Washington and others" does not appear; and it is not claimed that any one had the power to explain, modify, or supplement the application of the commissioner of pensions.

While I am clear that the act of July 25, 1882, is constitutional, I am equally clear that its provisions should be followed with reasonable strictness, and that, through failure to do so in this matter, the application and the warrant before me are void, and the respondent should be discharged from the rule.

UNITED STATES v. BUFFALO NATURAL GAS FUEL CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—WORDS OF CLASSIFICATION.

In tariff laws, words of classification are, in general, to be construed either in their common or their commercial meaning, as opposed to their scientific or technical sense.

2. SAME—CLASSIFICATION—NATURAL GAS.

Natural gas was exempt from duty under paragraph 651 of the act of 1890, as a crude mineral, and was not dutiable under section 4, as a "raw or unmanufactured article not enumerated." 73 Fed. 191, affirmed.

This is an appeal from a decision of the circuit court for the Northern district of New York (73 Fed. 191) affirming a decision of the board of general appraisers which reversed the decision of the collector of the port of New York assessing a rate of duty upon natural gas. The gas, which is obtained by boring into the ground, comes from Shirkstown, in the dominion of Canada, about 12 miles from Buffalo. It is conveyed, through pipes, to and across the Niagara river, and is thus imported into the city of Buffalo, and there used in the same form in which it is taken from the earth. The importation in question was on August 1 and 4 and November 21, 1891.

Edward B. Whitney, Asst. Atty. Gen., and Wm. A. Poucher, for appellant.

Herbert P. Bissell, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act in force at the date of this importation was what is known as the "McKinley Act," and was passed October 1, 1890. Prior to its passage natural gas had been obtained from the earth by boring or drilling in many different localities within the United States, had been bought and sold commercially, and had gone into use extensively; but, up to October 1, 1890, none had ever been imported. It is not mentioned by name in the tariff act, nor is it specifically enumerated therein. The collector assessed it as dutiable at 10 per cent., under section 4 of the act, as a "raw or unmanufactured article not enumerated or provided for." The importers protested, insisting that it was enumerated in one or other of the two following paragraphs of the free list:

"496. Asphaltum and bitumen, crude."

"651. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other processes of manufacture, not specially provided for in this act."

The board of general appraisers found that natural gas was a crude mineral, and exempt from duty under paragraph 651; and the circuit court has sustained that decision.

Much testimony from scientific men, geologists, mineralogists, and chemists was introduced upon the hearing before the board. It is interesting, but not especially helpful to a determination of the question presented here. In the "interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation if that differs from the ordinary understanding of the word." *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777.

In *U. S. v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638, Mr. Justice Story, referring to Two Hundred Chests of Tea, 9 Wheat. 430, says:

"It was there held that, in construing revenue laws, we were to consider the words, not as used in the scientific or technical sense, where things are classified according to their scientific characters and properties;" and "laws of this sort taxed things by their common and usual denominations among the people, and not according to their denominations among naturalists or botanists or men of science."

Reference may also be had to *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559; *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881; and *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777. In two of these cases shelled beans, although shown to be "seeds" in the language of botany, and tomatoes, although botanically they were "fruit," were both held to be "vegetables," within the meaning of that word in the tariff act. In the third case it was held that saccharine, a substance 300 times as sweet as sugar, although scientifically an "acid," was not an acid for revenue purposes.

There is no evidence in the record of any special trade meaning of the words "crude minerals." We are left, then, to determine the meaning of these words from judicial knowledge of the ordinary meanings of words of common speech, unless there is sufficient in the record to show that some modification of their ordinary signification was in the mind of congress when it passed the act. If the question whether the word "minerals," in ordinary speech, would include such an article as natural gas, were to be settled solely from

reference to the dictionaries, its solution might not be easy. In view, however, of the various official publications by the federal government set forth in the record, and which are not intended for scholars or scientific men, but to give to congress and to the people the best knowledge the compilers can, there can be little doubt as to what congress understood to be the scope and meaning of the words,—a scope and meaning which is within some, at least, of the definitions of the lexicographers.

For several years prior to the passage of the tariff act of 1890 there has been prepared each year, by the bureau of statistics in the treasury department, a so-called "Statistical Abstract of the United States." It is prepared under the direction of the secretary of the treasury, and contains statistics of finance, coinage, commerce, etc. It is printed each year at the government printing office, and transmitted by the secretary of the treasury to the house of representatives. These abstracts each contain tables giving the "qualities and values of minerals produced in the United States" during the five or six years immediately preceding the year of publication. In the table contained in the Statistical Abstract of 1888, minerals are divided into metallic and nonmetallic. Of the latter class 35 species are enumerated, and the sixth on the list is "natural gas," appearing between petroleum and cement. The same is true of the Statistical Abstracts of 1889 and 1890. It thus appears that the reports, to which it is to be supposed that congress refers for enlightenment as to the statistics of the products of this country, used the word "minerals" in a sense broad enough to include natural gas; and, if there be any doubt as to the ordinary meaning of that word, it is to be presumed that congress, when legislating as to the rates of duty to be laid upon the products of other countries, used such word with a meaning equally comprehensive.

We do not undertake in this case to decide whether or not natural gas is a "crude bitumen." If it be such, the provisions of paragraph 496 would control its classification, being more specific than those of paragraph 651. Both paragraphs are in the free list, and, since natural gas comes fairly within the general provision for crude minerals, and is therefore free, it is unnecessary now to inquire whether it is also within the more specific description "crude bitumen," which is also free.

The board of general appraisers properly reversed the collector's assessment of the article for duty. It is not a "raw or unmanufactured article not enumerated." The decision of the circuit court is affirmed.

WALLACE, Circuit Judge. I concur in an affirmance in this case, but not for the reasons given in the prevailing opinion. In scientific classification natural gas may be considered a mineral, but in the tariff act the term "minerals" is to be read in its common acceptation, in the absence of a different commercial signification, and does not, I think, include a gas, but means something which, in ordinary parlance, is mined. I think the importation in controversy should be classified under the provision of the free list which

exempts from duty "asphaltum and bitumen, crude." If it belongs there, as this is the more specific term of description, it is excluded from the category of "minerals, crude." According to the testimony in the record, "bitumen" is a generic term, applied to a large number of natural substances which consist largely or chiefly of hydrocarbons. This substance may be gaseous, as natural gas or marsh gas; fluid, as petroleum or naphtha; viscous, as the semi-fluid asphaltum; or solid, as some forms of asphaltum. According to McCulloch's Commercial Dictionary, bitumen includes a considerable range of inflammable mineral substances, burning with the flames in the open air, which differ in consistency from a thin fluid to a solid. He says:

"Near the village of Amiano, in the state of Parma, there exists a spring which yields this substance in a sufficient quantity to illuminate the city of Genoa, for which purpose it is employed."

ROUSSEAU v. PECK et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

PATENTS—ANTICIPATION AND INFRINGEMENT—ELECTRIC CIRCUIT BREAKERS.

The Rousseau patent, No. 279,107, for an automatic electric circuit opener or "cut-off," used chiefly in connection with lighting gas jets, *held* to be for an improvement of a secondary character; and the first claim thereof construed, and *held* that the form of the complainant's apparatus which was alleged to have been infringed, had been anticipated. 66 Fed. 759, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was a suit in equity by David Rousseau against John B. Peck and Sarah E. Ostrander for alleged infringement of an automatic electric circuit opener. The circuit court dismissed the bill, holding that the claims of the patent were not infringed, and were apparently invalid. 66 Fed. 759. The complainant has appealed.

Richard N. Dyer, for appellant.

Edward P. Payson and Edwin H. Brown, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This appeal is from a decree of the circuit court for the Eastern district of New York, which dismissed a bill in equity founded upon the alleged infringement by the defendants of claims 1 and 2 of letters patent No. 279,107, dated June 5, 1883, and issued to David Rousseau, for an automatic circuit opener or "cut-off." At the hearing before this court upon the appeal, the appellant withdrew from consideration the questions relative to claim 2.

The improvement which is shown in the patent was intended to be chiefly used in connection with systems for lighting gas by electricity. In these systems the circuit is ordinarily open until it is closed to perform each operation, but sometimes it becomes permanently closed, when the battery loses its power, is exhausted, and the apparatus is inoperative. The invention was intended to be an improvement upon the kind of circuit breaker shown in the device,

known in the record and in the art of circuit breaking as the "Gibson Cut-Off," which is used by the Holmes Burglar-Alarm Company, and in which, if an abnormal closure of the circuit occurs, it remains closed until the clockwork which operates the circuit breaker has run down. The specification says that the improvement was for the purpose of preventing the result which follows from too long a closure, and of "automatically breaking the circuit whenever it becomes closed longer than is necessary to operate any of the usual devices in circuit." The improvement is described in the last clause of claim 1, which is as follows:

"The combination, with an electric generator and an electric circuit emanating therefrom, of an electro-motive device which is vitalized by the closing of said circuit, automatic time mechanism which is started into operation by said electro-motive device when so vitalized, and an automatic circuit breaker which is operated by said time mechanism to permanently break said circuit at the expiration of a predetermined time after the closing of the same, substantially as set forth."

It will be perceived that the first four elements of the claim are of a well-known character, and that the fifth element is the one of novelty. The meaning of this clause of the claim is that the time mechanism is to cause the circuit breaker to break the abnormally closed circuit when the motor has run, and not until it has run, a time after the closing of the circuit, which time was established or arranged beforehand. The distinctive character of the Rousseau machine which differentiates it from the Gibson cut-off is that, "after the normal closing of the circuit in lighting the gas, the parts which tend towards the permanent opening of the circuit return to their original position." In other words, "if the time mechanism does not run for the predetermined period, the circuit breaker will be restored to the starting point." The claim does not, in terms, describe this operation. It says that the time after the closure of the circuit is predetermined, and the uniformity and equality of the predetermined periods are found in the claim, if at all, because the description of the mechanism shows that in fact the intervals of time become uniform and equal.

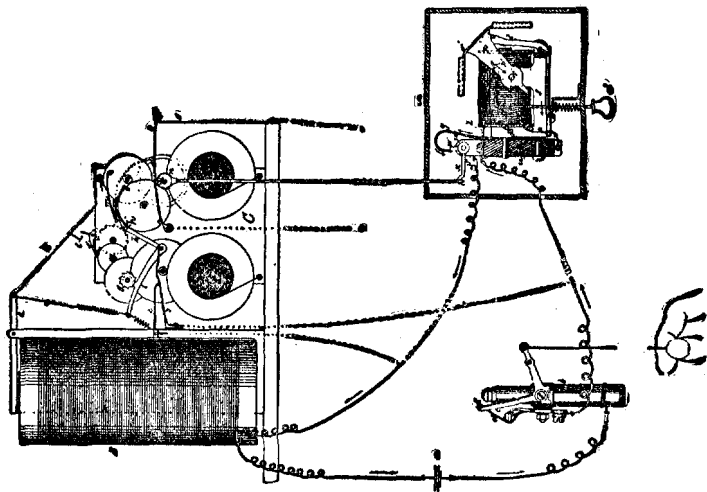
The defenses against the validity of the claim are many, and of a serious character. Judge Wheeler was of opinion that the claim was faulty because it did not include or describe this distinctive improvement, viz.: "The restoration or readjustment of the circuit-breaking mechanism after each normal closure of the circuit, and before the time mechanism had run the predetermined period"; secondly, because it was functional; and, thirdly, that, if the claim was for the mechanism of the specification, it had not been infringed. The defendants also insisted that the mechanism of the claim had been anticipated by devices alleged to have been pre-existing. A discussion of all the questions in the case would require an expenditure of a good deal of time upon a claim which is, at the best, of very little value. We shall therefore advert to one clearly-sustained defense, which is that the form of the complainant's circuit-breaking apparatus which was alleged to have been infringed had been anticipated.

It is to be premised that the patented improvement was of a secondary character; that there are different combinations of bars and springs, and other co-operating parts, which can be operated by clockwork so as to permanently break the circuit; that claim 1 is dangerously near being a claim for a mode of operation, and, if saved, it is saved by the words "substantially as set forth," which serve to limit the claim to the described mechanism (*Seymour v. Osborne*, 11 Wall. 516; *Curt. Pat. [4th Ed.]* 281); and that when construed by reference to the Sawyer patent, which will be hereafter mentioned, it is a secondary improvement of a narrow character. The bill in equity in this case was originally founded upon the alleged infringement of the Rousseau patent, and letters patent to William H. Sawyer, No. 279,023, dated June 5, 1883, and letters patent to Jacob P. Tirrell, No. 283,303, dated August 14, 1883. The complainant's expert, upon his *prima facie* case, testified that each of these patents claimed broadly an automatic circuit-opening device adapted to permanently break an electrical circuit only after the circuit had been closed a predetermined length of time, and, furthermore, testified, without objection, that the application for the Sawyer patent was filed before the application for the other patents, as appeared from the dates upon them, and that, therefore, the Sawyer patent was entitled to the broadest claim. Cross-examination of the witness showed that the claims of the Sawyer patent required that an element of the combination should have a characteristic which did not exist in the defendants' machine, and, furthermore, that the mechanism of Fig. 4 of the drawings of the Sawyer patent, which was described in the specification, but was not included in the claims, anticipated the form of the mechanism described in the Rousseau patent, which was alleged to have been infringed by the defendants. It was therefore necessary for the complainant not only to abandon the Sawyer patent as a patent which had been infringed, but to show that the Rousseau patent was its senior, and therefore had not been anticipated. When the complainant began his testimony in rebuttal, his counsel gave notice that, for the purposes of the suit, he abandoned the Sawyer and the Tirrell patents, and would rest his case upon the Rousseau patent, and thereupon introduced the testimony of Rousseau and Huck, one of his workmen, to show that he invented the mechanism in April or May, 1879. His application was filed April 29, 1881, and Sawyer's application was filed September 28, 1880. The testimony of Rousseau and Huck does not show, with strength, the creation of the Rousseau structure, as a completed thing for use, in 1879; but its strength, whatever it would have been, was destroyed by Rousseau's sworn preliminary statements to the commissioner of patents in the matter of the interference between his and Sawyer's applications. Mr. Brevoort testified for the complainant that the Rousseau cut-off of 1879 contained the inventions as patented in the first and second claims of the patent in suit; but Rousseau, when he made his statements, dated November 4 and November 16, 1881, in regard to the date of the invention, omitted all mention of his machine of 1879, and said that in August or September, 1878, he made drawings of a device in connection with electric gas-lighting

circuits, on the principle shown in his application, and that in March, 1880, he made a working drawing and a working instrument embodying the invention in question. If he had made a working instrument in the spring of 1879, he must have recollected, and it would seem that he would have stated, a fact which had so important a bearing upon the date of his invention. The attempt to answer this inconsistency by saying that the machine of 1879 did not contain a coil for generating a spark for the lighting of gas is without force. He took an assignment of the Sawyer invention for certain states on February 15, 1882, before the patent was issued, and his present title is by virtue of that assignment. Rousseau thus took the burden of proof of showing that his invention anticipated the invention described in Sawyer's patent, which he had put into the case, and which was *prima facie* an anticipation of his own patent. This burden of proof he has not sustained, and the question of priority remains as it did upon the testimony offered by the complainant's expert.

The Rousseau specification shows three forms of apparatus, which are described in general, but apparently correct, terms, as follows, in the defendants' brief:

"The principal form of the specification is composed of the magnet, B, which releases a detent, l, allowing a clock motor to work, which starts a second clock-work motor, which turns an eccentric, thereby elevating a shaft so as to change the circuit and shift the current into a second magnet, o, out of action, until the circuit is thus changed, which, on being energized, attracts its armature, thereby releasing an annunciator drop, which, in falling, ruptures the circuit.



"The patent, in a few lines (12-23, p. 3), suggests magnet, B, with one clock-work motor, and the tongues, 2, 3, instead of the entire apparatus, the clock then operating to remove the support of one tongue until it can drop away from the other. It also briefly suggests, as a third form, the magnet, B, and the two clockworks, with the tongues, 4, 5, the second clockwork lifting one tongue away from the other."

The second form, with one clockwork motor, and the tongues, 2 and 3, is the one which the defendants are said to use. The complainant's expert, upon being asked to point out wherein the combination of Fig. 4 of the Sawyer patent differed from the combination disclosed in claim 1 of the Rousseau patent, replied that he found that the elements were the same, but that there was a specific difference in the automatic circuit breakers, in that "the automatic circuit breaker in the Rousseau patent is brought into operation upon energizing the magnet, o, while that in Fig. 4 of the Sawyer apparatus is brought into operation by clock mechanism." Magnet, o, is not used in the second form of the Rousseau invention, and its circuit breaker is brought into operation by clockwork. A similar identity between Fig. 4 and claim 1 was subsequently stated by the same witness. The decree of the circuit court is affirmed, with costs.

ROEMER v. PEDDIE et al.

(Circuit Court of Appeals, Third Circuit. January 6, 1897.)

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—SATCHEL HANDLES.

The Roemer patent, No. 314,724, for an improvement in bag or satchel handles, consisting in a combination of a strap and metal plates, arranged on opposite sides thereof, with the edges of the strap projecting beyond the plates, and a covering secured to such edges, if valid at all, must be confined to the precise devices shown, and is not infringed by a handle having only one metal plate. 71 Fed. 407, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by William Roemer against T. B. Peddie & Co., for alleged infringement of a patent for an improvement in bag and satchel handles. The circuit court dismissed the bill, holding that the patent, if valid at all, must be so limited as to avoid infringement. 71 Fed. 407. From this decree the complainant has appealed.

Wm. Roemer, in pro. per.

Louis C. Raegener, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge. This suit was brought to restrain the alleged infringement of letters patent No. 314,724, issued to complainant, March 31, 1885, for a "bag or satchel handle." The claims of the patent are:

"(1) The improved handle, consisting, essentially, of a strap, metal plates, arranged on opposite sides thereof, to give strength to the handle, the edges of the said strap, a, projecting beyond said plates, and a covering secured to said edges, substantially as described.

"(2) In a bag handle, the oppositely concaved plates, b, c, having a projecting strap or piece there between, projecting to receive a covering, and said covering, said parts being arranged and combined substantially as set forth."

The defenses were noninfringement and want of patentable novelty. The bill of the complainant was dismissed by the circuit court on the ground that the defendants did not infringe the patent in suit, and the case is here on appeal.

Roemer states in his specification that his invention "consists in the arrangements and combinations of parts, substantially as will be hereinafter set forth, and finally embodied in the clauses of the claim." The record shows that no less than seven patents had been granted for bag or satchel handles prior to the date of Roemer's invention; and, as his claims are only for "the arrangements and combinations of parts," they must be limited to a strict construction. Confining the present inquiry solely to the question of infringement, a comparison of the Roemer handle with the alleged infringing article of the same kind which is used by the defendants will show the difference between them.

The Roemer construction consists of "a strap or centerpiece, preferably of leather, and b, c, are oppositely concaved strips of iron, or other suitable metal, between which the said centerpiece is clamped, the edges of the latter projecting beyond said plates, so that the outer or inclosing leather or pieces of the handle may be sewed or otherwise secured thereto." The defendants' handle is composed of an upper metal plate, and under this is a metal strap; but the latter does not correspond with Roemer's under plate, c, instead of which the defendants use a roll or filling of paper to give a rounded shape to the underside of the handle. Here there is observed the absence of one of the essential and indispensable elements of the Roemer combination.

It is insisted, however, that this roll of paper is the mechanical equivalent of Roemer's under plate, c. If this contention should be sustained, it would come dangerously near defeating the validity of the patent, in view of the fact that bag handles had already been made in which two rolls of paper were placed on opposite sides of the center leather strap. Roemer substitutes metal plates for both rolls. The defendants substitute a metal plate for only one of the rolls. Roemer was not an original inventor, except in so far as he may have succeeded in forming a new combination of old parts. He had been preceded by numerous other inventors, who had devised handles for bags and trunks out of the same kind of materials which he uses, and having a similar shape and form. Letters patent issued to Charles F. Walker, No. 178,801, of January 25, 187-, show a handle with a metal wire or other suitable metal in the center of the handle, surrounded by leather or other material. The Lagowitz & Lieb patent, of 1876, describes a handle made of sheet metal struck up into U-shape, and the edges brought together into the form of a tube. Roemer makes use of two half tubes, clamping between them a leather strap.

From the history of the art it is evident that the defendants have only applied a paper roll to the underside of a metal plate in the same manner in which it had been done prior to Roemer, who now invokes the doctrine of mechanical equivalents to sustain the charge of infringement. This doctrine is well stated in *Machine Co. v.*

Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, and is reaffirmed in *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 310. The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. Roemer was not a pioneer in the art, and, as was said by the learned judge of the circuit court, if his patent can stand at all, he must be confined to the precise devices mentioned in his claims; and, thus limited, the defendants do not infringe them.

The decree dismissing the complainant's bill is affirmed.

GREEN et al. v. AMERICAN SODA-FOUNTAIN CO.

(Circuit Court of Appeals, Third Circuit. January 18, 1897.)

No. 34, Sept. Term, 1896.

PATENTS—COMBINATIONS—SODA-WATER FOUNTAINS.

The Witting patent, No. 414,272, for improvements in dispensing apparatus for soda water, etc., compared with prior devices, especially the Adami and Lippincott apparatus, and held invalid as to the second claim, for want of invention and patentable combination. 75 Fed. 680, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by the American Soda-Fountain Company against Robert M. Green and others, trading as Robert M. Green & Sons, for alleged infringement of a patent for a soda fountain. The cause was first heard on exceptions to certain paragraphs of the complaint. 69 Fed. 333. Thereafter the circuit court sustained the second claim of the patent in issue, and entered a decree in favor of complainant. 75 Fed. 680. From this decree the defendants have appealed.

Strawbridge & Taylor and Frederick P. Fish, for appellants.
Joshua Pusey, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge. This is a suit for the infringement of the second claim of letters patent No. 414,272, granted November 5, 1889, to Theodore L. Witting, for "improvements in dispensing apparatus for soda water," etc., and by him assigned to the American Soda-Fountain Company, the complainant below. The specification states that the "invention * * * consists in the novel construction, combination, and arrangement of parts hereinafter set forth, and pointed out in the claims." The principal defenses were: First, that the combination of the second claim of the patent, in view of the prior state of the art, did not involve invention; and, second, that the claim was for an unpatentable aggregation. On hearing on bill, answer, and proofs, the circuit court overruled both defenses, and entered a decree finding the defendants guilty of infringement,

with the usual award for an injunction. The cause is now here on review.

The Witting patent is not for a primary invention, as will appear from the reading of the second claim, the validity of which is put at issue. The claim is as follows:

"(2) The combination of the outer case provided with a recess for containing glasses, drop doors hinged to said case above said recess and having journaled therein keys or handles for operating the syrup faucets, and laterally movable syrup cans and attached faucets located entirely within the case, for the purpose substantially as herein set forth."

The combination thus described is alleged to be unpatentable for the want of invention by the patentee in the adjustment of the different parts, and which, although, perhaps, it may be a convenient arrangement, called for nothing more than the exercise of mechanical skill in bringing together the well-known devices of prior inventors. The Witting apparatus belongs to that general class of soda fountains in which the syrup cans are horizontally inserted into that part of the casing which is below the ice chamber. Along the lower portion of the entire front of the casing extends a tumbler recess. Through the roof of this tumbler recess are a series of apertures corresponding in location to the faucets of the cans, one to each faucet, so that, when the faucet is opened, the syrup drops through the aperture into the tumbler beneath. The front of the casing is provided with a series of doors corresponding in number with the cans, hinged at the lower edges to the front edge of the roof of the tumbler recess, so that they may be dropped down to permit of the insertion and removal of the cans. In each of these doors is journaled the stem of an externally applied key or handle, the inner end of which stem, as the patent states, is "preferably bifurcated, or provided with a suitable slot, which engages the end, 12, of the plug, 1, readily allowing the door to be opened when required, the slotted or forked end of the key being detached from the plug by the operation of opening the door." This entire arrangement is described in the specification as follows:

"The syrup faucets being located within the refrigerating chamber, it is obvious some provision must be made for operating them from without, which is done by journaling suitable handles or keys, P, in the doors, R, and connecting their inner ends to the thumb pieces or handles, 12, formed on outer end of plug, 1. This may be done in various ways, but I prefer to hinge the doors to the case, A, at their lower ends, by means of hinge, t, so that said doors may open downwardly and out, as shown in Fig. 1."

To understand how much of originality or of invention there may be in the combination of the Witting apparatus, reference will be had to a few of the patents (in defendants' exhibits) for similar structures, of a date prior to the patent in suit. The Mathews patent, No. 50,255, of October 3, 1865, shows the casing of a soda-water fountain which embodies a tumbler recess, and contains vertically disposed cans, the valve-controlled faucets or outlets of which register with openings in the roof of the tumbler recess, and the valve stems of which are operated by handles passing through a hinged door in the top of the casing. The Mathews patent, No. 179,584, of July 4, 1876, shows the casing of a soda fountain which contains sep-

arate series of both horizontally and vertically disposed cans. The Adami patent, No. 316,594, of April 28, 1885, shows a casing which is provided in its upper portion with an ice chamber, and in its central portion with a series of horizontal can chambers for syrup cans, within which a series of horizontally disposed cans may be introduced, and the front face of which is provided with a series of doors hinged along the upper edge of the can chambers, and adapted to close said chambers to permit the introduction and removal of the cans. The Lippincott patent, No. 375,452, of December 27, 1887, shows a soda-water apparatus, the casing of which has a tumbler recess, a series of vertically disposed can chambers in the front of the apparatus, orifices through the roof of the tumbler recess registering with the outlets of the faucets of the cans, and a series of vertically disposed removable cans having syrup faucets located entirely within the case, and each of them provided with a lug or blade adapted to be separately engaged with the bifurcated inner extremity of a stem journaled within the front of the casing, the outer extremity of which stem is provided with a key or handle, by the movement of which from the outside of the case the faucet within the case is wholly controlled.

By comparing the separate parts of the Witting fountain with the corresponding parts of the prior structures as described in the patents just referred to, it will be seen that Witting has not added a single new feature to those contained in one or the other of the old fountains, excepting, perhaps, the drop doors, "having journaled therein keys or handles for operating the syrup faucets." In fact, all that Witting appears to have done was to imitate both Adami and Lippincott, and thereby produce the same results by substantially the same means. Thus, there was no novelty in the insertion of syrup cans from the front of the casing, or in having the faucets of the cases fitted to the apertures in the roof of the tumbler recess, or in journaling keys in the casing for the purpose of operating the faucets of the cans from the outside. Adami showed how horizontally disposed cans could be used with swinging doors hinged at their upper ends; and Lippincott, borrowing the tumbler recess from Mathews, demonstrated, for the first time, the application of a handle journaled through the case, on which was a claw which engaged with the blade of the faucet of the syrup can, by which he could manipulate the syrup from the outside of the case. In the specification of his patent, Lippincott says:

"The invention consists primarily in the combination, with a syrup jar having a cock in the neck thereof, of a shaft projecting beyond the outer casing of the fountain, and provided with a handle on its outer end for operating the key of said cock, the inner end of said shaft being constructed so that the jar, with the cock therein, may be readily removed from, and replaced within, the containing chamber (or another similar jar substituted therefor), without necessitating the breaking or disturbance of any joints or connections, yet, when the jar is in place, the cock therein will be in engagement with said shaft, and may be readily opened or closed by turning the handle on the end of the latter on the outside of the casing."

If this was all he did, it would not be contended that he was entitled to a patent; and this was the view taken by the patent

office when Witting first formulated his claims. Having these two patents before his eyes, Witting applied the journaled key of Lippincott to the swinging door of Adami in the only way in which it could be done, and placed the cans and their faucets entirely within the casing, as Lippincott had done, and, finally, used the horizontally disposed cans of Adami, and by this adjustment of parts secured the result which had already been accomplished by Lippincott, viz. the discharge of the syrup into the tumbler beneath by "the adaption of the valve-operating handle shown by Lippincott to the swing door shown by Adami." It is true, there is a slight distinction between the united Adami and Lippincott inventions and the Witting patent, consisting in the fact that the Adami doors are hung from the top, while the Witting doors are hung from the bottom; and this appears, from the proceedings in the patent office, to have been the only ground on which the patent was granted. Witting's original application contained seven claims, which were finally reduced to two. The original fifth claim, as subsequently amended, is the present claim 2, now in suit, and read as follows:

"(5) The combination of the outer case provided with a recess for containing glasses, doors hinged to said case, and carrying keys or handles for operating the syrup faucets, and syrup cans and attached faucets located entirely within the case, for the purpose substantially as herein set forth."

This claim was rejected because—

"Deemed to involve no invention over what is shown in patents to Lippincott of record, and Adami, 316,594, April 28, 1885 (dispensing fountains). The claim seems to involve nothing more than the adaptation of the valve-operating handle shown by Lippincott to the swinging door shown by Adami."

Several amendments followed, until claim 5 was made to read as claim 2 now appears in the patent, thus (the italicized words show the amendments):

"The combination of the outer case provided with a recess for containing glasses, *drop* doors hinged to said case *above said recess* and *having journaled therein* keys or handles for operating the syrup faucets, and *laterally movable* syrup cans and attached faucets located entirely within the case, for the purpose substantially as herein set forth."

Leaving out the "drop doors," it appears that nothing new was added by Witting to the Adami-Lippincott structures. The patent office had, in the first place, decided that "Lippincott is deemed to show the full equivalent of claims 5 and 7," and again held, after claim 7 had been canceled, that claim 5 involved "nothing more than the adaptation of the valve-operating handle shown by Lippincott to the swinging door shown by Adami." It would seem, therefore, that the patent was granted to Witting only on the addition of the drop doors. It was evident to the patent office that the application of the Lippincott patent to the Adami patent did not amount to invention; and it was not until Witting, without making any other material amendment, limited his invention to drop doors, that his patent was granted. In avoidance of the reference to Adami, Witting states, "Adami's doors are hinged at the top; they cannot drop." If there is anything of which it can be

possibly said that it has passed out of the domain of invention, it would seem to be the hinging of a door; that is, whether a door should be hinged at the top or bottom, at one side or the other, and made to open in any particular direction. The decision of such questions may be safely left to the judgment of a mechanic of ordinary skill and intelligence. It was a mere matter of mechanical choice with Witting to make a lift door or a drop door, and he preferred the latter. Lippincott journaled his key through the front casing in order to engage the stem of the handle with the valve of the faucet. Witting put in a door as Adami had done, and journaled the key in the door; and in making use of the Adami door he was compelled to adopt Lippincott's method of using the key. . The patents of Adami and Lippincott are not public property, and, as Lippincott could not appropriate the former's invention by the application to it of his own, neither should Witting be permitted to combine them by a mere mechanical adjustment which it required no invention to make. For these reasons we are unable to concur with the circuit court in sustaining the second claim of the Witting patent. He has produced no new result, nor has he invented any novel and improved means of obtaining an old result. The whole object of his device is to discharge the syrup from the can faucet, through the aperture in the roof, into the tumbler directly beneath it, and he attains this end in almost precisely the same way and by the same means which are shown in the Lippincott drawings. We do not regard the cutting of a door in front of the casing as proof of invention, since Adami has already preceded him in doing the same thing, and certainly there can be no invention in converting a lift door into a drop door. In *Hoffman v. Young*, 2 Fed. 74, the claim in a combination patent was sustained on the ground that it presented evidence of invention, because a new result had been produced, though it was conceded the case was near the border line of nonpatentability. In *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 559, 53 Fed. 369, this court decided that the invention there in suit was a primary one, and that the result achieved by the inventor was absolutely and entirely new, and had not, by any means, been previously attained. In each of these cases, cited by counsel for the appellee, the production of a new result is made the test of patentability. On the other hand, numerous authorities may be found in which patents for combinations in machinery and in compositions have been held void for want of invention. We refer to a few only: *Vinton v. Hamilton*, 104 U. S. 485; *Heald v. Rice*, Id. 737; *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. 1034. In *Aron v. Railroad Co.*, 132 U. S. 84, 10 Sup. Ct. 24, a patentee had made use of devices of earlier patents. All that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill. This was held insufficient to sustain his patent.

Having thus disposed of the first branch of the defense, it is unnecessary to discuss the question of aggregation, with which it is

so closely connected. We are of the opinion that the decree of the circuit court, by which the second claim of the Witting patent was sustained, should be reversed, and the cause remanded with directions to dismiss the bill; and it is so ordered.

ROBBINS et al. v. ILLINOIS WATCH CO.

(Circuit Court, N. D. Illinois. January 30, 1897.)

1. PATENTS—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Where the books of a corporate infringer of a patent for an improvement in watches and the testimony of its officers and employes fail to show any profit on the infringing watches, the profits made by another manufacturer on watches claimed to be of the same grade cannot be taken as the measure of profits, and no decree for profits can be made.

2. SAME—APPORTIONMENT OF PROFITS.

Defendant made and sold, as an entirety, watch movements on which it placed infringing stem-winding and hands-setting devices; but no profits were made on such sales. *Held*, that there was no sum to which any possible apportionment could be made, as between the infringing devices and the movement proper, and no profits could be recovered.

3. SAME.

An infringer is under no obligation to the patent owner to so use the patented device or to so manage his infringing business as to make a profit, for which he may be compelled to account.

This was a suit in equity by Leroy E. Robbins and Thomas M. Avery against the Illinois Watch Company for alleged infringement of reissued letters patent No. 10,631, issued for an improvement in stem-winding watches. The cause was heard on exceptions to the report of the master, to whom it was referred to take an account of profits.

Lysander Hill and Prindle & Russell, for complainants.

Bond, Adams, Pickard & Jackson, for defendant.

SHOWALTER, Circuit Judge. Complainants sued for the infringement of reissued letters patent of the United States, No. 10,631. After a hearing in the circuit court defendant was found guilty of infringement, and a perpetual injunction was awarded, and the case referred to a master, to take testimony and report his conclusions on the matter of damages and profits. Defendant prayed an appeal from so much of the decree as adjudged the infringement and awarded the perpetual injunction. The court of appeals affirmed the decree. The circuit court opinion is found in 50 Fed. 542; the opinion of the court of appeals, in 3 C. C. A. 42, 52 Fed. 215. The cause now comes on again on exceptions by the defendant to the report of the master pursuant to the reference for the accounting.

In reaching his conclusions and making up his report the master, following what he conceived to be the theory of the patent as declared in the opinion of the court of appeals, held the watch movement itself, as constructed with the winding and hands-setting mechanism,—in other words, the entire watch, exclusive of the case,—to be the subject-matter of the patent and of the infringement. He finds that the defendant has made and sold such uncased watches

to the number of 12,886, and has realized as profit on such manufactured articles the sum of \$25,337.58. The master does not find that any damage has resulted to complainants in consequence of the infringement. I infer, from the report and the arguments of counsel, that the evidence taken on the subject of damage would not have warranted a finding against defendant on that account. The master recommends a decree against defendant for the \$25,337.58 as the profits realized by it on the 12,886 uncased watches.

By the decree of reference the master was authorized to examine the books, records, and memoranda of the defendant, and its officers, agents, and employes were required to appear and testify, either at Chicago or at Springfield, where the defendant's business was carried on. There is no suggestion in the report that a full investigation was not afforded in this way. So far as this evidence and testimony went, it appeared that there had been no profit in the business of defendant in making and selling watch movements; that is to say, uncased watches. The selling price of the 12,886 in question was shown, but it did not appear, from the defendant's books, records, and memoranda, or from the testimony of the defendant's officers, agents, or employes, that these uncased watches had cost the defendant less than the selling price. The master, against the objection of defendant, permitted the books of the two beneficiaries for whom complainants are apparently trustees, namely, the Waltham Company and the Elgin Company, to be examined touching grades of watch movements or uncased watches alleged to be similar to the 12,886 manufactured and sold by defendant. The books of the Waltham Company did not show the cost, but those of the Elgin Company, in connection with the testimony of witnesses, did. What would have been the cost to the Elgin Company of 12,886 uncased watches, claimed to be of the same grade as those made by defendant, was subtracted from defendant's selling price, and the remainder is the \$25,337.58, treated by the master as the defendant's profit, and for which the decree is recommended.

If, in fact, the cost to defendant in providing material, and manufacturing and selling the 12,886 uncased watches, was less than the price realized on the sale, the difference would be defendant's profit. But, assuming (which defendant disputes) that the uncased watches made by the Elgin Company were substantially the same as the 12,886 made by defendant, the cost to the Elgin Company did not prove the cost to complainants. The testimony and records showing cost to the Elgin Company have no efficacy to show the cost to the defendant. Even if it were conceded, or proven in some way, that defendant did make some undetermined profit on the 12,886 uncased watches, I am not quite ready to say even that the presumptions as to the amount would be against defendant, or that the burden of the proof to fix the amount would be on the defendant. But here, at all events, the fundamental fact is wanting. There is no showing that defendant made any profit whatever on the manufactured articles in question. There is no showing that profits recoverable by complainants have been mingled with property of defendant. There was no duty or obligation, from defendant to com-

plainants, whereby the former was bound to make a profit, and is to be deemed in the wrong if it did not. The attitude of defendant is not, *prima facie*, that of a trustee vested with a valuable patent, belonging in equity to complainants, and bound to manufacture and sell the patented device, and make and pay over to beneficiaries a reasonable profit. Yet this, in substance, was apparently the prevailing theory in the master's office. The profit made by the Elgin Company was in effect treated as showing the reasonable profit that ought to have been made by defendant. The vital question here was whether or not defendant, in manufacturing operations as actually conducted by it, had in fact made any profit on the 12,886 uncased watches. Following, as already said, what he deemed to be the view stated in the opinion of the court of appeals, the master, against the objection of defendant, ruled that the profit on the uncased watch—meaning, as said, the entire watch movement, having on it the winding and hands-setting mechanism—was the subject-matter of the reference. The winding and hands-setting mechanism of the patent in controversy performed the function of the old watch key,—the function, namely, of winding the watch and of setting the hands, when they needed readjustment, to correct positions on the dial.

It is said that the winding pinion is attached on the inner side of the plate, and that a hole must be cut therein, and the axle or arbor or spindle must be extended through, and a hole cut in the watch face, in order to use a key to wind the watch. But this does not affect the question. The invention in controversy is still a combination having for its function the winding the watch and the setting the hands, whereas the function of the watch movement is to revolve the hands about the dial, and so mark the flight of time. The patent in controversy is no more an improvement in watch movements than would have been a modification bettering the old-fashioned watch key. Stem-winding watches were in the art. The patent on its face is for "an improvement in stem-winding watches." The patent in suit shows a stem arbor with the inner end cut off, and forming an independently movable block. When the stem arbor, thus shortened, is in its outermost position, the block is pressed outward by one arm of a lever, through the free action of a spring which bears against another arm of the same lever, and at the same time and by the same impulse the yoke is thrust into position, so that the dial wheel may, by the revolution of the stem arbor, be turned, and the hands set. When the stem arbor is pushed inward, it presses the block against the lever, and the yoke is thereby rocked from the hands-setting position into the winding position. When the stem arbor is pulled out again the free action of the spring presses the block into the space made vacant by the stem arbor, and the yoke takes once more the hands-setting position. The stem arbor is thus disconnected from the yoke mechanism. The latter, as said, takes the hands-setting position by means of the spring when the stem arbor is pulled outward, and by the inward push of the stem arbor against the block the winding position is attained. By this means the stem arbor does not prevent the exchange of differ-

ing cases for the same movement, and this is the useful result ascribed to the invention. The combined yoke, block, lever, spring, and wheels, being the portion of the winding and hands-setting mechanism attached to the movement, is no more part of the movement than is the stem arbor part of the case.

Defendant made and sold watch movements,—that is to say, uncased watches. On these movements defendant put that portion of the infringing device for winding and setting which is not necessarily placed in the watch case. The question before the master was, what profit did defendant realize by this use of the infringing device? Each of the 12,886 movements, with the infringing winding and hands-setting mechanism thereon, was made and sold as an entirety. Since, so far as appears, no profit resulted, there is no sum to which any possible apportionment of cost or selling price, as between the winding and hands-setting mechanism and the movement proper, could be applied. The entire profit on an uncased watch might be in fact due, for instance, to a patent winding and hands-setting device with which the movement is associated. But, if the selling price of such uncased watch did not exceed the cost of making it, no profit would come to the infringing manufacturer for the complaining patentee. The patent, as actually used by the infringer, would not, in fact, have yielded anything in the way of profit to be recovered. That a greater loss might have resulted if the 12,886 movements, associated with any winding and hands-setting mechanism which the defendant had the right to make use of, had been made and sold, is an idle speculation. As already said, there is no obligation on an infringer to the patentee to so use the patented device, or to so manage his business operations in that behalf, that a profit will result. I speak here only of profit. Even a losing business by an infringer might very easily injure the patentee by damaging his market. But damages are not here claimed.

I sustain the exceptions, other than those which pertain to costs. I doubt if that subject were within the reference. For the reasons given, I think the matter need not be sent again to the master. The decree will be for a nominal sum as damages and profits, complainants to pay the cost of the reference.

CARPENTER et al. v. EBERHARD MANUF'G CO.

(Circuit Court, N. D. Ohio, E. D. November 2, 1896.)

No. 5,208.

1. PATENTS—ASSIGNMENTS—PATENT-OFFICE RECORDS.

It seems that certified copies of assignments from the patent-office records are evidence of the genuineness of the signatures thereto, and prima facie proof of proper execution.

2. SAME—INFRINGEMENT SUITS—PROOF OF TITLE.

Where there was no satisfactory proof as to the ownership of one-half of a patent sued on, and, by the averments of the bill, more of the title was conveyed than originally vested in the patentee, *held*, that complainants' title was defective, and they were not entitled to relief.

A. SAME—INFRINGEMENT—BRIDLE BITS.

In the Campbell patent, No. 387,048, for a bridle bit, the curvature of the bit bars is made an essential part of the claims, and there is no infringement where it does not appear that defendant's bit bars curve in the same way, and accomplish the same function.

This was a suit in equity by Charles R. Carpenter and others against the Eberhard Manufacturing Company for alleged infringement of a patent.

Taylor E. Brown, for complainants.

E. A. Angell and Thomas W. Bakewell, for defendant.

RICKS, District Judge. The complainants in this case make certain averments in their bill with reference to the title which they hold in the patent issued to Hardy W. Campbell on the 31st day of July, 1888,—No. 387,048. The bill alleges that:

"Charles R. Carpenter, William H. Pugh, C. I. Shoop, citizens of the United States, residing in the city of Racine, in the county of Racine, state of Wisconsin; Abraham F. Risser, a citizen of the United States, residing in the city of Chicago, in the county of Cook, and state of Illinois (doing business as A. F. Risser & Co.); and the Racine Malleable and Wrought Iron Company, a corporation organized under and existing by virtue of the laws of the state of Wisconsin, having its principal office and place of business in the said city and county of Racine, state of Wisconsin,—bring this, their bill of complaint. * * * And your orators show unto your honors that by direct and mesne assignments and transfers, by instruments in writing, each for a full and adequate consideration, said Hardy W. Campbell granted and conveyed to your orators the full and exclusive right, title, and license of making, using, and vending, etc., the said invention."

The defendant, by its answer, denies any knowledge as to the title and transfers made as averred in the bill, and calls for proof. Thereupon the complainants have offered certain transfers and assignments made by Hardy W. Campbell to the various persons set forth in the bill. It is contended on behalf of the complainants that certified copies of these transfers from the patent office are sufficient to prove the signatures to the original instruments, that they were duly executed, and that they make out a prima facie case of title. The defendant's counsel contend that, while the statutes of the United States permit and authorize the registering of such transfers, they are not in themselves evidence of their proper execution by the parties whose names are thereto attached, but that they make out merely a prima facie case of title. Two opinions are cited by the defendant to sustain its theory,—one in the Fifth Circuit Court of Appeals Reports (case of *Paine v. Trask*, 5 C. C. A. 497, 56 Fed. 233), and the other in 9 C. C. A. 336, 60 Fed. 1016 (case of *Mayor, etc., of City of New York v. American Cable Ry. Co.*). These decisions seem to sustain the contention of the defendant's counsel. Complainants' solicitor cites a more recent case, decided in the Seventh circuit, the case of the *Standard Elevator Co. v. Crane Elevator Co.*, 22 C. C. A. 549, 76 Fed. 767. This is a very well-reasoned opinion, and goes to the extent of holding that the certified copies of assignments from the patent office are evidence of the genuineness of the signatures thereto, and prima facie proof of their proper execution. But, in connection with these averments, and the certified copies offered in support thereof, I am satisfied that the complainants' title is defective. There is not satisfactory proof as to

the ownership of the one-half of this patent, which was conveyed to Risser & Co., nor as to who Risser & Co. are, nor as to the relation of the Racine Malleable & Wrought Iron Company, who are licensees. According to the averments of the bill, there is more of the title conveyed than originally vested in the patentee. For these reasons I think the complainants' title is defective, and that they are not entitled to the relief for which they pray.

Having reached this conclusion, it is not important to examine the question of the validity of the patent sued upon. Under the circumstances under which this opinion is written, the court is not able to give the time to the consideration of this question which it deserves; but, inasmuch as the parties have gone to large expense in preparing the case, and inasmuch as the exhibits and the evidence narrow down so closely the question of infringement, even in the short time available to the court this question can be determined. The complainants' expert attaches great importance to the curvature of the bars. The patentee, in his specifications, seems likewise to have attached great importance to the curved bars. In lines 92 to 95 in the specification, he says: "When the bit is secured in this way, the curved bars adapt themselves perfectly to the roof of the horse's mouth, and form a cross which leaves the tongue entirely free under the bit, while the cross-bars prevent the horse from getting his tongue over it." The J. I. C. bit, as shown in the patent drawings and exhibit, shows two horizontally curved bars, with the curvature uniform throughout. The complainants' exhibit of defendant's bit shows that these bars are straight. The curvature of the bit bars is certainly an essential part of Campbell's claims, and, in order to show an infringement, it was the duty of the complainants to show that the defendant's bit bars curved in the same way, and accomplished the same function. For it is well settled that "where one patent combination is asserted to be an infringement of the other, a device in one, to be an equivalent of a device in the other, must perform the same functions." Giving the word "curved" the ordinary definition of the dictionary, and remembering that the burden is upon the complainants to show an infringement, the court finds this proof unsatisfactory and defective. The complainants' expert has not succeeded in reconciling his own testimony to make out from his own showing an infringement as the bill claims. There being, therefore, no proof of infringement, the bill must fail as to this part of the case.

A decree may be prepared accordingly, finding that the complainants' title is defective, and that there is no infringement, and the bill will be dismissed.

MORRIS BOX-LID CO. v. DAVIS PRESSED-STEEL CO. et al.

(Circuit Court, D. Delaware. December 3, 1896.)

PATENTS—VALIDITY AND INFRINGEMENT—CAR AXLE BOX LIDS.

The Morris patents, Nos. 379,712 and 423,795, for a car axle box lid, the main feature of which is a construction whereby the spring can be attached to the lid without the use of rivets, so that a broken spring can be replaced

without removing the lid from the box, were not anticipated by the device of the Kinzer patent, No. ——. Claim 1 of the former and claims 4 and 5 of the latter are valid, and are infringed by the device of the Davis patent, No. 521,231, in which the location of the spring is changed from the outside to the inside of the box, without substantially varying the mode of operation or result. But claims 1, 2, and 7 of the second Morris patent, which are for a car axle box lid, as an article of manufacture, independent of the manner of attaching the spring thereto, are not infringed thereby, even if valid.

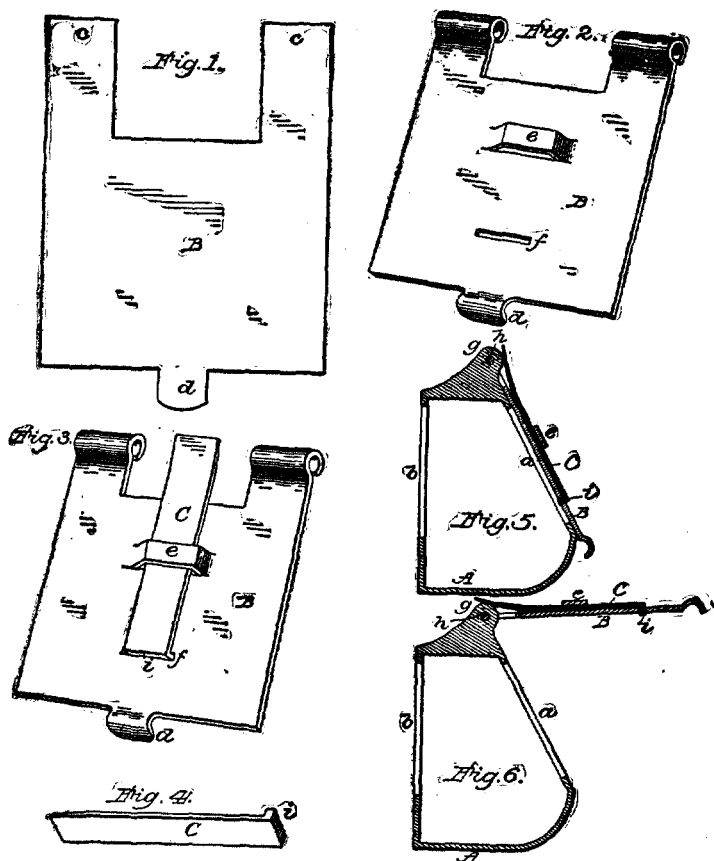
Otto B. Barnett and James H. Raymond, for complainant.
Francis T. Chambers, for defendants.

WALES, District Judge. This is a suit by the Morris Box-Lid Company, a Pennsylvania corporation, and sole owner of the patents here sued upon, against Davis Pressed-Steel Company, a Delaware corporation, and Nathan Davis, its president, for infringement of claim 1 of letters patent No. 379,712, dated March 20, 1888, granted to George W. Morris, and claims 1, 2, 4, 5, 7, and 8 of letters patent No. 423,795, dated March 18, 1890, also granted to George W. Morris. Each of these patents is for a "car axle box lid," and was assigned to the complainant on the date of its issue.

The object to be gained in making and adjusting a lid to the journal box of a car is to make a lid of such material and with such attachments that it can be easily hinged to the box, and readily opened for the introduction of lubricating packing, and be securely closed against the entrance of dirt and cinders. It was customary at first to use cast-iron lids for the journal boxes, but these proved to be defective in several respects. They were heavy, causing excessive wear to the pintle or hinge bolts, and were easily broken in ordinary use, thus leaving the contents of the box exposed. The steel spring, which was riveted to the lid, cut or wore off the soft iron rivets, and a broken or defective spring could only be replaced after the lid had been removed from the box, and a new spring riveted on. To provide a lid that would be free from these defects was the aim of Mr. Morris, and after several experiments he succeeded in producing a lid for which he obtained letters patent No. 379,712, of March 20, 1888, which, for convenient reference, will be called the "first Morris patent." The specification, after stating the object of the improvement, proceeds as follows:

"As the lid is often open for the hasty inspection of the condition of the journal and its lubricant, it is important that it should be light and easily opened and closed. For this purpose, I make the lid, B, of thin sheet steel or other suitable metal, stamped out in blank, as shown in Fig. 1, with corner edge projections, c, c, to form pintle-hinge eyes or scrolls, a lower edge projection, d, to form a handle, a loop, e, punched out so as to stand up from its outer face, and a punched-out slot, f, the loop and the slot being in a middle line.

"The journal box has a rounded projection, g, at its top, provided with a horizontal opening made to register with lid eyes to receive the pintle, h, which forms the hinge for the lid. The spring, C, is a narrow plate of steel of suitable thickness, and has a right-angled lip, i, formed at one of its ends, adapted to fit into the slot in the lid. The spring is applied to the lid by slipping its plain end up under the loop before the lid is hinged and fitted to the box; but the spring is only thus partially applied. After the lid is hinged and fitted to the box, then the spring is driven up from its lower angle-lip end through the loop until the spring lip reaches and is forced by the tension of the spring into the slot in the lid, and holds it fast. In this position the upper end of the spring will pass over

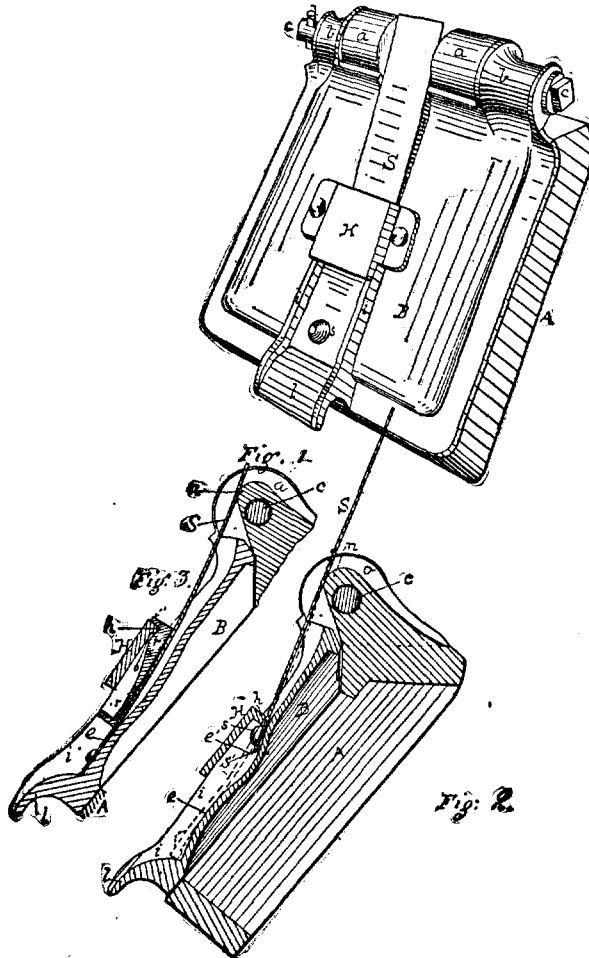


and bear upon a curved top part of the box over the hinge between the pintle-hinge forming eyes of the lid, so as to give a sufficient tension to the bearing end of the spring upon the top of the box to hold the spring firmly and closely down upon the open face of the box. The spring is thus secured without rivets, and permits the easy opening and closing of the lid. * * * I prefer to form the spring-confining loop integral with the lid, but it may be a separate attachment thereto. When the lid is open, the spring acts to hold it in such position.

"I claim: (1) An axle-box lid stamped out of sheet steel, with a raised cross-loop and a cross-slot stamped therein, and a plate-spring having a right-angled end, and fitted within said loop and within said slot, combined with an axle box having a top bearing for said spring, substantially as set forth."

The specification of the patent of 1888 has been given almost in full, because it is the foundation of the Morris patent of 1890, and will clear the way for a better understanding of the advance made by the latter. The validity of each patent has been assailed, but the defense chiefly relied on is noninfringement. It will be noticed that the prominent features of the first claim of the patent of 1888 are a lid made of sheet steel, with a cross-loop and a cross-slot stamped therein, and having a plate spring attached thereto without rivets, so that a broken or damaged spring can be readily replaced without

removing the lid from the box. In other words, Morris had contrived a plan for permanently fixing a spring to the lid of a journal box without rivets, and which would keep the lid down when closed, and hold it up when open. That the new lid was an improvement on all that had theretofore been invented or put on the market hardly admits of a doubt, but its patentability is denied in view of the invention of Jacob Kinzer, to whom a patent was issued for a car axle box lid, February 4, 1879, which, it is claimed, anticipates the Morris lid. In his specification, Kinzer states that his "invention relates to an improved arrangement of a spring upon an axle box and lid, whereby the elasticity of the spring may be made operative in holding the lid to its box, or inoperative, at pleasure." Referring to the drawings, the lid and the box being hinged together in the usual way, the specification thus describes the improved "arrangement":



"The lid is held to its seat on the box by means of a spring, S, one end of which bears on the lid near its front edge, as at e, and the other end on a rest, n, made on the box over the hinge, and between the cars, a, a', while a third or intermediate bearing is provided by a flange, h, extending down from a cap or box, H, which is riveted to the lid, so as to cross or span the line of the spring. The pressure of this flange, h, upon the spring, the end bearings being fixed, will determine the tension of the spring; and the rest, n, being stationary, the end of the spring bearing on the lid will operate to hold the lid on the box. * * * I also make side walls, i, which bound the bearing, e, and the depression, e', on either side, and prevent the lateral displacement of the adjacent end of the spring."

There is no evidence that the Kinzer lid was ever largely adopted or put to practical use, and it radically and plainly differs from the Morris lid of 1888 in many important particulars. The cross-loop of the Morris lid is not the equivalent of the cap, H, of the Kinzer lid, nor could it have been suggested by the latter. The cap, H, is put over the spring, and then riveted to the lid, and this must be done before the lid is hinged to the box, and the cap must be removed whenever it may be necessary to replace a broken spring. The Morris cross-loop is raised from the face of the lid, and is integral with it. The spring can be inserted under the loop either before or after the lid is hinged, and a broken spring can be removed, and a new one inserted, without unhinging the lid. The lower end of the spring in the Kinzer contrivance is held in place by friction, which prevents vertical displacement, and by the side walls, which prevent lateral displacement. The lower end of the spring in the Morris lid is securely anchored in the cross-slot, and cannot be driven from it by any ordinary means after the lid has been hinged. A reference to the specifications of these patents will make this perfectly plain. Other differences are that the Kinzer lid does not have a lot to receive the right-angled end of the spring which is thereby securely held from longitudinal movement, and that the Morris lid does not require the clumsy side walls of the Kinzer patent to prevent the lower end of the spring from lateral displacement. The slot in the Morris lid answers both purposes. In the language of Mr. Dayton, complainant's expert:

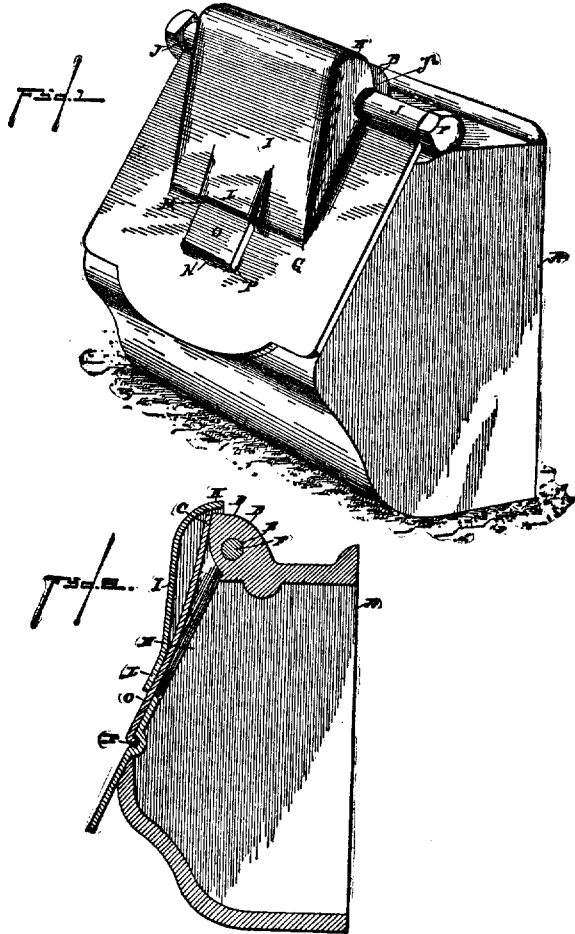
"In the Kinzer construction the spring is held from upward movement, with respect to the lid, solely by friction. In the Morris construction the spring is held not at all by friction, but by direct abutting engagement of the lateral surfaces of the lip on the spring with the side walls of the slot."

But Morris did not stop here. Further observation and experiments led to the additional improvements which are embodied in the patent of 1890, and are stated in the specifications as follows:

"The objects of my invention are—First, to provide a lid for car axle boxes in which a spring for closing said lid, and for keeping it closed, may be secured so as to bear against the shoulder of the axle box at the inner side of said lid; second, to provide such a lid with a slot and a stop for inserting and securing said spring from the outside of the lid after the latter has been properly hinged in place; and, third, to provide such a lid with a bulge or swell which may fit over the shoulder of the axle box, and form a comparatively tight joint for excluding dust from the box."

The improvements thus made on the lid of the first Morris patent are very striking. In the latter the spring is placed on the outside of a flat lid, with the upper end bearing upon the shoulder of the car axle box, the whole of the spring being exposed to view, and

unprotected. In the second Morris patent the shape of the lid is altered so as to provide a covering for the spring and its top bearing, thus more effectually excluding dust and grit from the box, and insuring greater safety to the spring. The raised cross-loop is dispensed with, and in its place a transverse slot at the lower end of the bulge is substituted. The spring is of the usual shape, having a lip at its lower end.



To quote from the specification of the second Morris patent:

"The lid is stamped out of a plate of malleable metal, and the bulge is formed with sharply defined and straight sides at its highest portion, so that it may form a comparatively tight joint with the shoulder or projection. The lid is first hinged in place by inserting the pintle through the eyes of said lid, and through the shoulder of the box; and the spring is thereupon inserted through the slot, M, and is guided upward by the passage or channel, L, in which it fits; and, when the upper end of said spring has reached the shoulder, the spring is driven upward until the lip engages the recess which forms the stop for the lower end of the spring."

The lid here described differs more widely than does the lid of the first Morris patent from the Kinzer "arrangement." The only resemblance between the Morris lids and the Kinzer lid is that they belong to the same general class, and that each may be hinged to the box of a car axle. In all essential respects for the purpose for which they are designed, there is entire dissimilarity both in the result produced and in the method of producing it. The great superiority and improved practical utility of the Morris lids entitled them to the protection of patents. The Kinzer lid has, it is true, a rivetless spring, but it was a failure. Morris was the first to invent a method by which a spring could be permanently attached to a lid without the use of rivets, that has proved to be a success, as is abundantly proved by its extensive adoption by car builders throughout the United States.

The claims of the second Morris patent of which infringement is charged are:

"(1) A car axle box lid, which consists of a plate of stamped malleable metal formed at the middle of its upper portion, with a bulge or swell, which terminates in a curved part at its upper edge, at which point the latter is split at J², J², each side of said swell, whereby the upper corner-edge parts are adapted to be turned to form the hinge eyes, substantially as described.

"(2) A car axle box lid, which consists in a plate of stamped malleable iron formed at the middle of its upper portion, with a bulge or swell, which increases in height towards the upper edge, and has the upper edge curved inward, with two transverse hinge eyes upon the upper edge and at both sides of said bulge or swell, and formed with a transverse slot at its lower end, and with a transverse slot or recess below said slot, substantially as described."

"(4) The combination of a car axle box formed with a perforated shoulder or projection at the upper edge of its opening, a lid formed at the middle of its upper portion with a bulge or swell, which increases in height towards the upper edge, and has said upper edge curved over said shoulder or projection, formed with two transverse hinge eyes upon the upper edge, and at both sides of said bulge, having a slot at its end, a pintle or hinge bolt passed through the eyes and the perforated shoulder, and a flat spring inserted through the slot, having its lower end secured by a suitable stop, and its upper end bearing against said shoulder or projection of the axle box, substantially as described.

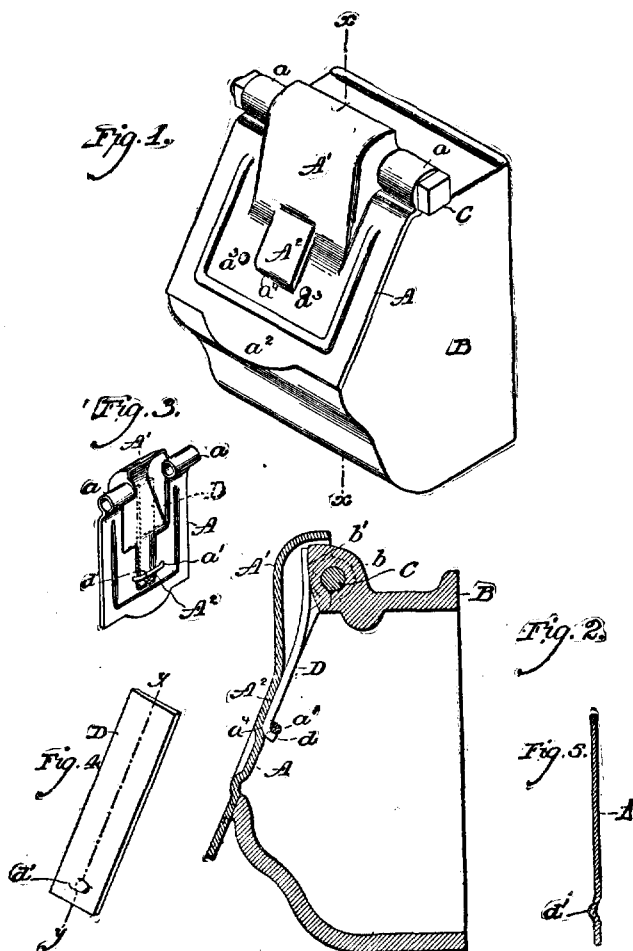
"(5) The combination of a car axle box formed with a perforated shoulder or projection at the upper edge of its opening, a lid formed at the middle of its upper edge, with a bulge or swell, which increases in height towards the upper edge, which is curved over said perforated shoulder, formed with two transverse hinge eyes upon the upper edge and at both sides of said bulge, a slot at its lower end, and with a transverse recess below said slot, a pintle or hinge bolt passed through said perforated shoulder or projection, and through the transverse eyes of said lid, and a flat spring passed through the slot of said lid, and having its lower lipped end secured in the recess below said slot, and its upper end bearing against said shoulder or projection, substantially as described."

"(7) As a new article of manufacture, the herein-described cover or lid for car axle boxes, consisting of a blank pressed or stamped so as to form an upper central swell or bulge, substantially as and for the purpose described.

"(8) As a new article of manufacture, the herein-described lid or cover for axle boxes, consisting of a blank pressed or stamped so as to form an upper central swell or bulge, a lower transverse slot, and a recess or slot below said transverse slot, forming a stop, substantially as set forth."

The alleged infringing article is made under letters patent No. 521,231, dated June 12, 1894, and issued to Nathan A. Davis, for a lid for car axle boxes, and is used and sold by the defendants. This lid is identical in shape, form, and material with the Morris lid of

1890, with the exceptions that it does not have the transverse slot, through which the spring is inserted from the outside, and the recess below the slot in which the angled end of the spring is anchored. The specifications of the Davis patent describes a lid formed with a bulge to fit over the shoulder of the box, the shoulder being used as a socket for the bolt that holds the lid to the box. The corners



of the lid are pressed into shape to form hinge eyes. A stirrup is secured on the inside of the cover, and to hold the cover shut a spring is employed, one end being held by the stirrup, and the other end bearing against the face of the shoulder of the box. To secure the spring firmly on the cover, and to prevent its lateral displacement, a socket is pressed in the cover below the stirrup by which a shoulder is formed at the end of the socket, and the spring, being made with a turned-up end, is adapted to be fitted under and below the stirrup.

When in position, the spring fits easily in the socket, and is securely held there by the turned-over end of the spring fitting neatly between the socket and the stirrup. The shoulder of the socket also forms a stop against which the end of the spring abuts, and prevents the spring from jarring down and freeing its upper end from the bearing on the shoulder of the box. The curved end of the spring is "hooked over the stirrup, and then brought into the groove in the inside of the lid, in which position the engagement of its hooked end with the stirrup of the lid effectually prevents it being driven upward, while the lower wall or end of the groove prevents its being forced downward, and the sides of the groove prevent its being moved to one side or the other." Among the advantages claimed for the Davis lid are that it is provided with an easily adjustable spring, which can be applied when desired without riveting and bolting, and which, when applied, is wholly within the axle box.

The defense is that the Davis lid does not infringe either of the patents in suit, because, (1) the Davis lid cannot be inserted to operative position after the lid is hinged to the box, which is a special object of the Morris invention; (2) that, whereas the Morris inventions consist of certain improvements for applying a spring to the outer face of the lid, the defendant's lid embodies a construction which requires the application of the spring to the inner face of the lid; and (3) that the Morris lid and spring are permanently secured together when brought into operative position, while the defendant's lid and spring are in no sense secured together, except when the spring is under the tension exerted by the horn of the box. And it is confidently asked whether infringement can be found where such obvious differences exist. But these differences do not relate to the main inventions of the Morris patents. The great improvements made by Morris were the means by which a spring could be attached to a box lid without the use of rivets, and thus allow a broken spring to be replaced without removing the lid from the box. This was the main feature of the first Morris patent. The next advance was to combine a rivetless spring which was inserted through the outside of a bulged and hooded lid, through which the spring could be inserted from the outside, and which, when closed, would more effectually protect the contents of the box from dust and grit. This was the improvement made by the second Morris patent, which is chiefly for a combination invention.

Now, the complainant claims that the defendants have only transposed the spring wholly from the outside to the inside of the box lid, while retaining the same three bearing points for the spring, namely, for its upper end the horn or projection of the journal box, the stirrup and shoulder at its lower end, with an intermediate point between the two. The stirrup in the Davis lid takes the place of the recess on the Morris lid for mooring the angled end of the spring, and these are the equivalents of, and were suggested by, the Morris constructions. Keeping in mind that the important feature of each of the Morris patents is the means by which a rivetless spring is attached to the box lid, the only inquiry as to infringement by the defendants of the Morris devices is whether the Davis lid uses

the same or equivalent methods to obtain the same result. An examination of the comparative drawings contained in complainant's exhibits show very clearly that Davis has made an ingenious attempt to avoid infringement by placing the spring on the inside of the lid, and thus has done no more than to change the location of the spring, which operates in substantially the same way as the Morris contrivance. The fact that the Morris spring can be attached to the lid after the latter has been hinged to the box, while the Davis spring lacks this advantage, is of no consequence, since it is admitted that in practice the spring in the Morris lid is attached before hinging.

The defendants also deny that there is any novelty in the mode of anchoring the lower end of the spring in the Morris lid, the same or analogous devices, it is alleged, having been previously adopted and used in snap hooks and letter clamps. On examination, however, of the patents relating to snap hooks and the letter clamps, the mode of placing and holding the spring in position will be found to be different from that employed by Morris. In the letter clamp the spring is secured at both ends, and in the snap hooks the spring is wedged into its place. While it is true that Morris was not the first, broadly, to make use of a spring with a right-angled end for the purpose of engaging in a slot or a depression, to anchor the spring against longitudinal movement, he was undoubtedly the first one to see the adaptability of applying the spring in that manner to a car axle box lid, and thus applied it to a new purpose to produce a new result, which are evidences of invention.

It follows from what has been said that the Davis contrivance for attaching and securing the spring to the inside of a car axle box lid is a mere evasion of, and to that extent infringes, the patents in suit. But it is in evidence that bulged or hooded lids, made of cast iron, and applied to car axle boxes, were in use long prior to the dates of the patents in suit. This fact is clearly established by the testimony of Mr. Dayton, the complainant's expert:

"xQ. 16. * * * To resume, I will ask you with reference to the patent of March 18, 1890, whether or not you understand that Mr. Morris was the inventor of a box lid having the general conformation of the lid illustrated and described by him, apart from the material or way in which that box lid was produced. A. I understand that he was not the first to make a lid of that general form, apart from its manufacture from sheet metal. xQ. 17. Mr. Morris says (lines 22 to 34 of the specification) that the objects of his invention are threefold, and first he says: 'to provide a lid for car axle boxes in which a spring for closing said lid, and for keeping it closed, may be secured so as to bear against the shoulder of the axle box at the inner side of said lid.' You understand, do you not, that lids fully answering this description were old at the time of Mr. Morris' invention? A. They were old in patents at least. xQ. 18. And you understand, do you not, that the third of Mr. Morris' objects, viz. 'to provide such a lid with a bulge or swell which may fit over the shoulder of the axle box, and form a comparatively tight joint for excluding dust from the box,' was also old? A. In cast-metal box lids, yes. xQ. 19. The second and only remaining object which Mr. Morris states himself to have had in view was 'to provide such a lid with a slot and a stop for inserting and securing said spring from the outside of the lid after the latter has been properly hinged in place.' Do you understand that lids such as Morris refers to, apart from the question of the material of which they are made, had ever had this capacity before? A. I do not. xQ. 20. And you clearly understand, do you not, that the defendant's lids do not have this capacity? A. I do."

It is also in proof that the method or art of stamping various kinds of articles from sheet steel was well known and in use before Morris made his box lids from that material, and it is well settled that the mere substitution of one material for another is not a patentable invention. *Roofing Co. v. Smeeton*, 9 U. S. App. 489, 4 C. C. A. 379, and 54 Fed. 385; *Kilbourne v. W. Bingham Co.*, 6 U. S. App. 65, 1 C. C. A. 617, and 50 Fed. 697. In the last-cited case the court says:

"The use of wrought steel or iron in lieu of cast metal is a mere substitution of materials, which, whatever the degree of superiority given to the manufacture thereby, is not patentable."

It only remains to point out those claims which, in the opinion of the court, are infringed by the defendants. Claim 1 of the first Morris patent clearly comes within this category, since it specifically names the new devices for securely fastening the spring to the lid without the use of rivets. "The gist of the second Morris patent," as expressed in the opinion of the complainant's expert, "is the box lid having the bulge or swell to inclose the spring, and also having a mutual conformation of the lid and the spring, substantially as stated, whereby the spring once in place is securely held against any possible displacement, solely by said conformation of parts, and without rivets or similar fastenings."

Claims 4 and 5 of this patent include the old housing or bulge, combined with the spring-securing devices of the first Morris patent, and are clearly infringed by the defendants, who use a lid of the same form, with equivalent devices for attaching the spring. Without passing on the validity of claims 1, 2, 7, and 8, which are for a car axle box lid as an article of manufacture, independent of the manner of attaching the spring thereto, it is enough to say that there is not sufficient evidence to sustain a charge of infringement of these claims, because the defendants' lid does not have the transverse slot and the anchoring recess below, which are the only novelties in the Morris lid per se. The mode of forming the hinge eyes, if it can be ranked as an invention, is anticipated by Morris' patent No. 192,254, of June 26, 1877.

Let a decree be prepared in accordance with the foregoing opinion.

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al.
(two cases).

(Circuit Court, N. D. Ohio, E. D. July 18, 1896.)

Nos. 5,510 and 5,511.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

Parties who make, and advertise for sale in their catalogue, as an independent device, one part of a patented combination, which part is valuable only in connection with the other elements of the combination, are guilty of contributory infringement.

2. SAME—PRELIMINARY INJUNCTION.

Preliminary injunction granted against infringements of the Van Depoele patents, Nos. 424,695 and 495,443, covering electric trolley switching devices.

These were two suits in equity by the Thomson-Houston Electric Company against the Ohio Brass Company and others for alleged infringement of patents relating to electric trolley switching devices.

Frederic H. Betts, for complainant.

Frank T. Brown, for defendants.

RICKS, District Judge. These two cases are before the court upon a motion for a preliminary injunction. Case No. 5,511 involves a motion for preliminary injunction to restrain the infringement of the Van Depoele patent No. 495,443, dated April 11, 1893, application for which was filed in the patent office on March 12, 1887. Case No. 5,510 involves a similar motion for preliminary injunction on patent No. 424,695, dated April 1, 1890, application for which was originally filed on March 12, 1887, being a part of application for patent No. 495,443, but was divided in the application upon which the patent finally issued, which was filed October 27, 1888. Both of these patents have been previously adjudicated to be valid. Patent No. 495,443 has been adjudicated valid in the case of Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co., 71 Fed. 192; and patent No. 424,695 has been adjudicated valid in the case of Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 69 Fed. 257, and, on appeal, in *Id.*, 18 C. C. A. 145, 71 Fed. 396. The claims of patent No. 495,443 which are alleged to be infringed by the defendants herein were claims Nos. 6, 7, 8, 12, and 16, all of which are sustained by Judge Townsend, in the case above referred to, in 71 Fed. 192. The defendants were duly served with notice of these decisions, and with requests to desist from further advertising the infringing devices, and further offering them for sale. Complainant has filed an affidavit of Mr. Coffin showing that they are fully equipped and ready to supply all demands from the electric railways for all necessary parts.

The defenses to these motions are based upon two propositions: First, that the defendants have not infringed, because they have only sold certain parts of the patented combinations claimed; second, that the patents are void, because the inventions claimed in the claims in suit have been previously described in prior patents to the same inventor. The complainant contends that it is no defense for a party sued for infringement of patented combinations that the infringer has only made and sold a part of said combination, if the proof shows that he made and sold those parts for the purpose and with the intention that the purchaser should utilize it by supplying the other parts. This proposition is well sustained by Judge Townsend in the case of Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co., 72 Fed. 1016, a copy of which opinion is filed and annexed to the affidavit of one of the witnesses in this case.

The patent No. 424,695, in its third, eleventh, and nineteenth claims, covers a combination of overhead suspended wire conductor, the switch plate having depending flanges in an upwardly

pressing contact device, which is claimed as an invention. This contact device is named in the eleventh and nineteenth claims as a grooved wheel carried on the end of an upwardly pressed arm. The trolley arm and groove passes under the frog where the electrical contact is with the tips of the roller, instead of by wire to the bottom of the groove. The defendants make this switch device, advertise it for sale in their catalogue, and offer it as an independent device; but, as constructed and sold, it is, in and of itself, of no use, and can only become valuable and useful when attached to the other combinations of the trolley system. This is a clear case of contributory infringement. If the device could be used for any other purpose, independent of the combination referred to, the defendants would not be interfered with in the manufacture and sale of the same. But, inasmuch as it is valuable only in connection with the other combinations of the patent, it would defeat the spirit and purpose of the patent laws if the defendants were allowed to manufacture and sell it unrestrained and unconditionally.

But it is claimed that there is no proof of infringement, that a single sale of this device was made to one of complainant's agents, and that the defendants did not know for what purpose it was to be used. But this is a mere evasion. The defendants advertise this device in their catalogue by a cut, and offer it for sale; and it is idle for them now to say that they only made this single sale, and are, therefore, not infringers. They would not advertise it at a great expense. They would not manufacture it at an expense, and offer it for sale through agents at an expense, without intending to reap some profit from it, or promote their business interests in some way by it.

Both these patents have been fully considered by the circuit courts of the United States in the Eastern districts, and, after full and fair hearing, have been adjudged to be valid. So far as I can discover from the defendants' briefs, every point now urged against these patents was considered in the other cases. It is urged, however, that, under the decisions of the circuit courts referred to, it became necessary for the complainant to make disclaimer as to certain claims, and that these disclaimers have been so broad as to give the public the right to use the inventions therein referred to. But even this contention has been before heard and disposed of. It will not, therefore, be profitable or useful for this court to review these decisions, and consider these objections at length. I think the universal practice and custom is, when cases have thus been once fully heard and considered, to accept the decisions of the lower courts until passed upon by the highest courts. In one of these cases, at least, the circuit court of appeals for the New York circuit has affirmed the decision of the court below, and this decision may, therefore, be accepted as final.

I think the proof of infringement is sufficient. Judge Lacombe, upon similar proof, allowed an injunction on the same patents in New York, and I think the complainant is entitled to the relief prayed for in these cases. An injunction will be allowed restrain-

ing the defendants from manufacturing the switch plate covered by the patent No. 424,695, as described in claims 3, 11, and 19, and defendants will be further restrained from manufacturing the device covered by patent No. 495,443, in claims 6, 7, 8, 12, and 16.

If, as contended by defendants' counsel, the defendants are not manufacturing or selling these devices, no harm can result from the allowance of an injunction and restraining order. If, on the contrary, they are making any characteristic parts of the combination covered by the several claims hereinbefore stated, and selling them or disposing of them in such manner as to make it difficult for the complainant to prove infringement, they ought not to be encouraged in any such trick or device. If, as contended, the infringements are so few and so trifling that they cannot be proven, no harm can result to the defendants. If, on the other hand, the infringements are cunningly hidden from observation, and difficult to prove, the complainant ought not to suffer by it. This patent having been established at great expense, and after long litigation, the complainant is entitled to the full benefit conferred upon it as the owner of a valid patent under the patent laws, and should have the full protection of the court. A decree may be prepared accordingly.

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al. (two cases).

(Circuit Court, N. D. Ohio, E. D. October 26, 1896.)

Nos. 5,510 and 5,511.

PATENT SUITS—PRELIMINARY INJUNCTIONS—PRIOR ADJUDICATIONS—APPEAL AND SUPERSEDEAS.

A court, in granting a preliminary injunction in a patent suit, followed prior decisions of other courts on the merits. *Held*, that it would also follow those courts in refusing a supersedeas on allowing an appeal.

These were two suits in equity by the Thomson-Houston Electric Company against the Ohio Brass Company and others to restrain the alleged infringement of the Van Depoele patents, Nos. 495,443 and 424,695, for electric trolley switching devices. Preliminary injunctions were heretofore granted. 78 Fed. 139. The present hearing is in relation to the granting of an appeal and supersedeas.

Betts, Hyde & Betts and Squire, Sanders & Dempsey, for complainant.

Frank T. Brown, for defendants.

RICKS, District Judge. In these two cases, the complainant's solicitors were served with notice by solicitors for the defendants that on the 1st day of October, 1896, at 10 o'clock a. m., they would apply to the court for an order superseding the injunction allowed in the opinion rendered in these cases, and for the allowance of an appeal. Solicitors for the defendants appeared at the time stated. Counsel for the complainant, through a clerk in their office, had before that time appeared and asked for information with reference to

a hearing, which the court supposed referred to the case of the Continental Trust Company against the Toledo, St. Louis & Kansas City Railroad Company. Acting upon this supposition, the court advised the representative of complainant's solicitors that the case would be heard at 11 o'clock that morning. In the meantime, solicitors for the defendants appeared, and, no one appearing for the complainant, the orders as prepared by counsel for the defendants were signed *ex parte*. An hour afterwards, when complainant's solicitors appeared for the hearing of the motion, the court for the first time discovered that a misunderstanding had existed, and that the inquiry to which reference is made in this opinion really referred to the hearing in these cases. In the meantime, defendants' solicitors had left the city. Thereupon the court directed that the orders be not entered upon the journal, and counsel for the defendants were thereupon notified of the mistake. Correspondence has followed, the purport of which has been to ask the court to supersede the injunction pending the appeal, with an intimation that the opinion in the cases relied upon in the opinion cited by the court were afterwards modified in the case of Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co. (in the United States circuit court of appeals for the Second circuit) 22 C. C. A. 1, 75 Fed. 1006. The court is perfectly willing to allow this order to be modified in the same way in which the court of appeals modified the order in the Kelsey Case; but, inasmuch as, in all the cases in the First, Second, and Third circuits, the supersedeas has been refused, and inasmuch as this court has followed the decisions of those courts upon the merits, I see no reason now why the supersedeas should be allowed.

It is claimed by the solicitor for the defendants that, as soon as the *ex parte* orders were approved by me, on the 1st of October, the defendants were notified that the supersedeas had been allowed, and that thereupon they made some contracts in perfect good faith before any notice was received that the orders were held for further consideration. If the defendants can show by affidavit that, acting in perfect good faith, they made bona fide contracts, and that these were made before they had notice that the orders were held, the court will grant them proper relief in some form upon proper presentation of the facts. The order allowing the appeal may be entered, but the injunction will not be superseded pending that appeal.

THE MUTUAL.

THE J. PERCY BARTRAM.

BARNEY DUMPING BOAT CO. v. THE MUTUAL.

SAME v. THE J. PERCY BARTRAM.

(District Court, D. Connecticut. January 9, 1897.)

1. ADMIRALTY PRACTICE—RELEASE ON STIPULATION—ADDITIONAL SECURITY.
After a vessel has been released on stipulation, she is freed forever of the lien, and the court therefore has no authority to require the claimant to give any additional security.
2. COLLISION—SCHOONER AND TOW—CHANGE OF COURSE—NEGLIGENT LOOKOUT.
Where a schooner collided at night with the hindmost of two dumpers in tow of a tug, *held*, on the evidence, that the schooner changed her course, and had a negligent or incompetent lookout, and consequently was solely in fault.

This was a libel by the Barney Dumping Boat Company against the steamtug Mutual and the schooner J. Percy Bartram to recover damages resulting from a collision.

Carpenter & Park, for libelant.

Goodrich, Deady & Goodrich, for the J. Percy Bartram.

Macklin, Cushman & Adams, for the Mutual.

TOWNSEND, District Judge. Libel in rem. A preliminary question is raised herein by motion of claimant to vacate order for additional security. The parties originally agreed that the bond should be fixed at \$5,000, which was accordingly filed, and the vessel was duly released. Afterwards, on an ex parte application, the court made an order for additional security in accordance with the provisions of rule 23 of the district court rules in the Southern district of New York. The claimant has failed to file any additional bond, and claims that the court had no power to make said order, because there is no express rule authorizing the court to make such order in this district; and further because the vessel was released by consent upon the filing of said bond for \$5,000. I think the point is well taken. In *The William F. M'Rae*, 23 Fed. 558, Judge Brown says:

"That a vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties, is a proposition too firmly established to be open to question. *The Kalamazoo*, 9 Eng. Law & Eq. 557; *The Wild Ranger*, Brown. & L. 84; *The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346; *The White Squall*, 4 Blatchf. 103, Fed. Cas. No. 17,570; *The Old Concord*, 1 Brown, Adm. 270, Fed. Cas. No. 10,482; *Senab v. The Josephine*, 4 Cent. Law J. 262, Fed. Cas. No. 12,663."

See, also, *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992.

In *The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346, Judge Nelson holds that the vessel, having been discharged from arrest, upon the giving of bond or stipulation, returns into the hands of her owners discharged from the lien or incumbrance which constituted the foundation for the proceeding against her. See, also, Henry, Adm. Jur.

& Proc. p. 338, § 123. Whether there was any such mistake in fixing the amount of the original stipulation, or in discharging the vessel, as would authorize an order for the redelivery of the vessel, it is not now necessary to decide. The motion to vacate the order is granted.

At about 9 o'clock, on the night of September 28, 1895, the claimant, the steamtug *Mutual*, started from Canal street, North river, with a tow of two dumpers, bound for the dumping grounds at Sandy Hook. The dumpers were known as Nos. 12 and 2, and tailed one behind the other, No. 12 being ahead; each having from 60 to 80 fathoms of hawser. At about 10 o'clock on said night, the respondent, the schooner *J. Percy Bartram*, heavily laden with coal, passed Sandy Hook on the way from Philadelphia to New Haven. At about midnight, in the Narrows, between Staten Island and the Long Island shore, and opposite Bay Ridge, or the Crescent Club House on Long Island, the *Bartram* collided with dumper No. 12, causing her severe injury. Her owners have filed this libel against said steamtug *Mutual* and said schooner *Bartram*.

The answer of the schooner alleges that the dumper No. 12 was negligent in failing to steer after the tug, and in failing to have proper lights. There is no evidence to support the former allegation. There is such a preponderance of testimony to the effect that the dumper had one white light forward and one aft, properly displayed and burning, that this fact also must be taken as proved. It is true, the master and mate of the *Bartram* state that they saw no lights on No. 12, but their admissions as to the numerous shore lights and white lights of vessels lying at anchor, seen by them just prior to the collision, indicate that they may have mistaken the white lights of the dumper for other lights. They admit that they saw the staff lights on the tug, showing she had a tow. I find, in accordance with the preponderance of evidence, that there was no negligence on the part of the libellant.

It is claimed by the schooner that the collision was caused by the fault of the tug *Mutual* in not keeping out of the way of the schooner, and by the *Mutual* that it was caused by the fault of the schooner in porting her helm, and changing her course. At the time of the collision the night was clear. There was a southeast 10-16 knot breeze. The tide was the first of the flood. The schooner and tug sighted each other when they were about a mile and a half apart, standing green to green, the tug being about a point off the schooner's starboard bow, and the schooner, according to the tug's witnesses, being about four points on the tug's starboard bow. From all the evidence, I find that the schooner must have been making about six knots an hour. The course of the tug was originally southwest, but when first sighted by the schooner, she had shifted her course to south by east or southeast, and was heading somewhat towards the Long Island shore, in order to avoid the strength of the flood tide. When the vessels sighted each other, and for some time thereafter, the schooner was heading from north to north by east. That she changed her course, and that said change caused the collision, appears, not only from the testimony of the witnesses for the tug, but

also from the testimony of those on the schooner. In view of the contradictions and improbabilities in the latter, it is clear that the collision could not have occurred as it did unless the schooner changed her course. It further appears that the lookout and wheelsman on the schooner were incompetent or negligent. The master admits that, although he saw the tug a mile and a half away, and knew she had a tow, he saw no light on either tow until he was within 500 feet of one and close on to the other, although it is admitted as to the former and proved as to the latter that each had proper lights burning. He says that he first saw the green light of the tug 10 or 12 minutes before the collision, when she was a mile and a half away, about a point on his starboard bow, and steering about south by east or southeast, and he repeatedly states that she kept on that one point on his starboard bow for about 10 minutes. Again, he says he did not notice whether the tug was broadening off on his starboard bow. At the close of his testimony he was recalled to correct certain mistakes. As to this one, he says:

"Q. Did you make some correction of the bearing of the Mutual's green light from the time you first saw it? A. I say I didn't understand the question as put to me, and, naturally, if I was steering north, one-half west, and the two boats was steering south by east, that we would be going apart,—that we would be spreading. Q. That is, the light would draw further astern? A. Yes, sir. Q. That is, the boats approached each other? A. Which I am not able to give the distance."

But if the green light was first seen, as he and his wheelsman say, on his starboard bow, he could not have passed the tug 200 feet away, and collided with the tow, if he had held his course. That the tug must first have been on his port bow in order to allow such a collision, after he had kept his course for a mile and a half, seems manifest.

Accepting as true the testimony of the master as to the position of the schooner and tug, the ordinary rules of trigonometry and surveying make it mathematically certain that there could have been no collision if the schooner had kept her course. It is not claimed that the tug changed her course. A mile and a half—the distance between the tug and the schooner—is about 8,000 feet. The angle between the course of the schooner and the line drawn from the schooner to the tug is one point, or $11^{\circ} 15'$. The natural sine of this angle, which would be a line drawn from the tug perpendicular to the course of the schooner, is .1951. .1951 of 8,000 feet would be 1,560 feet, so that the tug, when first seen, must have been 1,560 feet from the line of the course of the schooner. If the master's testimony is correct, the tug must have been approaching the line of the course of the schooner, and the tows behind it must always have been further from this line than the tug, so that, if the schooner had kept her course, she could not have passed the starboard side of the tug, some 200 feet away, and struck the forward tow. She certainly could not have struck it squarely on the bluff of the starboard bow. Counsel for the schooner, in his ingenious brief, claims that the following facts are proved: First. That the schoon-

er was headed N. $\frac{1}{2}$ E.; the tug S. E. Second. That when the schooner first sighted the green light of the Mutual, it was about ahead, and a mile and a half away. Third. That the schooner was not going over five miles an hour. He further claims that the tug and tow were 1,300 feet long. Now, it is testified, and undisputed, that the tug and tow were going two miles an hour. If they were going two miles an hour while the schooner was going five miles, the tug must have gone over 3,000 feet while the schooner was reaching the point where the tug was first seen; and if the schooner did not change her course, the tows must have been several hundred feet away from the line of the schooner's course when they passed the schooner. The brief of counsel for the schooner argues that the tow was crossing the line of the schooner's course. If this were so, and the rates of speed were as claimed in said brief, the schooner could not have collided with said tow unless the tug, when seen a mile and a half away, was at least one point on the port side of the schooner, instead of ahead or on the starboard side. That the schooner was not heading N. $\frac{1}{2}$ E. up to the time of the collision is shown not only by the foregoing facts, but also by the testimony of five witnesses on the tug Mutual, the tows, and on the tug Ramsay, all of whom swear that she did change her course. That the Mutual was "about ahead" of the Bartram when a mile and a half distant, or when first seen by those on board the schooner, is denied by the master of the schooner, who testified as follows:

"Q. How long a time before the collision had you seen the green light of the Mutual? A. Ten or twelve minutes. Q. And then she was a mile and a half away? A. Yes. Q. Where was she when you first saw her? A. On our starboard bow. Q. How many points? A. About a point."

It is denied by the wheelsman of the schooner, who testified as follows:

"Q. Up to that time you hadn't seen any tug? A. O, yes; I could see a tug-boat on the starboard bow, coming down. Q. How far away had you seen that light? A. About a mile. Q. How far on your starboard bow did those lights—the green light and the bright lights—show when you first saw them? A. About a point on our weather bow, I should judge that it was."

Again:

"Q. How much was she on your starboard hand a mile away? A. I dare say she was half a point."

The statement of the lookout of the schooner, who, according to the preponderance of his own testimony, and according to that of the wheelsman, did not see the light of the Mutual until just before the collision, is as follows:

"Q. How far away was she when you first saw the green light? A. Well, I suppose she was a couple of hundred yards, more or less. Q. And how did that light bear upon you? A. It bore about right ahead of us."

I do not consider it material how the light of the tug bore at that distance, nor that the testimony of this witness upon that point is of any weight in the circumstances. This testimony, however,

and that of a deck hand on the tug Mutual, is the only evidence which is claimed to support the argument that the Mutual was ahead of the schooner when a mile and a half away. The testimony of the deck hand, in fact, however, does not support any such contention. He says:

"Q. How far was the schooner away from you when you first saw the green light? A. About a mile away when I first saw it. Q. On what bow of your tug did you see the green light? A. Starboard bow. Q. Did you say anything when you saw this green light of the Bartram? A. Yes, sir. I reported it to the captain. Q. What did you say? A. I told him I saw a green ahead. He told me he saw it before. Q. How far was she away from you when she showed both her red and green light? A. I should think about 800 feet; around there somewhere; I couldn't say exactly; may be more or less. Q. What was done on your tug then? A. The captain tooted his whistle."

And it was only at this time and in this connection that he testifies, as stated in the brief for the schooner, that "when the schooner showed both lights, the vessels were head and head; dead ahead of each other."

Some further contradictions in the testimony of those on board the schooner, are the following: The master says, the lookout on the schooner reported the tug about 10 minutes before the collision. The lookout says the alarm whistle first attracted his attention to the tow. "He could see the green light a little ways before that." "Q. How far away was she when you first saw the green light? A. Well, I suppose she was a couple of hundred yards, more or less," and he then reported to the captain. Afterwards he says the tug was 60 or 70 fathoms away when he first saw her, and again he says the distance was 500 or 600 yards, and that the 200 yards referred to the time when the alarm whistle was given. The wheelsman says, "The collision occurred immediately after the lookout made his first report." The master testifies that about 20 minutes before the collision he changed his course from N. to N. $\frac{1}{2}$ E. The wheelsman says that for two hours before the collision he was sailing N. $\frac{1}{2}$ E., and that he made no change in said course up to the time of the collision. The master says the velocity of the wind that night was from 10 to 15 miles an hour; the lookout says it was a 5-knot breeze. Whether, therefore, this case be disposed of by accepting as true the evidence of the witnesses for the tug, or the evidence of the captain of the schooner, or by analyzing the contradictory evidence of the three witnesses on behalf of the schooner, and rejecting certain portions thereof, for the reasons already stated, it sufficiently appears that the collision could not have occurred without an inexcusable change of course on the part of the schooner. I am constrained to believe that when those on board of the schooner saw that she was far enough off to clear the tug, they changed her course for an anchorage near the Long Island shore, without looking out for the tow. The admitted facts that when the schooner neared the tug those on board the tug blew an alarm whistle, and, as the schooner passed, called out to look out for their tow, confirms this view. Decree for libellant against the schooner.

YOUNG v. ONE HUNDRED AND FORTY THOUSAND HARD BRICK.

(District Court, S. D. New York. December 30, 1896.)

DEMURRAGE—ALLOWED AFTER EXPRESS NOTICE AND REASONABLE TIME—BRICK CARGO—UNREASONABLE DETENTION—ALLEGED CUSTOMS INVALID.

The libellant having taken on board his scow 252,500 brick from the yard of the manufacturer on the North river, was afterwards directed to a berth at the foot of Canal street for delivery to Mr. Peck, the purchaser. On September 12th, the day following arrival, the discharge was commenced at the rate of a few thousand per day only, as they were wanted and carted away by a subvendee. The delay was increased by an unusual amount of inferior brick in the cargo. On the 20th the master gave notice that he would claim demurrage unless the cargo was delivered by the 25th. Five days was a reasonable time for unloading the whole cargo. Mr. P., the first vendee, having finally refused to accept the residue of the cargo, the shippers on the 26th ordered the scow to the Wallabout, where the residue of 140,000 was discharged on October 1st. There was no bill of lading, and no agreement as respects demurrage. Much evidence was taken as respects an alleged local custom (1) that the carrier of brick must wait the convenience of the vendee or the subvendee, in unloading the vessel; (2) that the master was bound to prevent putting on board inferior brick from the manufacturer's yard. *Held*: (1) That the evidence as to both of the alleged local customs was insufficient to sustain them; and that they were also invalid, as unreasonable and indefinite; (2) that while the evidence showed that more time was usually allowed for discharging brick than other ordinary cargoes, the notice by the master in the present case was a lawful, reasonable and proper notice, giving abundant time for unloading, and that he was entitled to demurrage after the 25th.

Foley & Wray, for libellant.

Wilcox, Adams & Green, for claimant.

BROWN, District Judge. The libellant claims demurrage for eight days' delay in the discharge of a cargo of 252,500 brick taken on board the scow *Riley & Rose* at Roseton, a few miles above Newburg, on September 5, 1894. The bricks were shipped by the manufacturers, and had not been sold when loaded. In accordance with the usual practice, the scow proceeded to the foot of Fifty-Second street, New York, to wait for a sale of the brick and orders for delivery. The cargo was soon after sold by the manufacturers to Mr. Peck, and the scow was directed to deliver the brick at the foot of Canal street, to which she proceeded at once on the 11th of September, 1894, and reported to the purchaser. The discharge commenced on September 12th, and from seven to ten thousand brick were discharged each working day following until some time between the 19th and 25th of September, when Mr. Peck refused to unload any more on account of the great number of pale brick found in the cargo, his purchase having been of hard and washed brick. The brick unloaded were taken in carts only, by which they were carried to the consumer, to whom they were sold by Mr. Peck. It is customary, as Mr. Peck testified, to deliver brick either in carts or by piling them upon the dock. None in this case were piled upon the dock. The evidence shows that 60,000 per day would be a reasonable day's work in unloading, and that five days' time was quite sufficient to discharge the whole cargo.

On the 20th of September, the libelant, after previous complaints to Mr. Peck, gave notice to the shipper by telegraph that demurrage would be claimed unless the cargo were unloaded by the 25th. On the 26th, by direction of the shipper, the scow was ordered to the Wallabout, Brooklyn, where the discharge of the residue of 140,000 brick was completed on October 1st, and the present libel was thereupon filed against them for the freight and demurrage. The freight was subsequently deposited in court. There was no express agreement between the parties in regard to the time or rate of discharge, or as respects demurrage.

For the defense it is contended, that the soft brick were taken on board by the fault of the master of the scow; that under an express agreement with the shipper he had agreed to throw out the soft brick; and it is further alleged that it was by custom his duty to do so. The master of the scow denied the alleged agreement, and any knowledge of the alleged custom, but admitted some incidental conversation in regard to soft brick, and that a few were taken off by the shipper's superintendent.

In support of the reasonableness of the alleged custom, it is urged, that when brick are taken from the kiln upon barrows, by which they are brought to the vessel, it is so dark at the kiln that the quality cannot be distinguished; and it is necessary, therefore, that the separation be made at the dock. Admitting this to be so, there is no reason why the shipper should not incur the labor and the responsibility of the separation. It would certainly be an onerous and a dangerous responsibility, if the captain of a scow should undertake such a separation, and incur the risk of satisfying the purchaser. Nothing short of very clear proof ought to be accepted as transferring this responsibility from the manufacturer and shipper to the captain of a scow. The evidence in this case seems to me quite insufficient to establish such a shifting of responsibility. The friendly aid of the captain of the scow might naturally enough be sought and given; but to cast the whole legal responsibility on him is a very different thing. The evidence is insufficient to warrant any such conclusion. The proof as to the quantity of the pale and rotten brick, and of broken arches, namely from one-fifth to one-seventh of the whole cargo, strikingly illustrates, as it seems to me, the unreasonableness of defendant's contention. It seems impossible that such a proportion of inferior brick could have been put on board without negligence on the part of the shipper's men who loaded the scow; and why should the scow captain be charged with responsibility for their negligence? The evidence also of what took place while the cargo was loading, shows that the captain of the lighter could not have understood that any such responsibility as is here claimed was devolved upon him; and I cannot find that it was. The delay, moreover, of two weeks from the 12th to the 25th of September, evidently was not caused by the pale brick, but through the claim to keep the scow for the convenience of Mr. Peck and his vendee, and through the failure of the shipper to act promptly after the libelant's notice of September

20th. Any objections to the cargo should have been made much earlier.

It is further contended that by the custom of the brick business on the North river, no demurrage ever accrues; that there is no such thing as a customary rate of discharge or customary dispatch; but that the vessel is bound to wait for the convenience of the consignee; and that this convenience also includes the convenience of the purchaser from the consignee.

Much testimony has been taken on this subject on both sides. It indicates that while claims for demurrage in such cases are not unknown, they have been comparatively few, and that brick boats have been, and perhaps most commonly are, detained beyond the period which would usually be deemed admissible in other kinds of transportation. It is evident that this is largely due to the close relations between the manufacturers of brick and the owners of barges, scows, or schooners employed in the brick trade. The claimant's evidence, however, establishes no fixed or definite conclusion, except that the consignees of the brick refuse to pay demurrage, though boats may be considerably detained, and that suits are occasionally brought for demurrage. Most of the defendant's witnesses do not claim any indefinite time for discharging; but they differ much as to what would be a reasonable time, varying from two or three weeks to two months. The libellant, while admitting frequent delays in discharge, denies any such custom as the defendant alleges.

It is evident that so loose and indefinite a practice is not sufficient to establish any valid custom, or an obligation to wait for the arbitrary convenience of the consignee, or his vendee. Such a custom would plainly be too unreasonable and indefinite to admit of legal sanction. Every custom, in order to become obligatory, whether local or general, must be so well known and understood that it may fairly be presumed that all persons engaged in that trade are acquainted with it and assent to it. To be obligatory, it must not be merely a loose practice, but precise, definite and certain, so as to supply the place of the common law in the given case, and be capable of being applied to the contract in defining and fixing the rights of the parties under it. *The Paragon*, 1 Ware, 328, Fed. Cas. No. 10,708; 1 Pars. Cont. 53; *Walls v. Bailey*, 49 N. Y. 464, 468. See *The Eddy*, 5 Wall. 481, 486, 496; *Isaksson v. Williams*, 26 Fed. 642; *The Innocenta*, 10 Ben. 410, Fed. Cas. No. 7,050.

Aside from the unreasonableness of detaining the vessel for the mere convenience of the consignee, or his vendee, the evidence falls far short of establishing any definite substitute in place of the common-law obligation of reasonable diligence in discharge. The evidence indicates, moreover, that the sales of brick are largely through commission agents, and that the ordinary practice is to arrange, at the time of the sale to the consignee, for the place of berth and for the period of discharge. The agent who engaged this scow to the shipper testified that this case is exceptional in those particulars.

In view of such indefiniteness in the practice, and the lack of any definite rule as to the rate of discharge, I have no doubt that in cases where no provision is made as to the time for unloading, it is competent for the master of the boat, whenever he is dissatisfied with the rate of discharge, after being sent to a berth, to give notice, as was done in this case, claiming demurrage unless discharge is completed within a reasonable time thereafter; and that after such notice demurrage may be collected for any delay beyond what may be proved to be in fact a reasonable time from the date of the notice so given. In this case notice was given on the 20th of September, requiring, in effect, that the residue of the cargo should be discharged within five days. This was much longer than was necessary to discharge the residue of the cargo. If Mr. Peck had already refused on the 19th to receive the rest of the cargo, as the respondent in its brief contends, there was certainly unreasonable delay in not sending the cargo to the Wallabout until the 26th. If, as the libelant contends, the rejection of the cargo was not until the 25th, a period of eleven days was certainly an unwarranted period to hold the scow for determining whether to accept or reject the cargo.

I find that the notice given by the libelant on September 20th was a reasonable and lawful notice, and afforded sufficient time for the discharge of the rest of the cargo; and that the libelant is, therefore, entitled to seven days' demurrage from September 25th to October 1st, at the stipulated rate of \$16 per day.

A decree for the libelant may be entered for that amount, with interest, and also with costs, as it is evident from the nature of the litigation that the absence of a prior demand has made no difference as regards the defense.

THE GLIDE.

HUDSON v. GRAFFLIN.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 181.

SHIPPING—DAMAGE TO CARGO—PERILS OF THE SEA—NEGLIGENCE.

Damage to a cargo of fertilizers, shipped on a barge from Baltimore to Norfolk, by sea water getting in through the hatches during a severe but not unusual storm, *held* to be attributable to negligent calking of the hatches and failure to cover them with tarpaulin battened down, as was customary with such cargoes, rather than to the "perils of the sea."

Appeal from the District Court of the United States for the District of Maryland.

This was a libel in rem by William H. Grafflin, as administrator of George Grafflin, deceased, against the barge Glide (George P. Hudson, claimant), to recover for damage to cargo. The district court

rendered a decree for the libelant, and the complainant has appealed.

Robert H. Smith, for appellant.

Frank Gosnell (T. M. Lanahan, on the brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The appellee filed the libel in this case in the district court for the district of Maryland against the barge Glide. The appellant intervened as managing owner and claimant. The libelant claimed damages because of injury to a cargo of fertilizers which he had shipped on the barge at Baltimore, to be transported to Norfolk. The Glide sailed from Baltimore during the night of the 20th of February, 1893, in tow of the Virginia Ehrman, and arrived at Norfolk on the 22d of that month, with a portion of her cargo damaged by sea water. The libelant insists that it was the duty of the barge to carry the cargo safely, except such loss as might be caused to it by the act of God and the public enemy, and he specially claims that the captain and owners of the Glide were guilty of negligence in not properly securing her hatches by calking them, and afterwards covering them with tarpaulins securely battened down. The court below decreed in favor of the libelant, from which decree this appeal is prosecuted.

The appellant claims that the district court erred in finding the Glide in fault, and her owners liable for damages to the cargo. He insists that the damage was caused by dangers of the seas, and that, therefore, the barge was exempt from liability. The owners of the Glide, in receiving the cargo, and receipting for the same, contracted for the safe custody, due transportation, and proper delivery of the 507 tons of fertilizers, belonging to the libelant. It was to have been so delivered at Norfolk in as good order and condition as when shipped. It is so well established and now universally admitted that the contract to transport implied that the barge was reasonably fit and suitable for the service which the owners engaged to perform, and that she was in condition to encounter such perils of the sea as a vessel of that kind, with a cargo of that character, laden in the way she was, may be fairly expected to encounter in a voyage from Baltimore to Norfolk, that argument is not required, nor is the citation of authorities necessary, to sustain the same.

We think the evidence clearly shows that the Glide, when she sailed from the port of Baltimore with the cargo of appellee on board, was seaworthy, and in every way fitted for the voyage to Norfolk, concerning which she was then under contract. That the cargo was damaged when it reached Norfolk is beyond question,—is, in fact, admitted. The only matter we have to determine is, was the damage caused by the vis major, or by the carelessness of the masters and owners of the barge. That the Glide, during her voyage, encountered a severe storm is clearly shown. The sea was heavy, the waves rolled over the barge, and the wind blew strong.

The tug at the same time had in tow the barge Dixie, also laden with fertilizers, and her cargo was also damaged, but slightly, as compared with that of the Glide. The tug Peerless, with a tow of two barges and a bark, left the port of Baltimore very soon after the Virginia Ehrman left with the Glide, and encountered the same storm. Her mate describes the storm as very severe, and says they let go of and anchored the bark, and took the barges into harbor, coming out, and proceeding to Norfolk the next morning. The cargoes of these two barges consisted also of fertilizers, and they reached the point of destination, Norfolk, without damage. The storm, though quite severe, was not unusual, and the fact that other barges and other tugs passed through it without damage indicates, at least, the absence of the elements necessary to constitute the interposition of the vis major, and suggests that, had there been more attention paid to the safety of the cargo and to the management of the barge, there would have been no necessity to subsequently rely upon the perils of the sea.

The damage to the cargo of the Glide was caused by the sea water entering at the hatches, and saturating the bags of fertilizers immediately thereunder. There were four regular hatches on the Glide, which appear to have been properly constructed, and well supplied with covers fitting flush with the top of the coamings. But we are forced to the conclusion, from the evidence, that they were not properly calked, and the testimony is uncontradicted that the barge used no hatch cloths or tarpaulins during any time of the voyage, not even when the sea was washing over the hatchways. The weight of the testimony shows that the custom at the port of Baltimore, especially with perishable cargoes, was for barges to calk the hatchways securely, put the tarpaulins on, and batten them down. The Glide had no tarpaulins previous to the voyage during which this cargo of fertilizers was damaged, but immediately thereafter she procured them. The hatches of the Dixie, the barge in tow with the Glide, as also those of the two barges in tow of the Peerless, were properly calked, tarpaulined, and battened down. No effort was made to calk the hatches of the Glide until after she left the port of Baltimore, and it is evident, to say the least, that the work was not well done, and, even then, if they had been securely tarpaulined, the damage would most likely have been obviated. While it is true that the damage was caused by the storm, yet it is also true that it could have been prevented by the exercise of reasonable skill and proper seamanship, and therefore the loss was not occasioned by the perils of the sea, and the carrier was not exempt from liability therefor. We cannot say, from the evidence found in the record, that the damage to the cargo of the Glide was produced from causes extraordinary in character and irresistible in force, that could not have been anticipated by human skill, and guarded against by proper exertion and prudent seamanship; and, consequently, it follows that we must find that the master and owners of said barge are liable to the appellee for the damages found by

the court below. *Bearse v. Ropes*, 1 Spr. 331, Fed. Cas. No. 1,192; *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657; *Story*, Bailm. § 512a; *The Chasca*, 32 Law T. (N. S.) 838; *The Svend*, 1 Fed. 58; *The Bark Kate Irving*, 5 Fed. 633.

We concur fully with the learned judge who decided the case below, and the decree appealed from is affirmed.

THE QUEEN.

BANCROFT-WHITNEY CO. et al. v. THE QUEEN.

(District Court, N. D. California. November 25, 1896.)

No. 10,301.

1. LACHES IN ADMIRALTY—STATUTES OF LIMITATION.

Mere delay, for the full period of four years allowed by a state statute of limitations, in bringing a suit in rem to recover damages to cargo, is not of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit.

2. SAME—STATE STATUTES CREATING LIENS.

In a suit which is brought to enforce the lien given by the general maritime law for damage to cargo through the ship's fault, the limitation of one year contained in the California statute (Code Civ. Proc. § 813), which gives a lien for injuries to goods shipped on board a vessel, does not apply.

3. CARRIERS BY SEA—DAMAGE TO GOODS—PRESUMPTIONS.

Where goods are returned to the port of shipment greatly damaged by sea water, a presumption arises of negligence on the part of the carrier.

4. SAME—PERILS OF THE SEA—EXCEPTIONS IN BILL OF LADING—BURDEN OF PROOF.

A shipowner, against whom a prima facie case of negligence has been made out, does not discharge the burden of bringing himself within the exceptions of perils of the sea by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely leaves in doubt the question as to how the leak arose which caused the damage.

5. INSURANCE—SUBROGATION—DISSOLVED PARTNERSHIP.

An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty in the partnership name to recover the amount of the loss from the carrier.

6. CARRIERS—DAMAGE TO GOODS—ASCERTAINMENT OF DAMAGE—AUCTION SALES.

Sale by auction in a great mart of commerce is a proper method of determining the value of goods damaged in the hands of a carrier.

7. ADMIRALTY—JURISDICTION IN REM.

The requirement that a libel in rem must state that the property is in the district does not prevent the court from acquiring jurisdiction in the case of a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on alias monition. 61 Fed. 213, reaffirmed.

This was a libel in rem, by various shippers of goods shipped on board the steamer *Queen*, for breach of contract, for damages to said goods by sea water, alleged to have been caused by the negligence of the master, officers, and crew of the steamer, while said goods were being transported from the port of San Francisco to the port of San Diego, state of California. The case involved 37 claims.

Various exceptions filed by the claimant to the libel were overruled in an opinion filed April 17, 1894. 61 Fed. 213. On May 12, 1896, the cause was heard on a motion by the claimant for a judgment in its favor after the libelants had rested their case, which motion was denied. 75 Fed. 74.

Andros & Frank, for libelants.

Geo. W. Towle, Jr., for claimant.

MORROW, District Judge. The action is for a breach of contract on the part of the carrier, and includes some 37 claims, made by various shippers of goods shipped on board the steamer Queen, for damages by sea water, alleged to have been caused by the negligence of the master, officers, and crew of the steamer, while said goods were being transported from the port of San Francisco to the port of San Diego, state of California. Testimony was introduced with respect to but two of the shipments, viz. that of the Bancroft-Whitney Company and that of Hellman, Haas & Co. It was intimated at the hearing that these two claims would present all the questions arising on the several claims, and that, after a final decision has been reached with respect to them, the others would be a matter of subsequent arrangement.

The question of laches, which was raised when the exceptions to the libel were argued, was again urged at the final hearing. While the court, at the argument of the exceptions, strongly intimated that it would deny this ground of exception, still the question was left open, subject to the introduction of evidence as to whether or not the libelants had been guilty of laches in failing to bring their suit within four years from the date of the contracts of affreightment. That portion of the opinion, rendered in ruling on the exceptions to the libel, so far as it is material to the present inquiry, is as follows:

"In other words, the deduction from the authorities is that, while there is no such thing as a statute of limitation in the admiralty law, yet courts of admiralty, in the furtherance of justice, will act by analogy, and refuse to entertain any suit where the party seeking to enforce his claim or lien has been guilty of laches. It is, in fact, the equitable doctrine of laches, depending upon the circumstances of the case. What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case. It is, therefore, a question of evidence, to be determined hereafter upon the facts as they may appear." The Queen of the Pacific, 61 Fed. 213, 216.

Counsel for claimant refers to several provisions of the Code of Civil Procedure of the state of California, which provide different periods of limitation within which suit can be brought. Among these statutes of limitation which would be applicable, assuming that the court were justified in acting by analogy, and setting up the equitable bar of laches, is section 337 of the Code of Civil Procedure, which provides a limitation of four years in which "an action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this state," can be brought.

As the contracts of affreightment which are involved in the present libel were all executed in this state, it follows that, if the court should determine that the libelants have been guilty of laches, the section referred to contains a rule applicable to this case. The libel was filed on the last day of the four-years limitation as to most of the contracts, although as to some of them it is one or two days behind the time. The claimant contends that this delay in bringing the libel constitutes laches. There is nothing in the case, however, outside of mere delay in bringing suit, which indicates that the libelants have been unduly negligent or unnecessarily slow in prosecuting their claims for damages. The most that can be said against them is that they have availed themselves of the full statutory period allowed by the state provision before instituting their suit. But this, of itself, without some proof of any exceptional circumstances from which laches would be imputable, is not sufficient to justify a court of admiralty in declining to entertain a suit, and refusing to pass upon its merits. As was said by Judge Lacombe, in *Southard v. Brady*, 36 Fed. 560:

"It is true that there is no statute of limitation in admiralty, but courts of admiralty, like those of equity, will not lend their aid to enforce stale demands. Exceptional circumstances sometimes induce a court of admiralty to pronounce a claim stale after a lapse of time less than the local statutory period of limitation. Where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations."

Judge Brown, in *Nesbit v. The Amboy*, 36 Fed. 925, after stating that the courts of admiralty will enforce the doctrine of laches as against procrastinating litigants, where it appears that third parties have acquired a bona fide lien or right in a vessel, continues thus:

"But where no subsequent bona fide liens have arisen, there is no good reason why a suitor should not be permitted to proceed in rem in courts of admiralty, so long as he may sue in personam, or maintain a suit at law for the same debt,"—citing *The Lillie Mills*, 1 Spr. 307, Fed. Cas. No. 8,352; *The Bristol*, 11 Fed. 162; *The Martino Cilento*, 22 Fed. 859.

The circuit court of appeals for the Second circuit, in the case of *Bailey v. Sundberg*, 1 C. C. A. 387, 49 Fed. 583, speaking through Judge Wallace, said, in passing upon a contention, as in the case at bar, that the libelants had been guilty of laches in delaying the commencement of the suit:

"Inasmuch as the present action was commenced within six years from the time when the cause of action accrued, and there are no special circumstances to charge the cargo owner with laches, we think there is no equitable bar to the suit upon the ground of delay. Where there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitations."

Further citation of authority is unnecessary. It only remains to apply the rule therein enunciated to the case at bar.

In the first place, it does not appear that the claimant, by this delay of four years, has been prejudiced in any of his rights, or that any defense which he could or would have presented has been impaired or jeopardized. It does not appear that the claimant could

or would have presented a stronger or better defense, had the action been commenced sooner. No pretense is made that, by reason of the delay, witnesses have died or gone away, or that testimony, once accessible and material to a defense of negligence, has been lost. In other words, there is no showing by claimant of any special or exceptional circumstances which would justify this court, as a court proceeding upon equitable principles, to hold that the libelants have been guilty of such laches as, in good conscience and equity, amounts to an equitable defense and bar to this libel. While it is true that the long delay of four years is unexplained, and the court is at a loss to understand why the libel was not sooner filed, still such laches as there may have been is, under the facts of this case, not sufficient to justify this court in dismissing the case without considering its merits. The contention of counsel for claimant in this respect is, therefore, overruled.

With respect to the limitation of one year, contained in section 813 of the Code of Civil Procedure, as to suits to enforce the lien given by the state statute for injuries to goods shipped on board a vessel, what was said by this court in the opinion upon the exceptions to the libel (see opinion, 61 Fed. 213, 216, and cases there cited) is applicable and pertinent at the present time. It is sufficient to say, as was there stated, that the libelants are not suing to enforce the lien which the state statute purports to give, but they are suing to enforce the lien given by the general maritime law. See, particularly, *The Key City*, 14 Wall. 653, 660; *Henry*, Adm. Jur. & Proc. 185.

The libel sets forth that the goods comprising these several shipments were shipped in good order and condition, under the contracts contained in the shipping receipts; that the steamer sailed from the port of San Francisco with said goods on board, bound for the port of San Diego; that said goods were never delivered at the port of San Diego, but were returned to the port of San Francisco in a greatly damaged condition, having been wet with sea water during the voyage, which, it is alleged, gained access to the interior of the vessel, where the goods were stowed, by reason of the negligence of the steamship company and its officers and servants. The answer admits these facts, with the exception, however, that it denies specifically that said goods were so wet with sea water during said voyage through or by the negligence of the steamship company or its officers or servants. As a further and separate defense, the answer avers, substantially, that the said steamship, when she sailed from the port of San Francisco, was stout, staunch, strong, and seaworthy in every respect; that she was completely manned, officered, and otherwise thoroughly equipped for her then intended voyage; that she left San Francisco on April 29, 1888, at about 2 o'clock p. m., and proceeded down the bay, out through the Golden Gate, across the bar, and on her course in a southerly direction with a fresh northwest wind blowing and a northwest chop sea; that no unusual incident was known to occur during said 29th day of April; that about 1 o'clock a. m. of the next day, April 30th,

said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers; that about 2:15 or 2:30 o'clock a. m. of the same morning, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine room, and about 6 or 8 inches above the deck of the alleyway in the between-decks of the vessel; that the examination thereupon made resulted in the discovery of water in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch combings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold, so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that, about 5 o'clock a. m. it was deemed prudent by the master of the vessel to make for Port Harford with all convenient speed, which was done, and at about the hour of 7 o'clock a. m. the said vessel was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water; that the beaching of said steamship was necessary to prevent and avoid a total loss of said steamship, and of all the merchandise then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo, and of rendering entirely safe the lives of all the passengers and crew, aggregating 212 persons, then on board the vessel.

Under this state of the pleadings, the following facts appear to have been established: (1) That the libelants' merchandise was shipped under the contracts of affreightment, or "shipping receipts," as they are termed, annexed to the libel. (2) That such contracts or receipts provided, among other things, as follows: "The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accidents to or from machinery, boilers, or steam, or any other accident or danger of the seas, rivers, roadsteads, harbors, or of sail or steam navigation, of what nature or kind soever." (3) That the merchandise was never delivered at the port of destination. (4) That it was returned to San Francisco, and delivered to the shippers in a damaged condition. (5) That this damage arose from having been wet with sea water. Under the issues, as thus presented, the proctor for libelants contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment. Some testimony, also, was introduced respecting the damaged state of the shipment of Hellman, Haas & Co. when it was returned to San Francisco, and that the goods, in their damaged state, realized less than they would have brought had they

been returned in good order and condition. The libelants then rested their case. Thereupon, claimant moved for a judgment in his favor, contending, among other things, that there was a presumption that the vessel was seaworthy when she set out on her voyage, and that the fact that the merchandise was damaged by sea water did not, in the absence of any affirmative proof by libelants of negligence on the part of the carrier, create a presumption of negligence against the latter, but rather gave rise to the presumption that such damage had been caused by a peril of the sea.

After elaborate arguments, this court held that, under the state of facts disclosed by the pleadings, and the proof introduced by the libelants, a prima facie case of negligence had been made out, and that the burden of removing this presumption, by showing affirmatively that the damage had arisen through a peril of the sea, or in some manner other than through the negligence of the carrier, devolved upon the claimant. The court pointed out that the admitted facts in the case were not sufficient to entitle the carrier to the presumption that his vessel was seaworthy at the inception of the voyage, but, on the contrary, they seemed to justify the presumption that the vessel was unseaworthy at that time; and the mere fact that the libelants' merchandise was wet and damaged by sea water which gained access to the vessel did not necessarily give rise to the presumption that it was occasioned by a peril of the sea. The motion for a judgment in favor of the claimant was, therefore, denied. *The Queen of the Pacific*, 75 Fed. 74.

The claimant thereupon introduced evidence in support of the averments of the answer, tending to show (1) that the steamship, when she sailed from the port of San Francisco, was absolutely seaworthy; (2) that she was manned by a competent master, officers, and crew; (3) that the fact that the vessel was leaking was discovered about 11 hours after the steamer sailed from San Francisco; (4) that everything was done, consistent with prudent navigation and good seamanship, to discover the aperture or place through which the water entered the vessel; (5) that the leak or quantity of water entering the vessel increased to such an extent that the vessel was compelled to put into Port Harford with all convenient speed, and was there beached about 17 hours after sailing from San Francisco. It appears, from the evidence, that the leak was on the starboard side of the vessel. The presence of water was first noticed at about 10 minutes past 2 o'clock of the morning of the 30th of April by a water tender, whose duty it was to look after the boilers, the ship's pumps, and the bilges, and whose watch it then was. He discovered a small amount of water on the floor of the engine room, in a place that should have been dry. Upon investigation, it was found that water was coming through a small hole in the bulkhead over the engine room, or, to be more specific, that it was dropping from a point in the iron bulkhead on the starboard side of the engine room, and about three or four inches above the deck of the alleyway in the between-decks of the vessel. The water was undoubtedly coming from what was termed a "water-tight com-

partment" on the starboard side. The matter was reported to the captain, and measures immediately taken to ascertain the locality and cause of the leak, and to arrest its progress. Two donkey pumps and a centrifugal pump were set to work. A list to starboard had been noticed about an hour previously, but no particular significance was attached to this at the time, although steps were taken to correct it by shifting freight from starboard to port, and burning coal mostly from the starboard bunkers. But, soon after the leak was discovered, the chief officer reported that there was a starboard list of from six to seven degrees. The hatch was taken off, to let the water descend into the ship's after lower hold, and the engineer tapped the lower hold in the alleyway and also the shaft alley. All measures, however, to arrest the flow of water into the compartment, and to correct the list of the vessel, proved ineffectual and unavailing, for the list kept steadily increasing, until the captain, as set forth in the answer and reaffirmed in his testimony, acting under cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving the vessel and cargo, and lives of all persons, passengers and crew, on board, ran the vessel upon the beach at Port Harford in about 22½ feet of water, at about 7 o'clock a. m., or about seven hours after the leak was first discovered.

The evidence is silent as to the cause of the leak, and even the exact locality where the water gained access to the vessel is not disclosed by the evidence. Capt. Alexander, the master, testified that the vessel was an iron-screw steamer, brig-rigged, built by Cramp & Sons, of Philadelphia, in 1882; that she was submitted to regular inspections once a year from the time she was built until the date of the accident, on April 30, 1888; that she was rated by the board of inspectors, at the last examination, as "A1," and, from the knowledge which the witness had of iron steam vessels, he would rate her, as she was at the time she sailed from San Francisco, just previous to the accident, as first-class,—the best that is given for iron steamships. Referring to the time when the leak was first discovered, the witness was asked:

"Q. Did you then endeavor to ascertain how the water entered the vessel? A. Yes, sir. Q. Were you able to find where it entered the vessel? A. No, sir. I knew very near where it came in the vessel, but I did not know how it came in. I knew it came in on the starboard side in a water-tight compartment."

On cross-examination, the witness was asked:

"Q. Could you tell about how high above the between-decks the leak was? A. I could not tell. It was in a water-tight compartment. So I had no way of seeing or finding out. * * * Q. This water-tight compartment, was it lengthwise of the ship or athwart ship? A. No, sir; fore and aft, opposite the boiler and engine. * * * Q. What is the width of the bulkhead alleyway inside? A. I don't know exactly, but I should say ten feet; it may be more than that; it may be eleven; it might be nine or twelve; I should say about ten feet,—the width of the alleyway across between-decks. Q. Was the reason why you could not discover where this leak was on account of the between-decks being filled with cargo? A. No, sir. Q. Why could you not find it, if the cargo did not obscure it? A. We tried to discover it from the outside, and could not. There were men on the outside

to see if they could discover anything upon the outside of the ship, and could not. Q. Why did you not try to discover it from the inside if the cargo did not prevent you? A. My instructions have been and were— Q. Never mind your instructions. Why did you not do it? A. Because the United States inspectors told me to close those doors, and keep them closed, and never open them,—the United States inspectors of hulls and boilers. The Court: At sea? A. At sea, in case of an accident. Q. No matter what danger the ship was in? A. No matter what danger the ship was in. Q. Did you understand, by that instruction, that you were not to take any proper precaution to ascertain whether there was a leak or not, and stop it? A. How did I know there might not have been a plate off the side of the ship, or we had collided with something? To use good judgment, I considered it proper to keep those doors closed in all compartments, when we find the ship making water, and I should do the same thing to-morrow."

On redirect examination, the witness was asked:

"Q. Did you ascertain where the water came from into the after between-deck,—whether it came into the side of the vessel directly from that point, or whether it came in out there from the alleyway, as you term it? A. It came from the alleyway. Q. As I understand you, you did not consider it prudent, at that time, to open either of the doors that closed the alleyway? A. I did not, sir. * * * Q. There are two doors to each alleyway? A. Yes, sir; on the forward end and the after end. Q. The same on both sides? A. Yes, sir; on the port and starboard side."

The captain further testified that there was a guard, also known as a "stringer," or "fender," on the vessel. It was a piece of oak, 14 inches thick, upon the ship's side, put on between the deck frames, probably 10 inches down, and about 14 inches out from the ship's side. It extended to within 20 or 30 feet of the bow, and the same aft. The sea would wash over the guard four or five times a minute. When the vessel was on an even keel, in still water, the guard was a foot and a half above water, as the vessel was then loaded. This guard served for a fender, and was used, also, for landings. Nothing was afterwards discovered which indicated that this guard had anything to do with the leak, and the captain was not aware that, at any time during the voyage, the ship collided with or struck anything, until she was beached at Port Harford. Had anything serious of that character occurred, it would have been the duty of the officer of the deck, if he knew of it, to report it. No such report was, however, made. In closing the testimony of this witness, he testified as follows, in answer to questions propounded by counsel for libelants:

"Q. When you raised the steamer at Port Harford, in order to do that, did you pump her out? A. Yes, sir. Q. Was it necessary, in order to pump her out and float her, to ascertain where the leak was? I don't ask you what it was. A. I understand. Not necessarily so. Q. Did you understand where it was? Mr. Towle: Personally, yourself. Mr. Andros: No. Q. Did you know, as master of that ship, where it was? A. No, sir; I did not know where it was. Q. Did you send down a diver? A. Yes, sir. Q. How many times did the diver go down? A. I think some three or four times,—five, maybe. I don't remember exactly. That I could not say. Q. When he went down the first time, for what purpose did he go? A. He went to see if he could find anything wrong with the ship, or a hole in her,—the condition of her bottom as far as he could see. Q. Did he go down at any time for the purpose of stopping any leak that he might have found? A. I think he did; yes, sir. Q. So far as you know, he did stop it? A. As far as I know, he did. Q. After he had gone down for the purpose of stopping

the leak, and returned, did you then commence pumping her out for the purpose of floating her? A. After all the bulkhead doors were secured from the inside, we built a cofferdam around the forward hatch, and we pumped her out. Q. You had to build a cofferdam around her in order to free her hold from the water? A. Yes, sir. Q. When she was pumped out she would float, of course? A. Yes, sir. Q. How long after she was floated was it before she started to come to San Francisco? A. I think we were here in about forty-eight hours after she was floated. I think about forty-eight. Q. Did she leak coming up, to your knowledge? A. She made no water to my knowledge. * * * Q. You testified, the other day, that an attempt was made to discover where the leak was by looking along the outside of the ship? A. Yes, sir. Q. Was that done by sending a man down in a bowline? I think you so testified. A. Yes, sir. Q. Did he go below the stringer of which you have spoken? A. No, sir. Q. Whereabouts is that stringer located with reference to the deadlights of the ship,—above them? A. Just above the deadlights. The deadlight is close up under the guard. It may be six or eight inches,—something like that, but not far from that."

Frank Mallow was called by the claimant, and testified that he was on the steamer on the voyage in question; that he was captain of the after hold; that his duty was to look after the freight, clean up the hold, clean the deadlights, and close them; that he performed that duty on this particular trip; that he saw that the deadlights were all properly closed upon that trip before the steamer sailed from San Francisco. He also explained how the glass and iron backs of the deadlights were fastened by means of a screw, and this screw set in place by a wrench or key.

A. Johansen, the carpenter, testified that it was his duty to go below and see that everything was all right at 8 o'clock at night. He made that inspection at 8 o'clock on the night after the vessel left San Francisco, visiting the vessel below, fore and aft, including the after between-decks. Everything was all right. No indications of water in the after between-decks at 8 o'clock that night.

It does not appear, from the testimony, that the vessel, after she left the port of San Francisco, met with any known accident or injury which would have caused a leak. She does not appear to have struck or come in contact with any rocks or other objects until she was beached at Port Harford, nor did she encounter such boisterous weather as would account for an opening in her side to which the leak could be attributed. It is true the captain testified that, after they sailed from San Francisco, they had some boisterous weather,—strong northwest winds,—a heavy nor'wester; but he admitted, on cross-examination, that it was the ordinary weather met with and expected at that season of the year, and no pretense is made, either by him or his counsel, that the leak could be rationally attributed to any injury produced by the weather then prevailing.

From what has been stated of the pleadings and testimony, it appears that the case has been tried upon such narrow lines that but few facts of substantial value have been disclosed to enable the court to arrive at a satisfactory conclusion as to the real and efficient cause of the disaster. Indeed, it may be said that the case did not reach that stage of proof where this particular question had been

fully developed as an issue. As the case progressed, the important question always presented was to determine the presumptions of law and fact, and on whom the burden of proof rested. The allegation of the libel is that the merchandise was returned to the port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during the said voyage, which, through the negligence of said steamship company and its officers and servants, gained access to the interior of the said ship, where said merchandise was stowed. The burden of proving this allegation was upon the libelants; but, it being established that the merchandise had been returned to the port of shipment in a greatly damaged condition by reason of having been wet with sea water, a legal presumption of negligence arose which was attributed to the carrier because of this circumstance, and upon this presumption the libelants rested their case. But this legal presumption of negligence now placed upon the carrier was based upon a presumption of fact, that the vessel, having become unfit to prosecute her voyage without being visibly exposed to any extraordinary perils or dangers of the sea, was in an unseaworthy condition when the voyage began. *Work v. Leathers*, 97 U. S. 379; *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Paddock v. Insurance Co.*, 11 Pick. 227; *The Planter*, 2 Woods, 490, Fed. Cas. No. 11,207a. This presumption of fact was met by proof from the claimant that the vessel, as before stated, was a well-constructed, iron-screw steamer, built in 1882; that she was submitted to regular inspections once a year from the time she was built until the date of the accident; that she was rated by the board of United States inspectors, at the last inspection, on June 21, 1887, as "A1"; that the hull of a vessel of the construction of the *Queen*, properly repaired and cared for, would last from 50 to 60 years; that she was kept in proper repair, and, at the time she sailed from San Francisco, just previous to the accident, she was rated by her master as first-class,—the best that is given for an iron steamship; that, upon the return of the vessel to San Francisco immediately after the accident, she was examined by James Dickie, a competent shipbuilder of long experience, and the superintendent of the shipyard at the Union Iron Works, and, aside from the apparent effects of grounding at Port Harford, he found her in a remarkably good condition, and nothing to indicate unseaworthiness.

The testimony relating to the guard or fender on the outside of the vessel incidentally disclosed the fact that just below it were the deadlights. The condition of these deadlights then became a matter of some significance. Had one of them been negligently left open when the vessel sailed, the flow of the water through such an opening into the compartment might account for the leak; but the claimant introduced testimony tending to show that the deadlights were all closed when the vessel sailed from San Francisco, removing the presumption of unseaworthiness that might attach to the unexplained condition of these openings at that time. Here we reach the difficult point in this case. Upon whom now rests the burden

of proof? Has the carrier removed the presumption of negligence cast upon it by the return of the merchandise in a damaged condition, wet with sea water? Was it sufficient, to shift the burden of proof back upon the shipper, for the carrier to show that the vessel was in a seaworthy condition at the commencement of the voyage?

In the case of the *Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, the libellant sought to recover for damages to a cargo caused by the vessel taking in water through a hole in her side made by the breaking away of a cap from one of the bilge-pump holes. The defense was, that such breaking was caused by a danger of the sea, within the exception in the charter party and bill of lading. The vessel was on a voyage from Weymouth, Mass., to Savannah, Ga., with a cargo of guano. She encountered some rough weather, and shipped large quantities of water, a portion of which found its way into the cargo through the bilge-pump hole. The circuit court found, as a fact, that before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination, which was at that time made of them, consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected. The court said:

"Perils of the sea were excepted by the charter party, but the burden of the proof was on the respondents to show that the vessel was in good condition, and suitable for the voyage, at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438, 9 Sup. Ct. 469. It was for them to show affirmatively the safety of the cap and plate, and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand, from the findings, that the severity of the weather encountered by the *Morrison* was anything more than was to be expected upon a voyage such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded and with a hard cargo might have anticipated under the circumstances. The especial peril which seemed at one time to threaten her safety was directly attributable to the water taken on board through the uncovered bilge-pump hole."

The circuit court had determined that, as no one witnessed the removal of the bilge-pump hole plate, direct evidence of the cause of the mishap was not obtainable. It was to be inferred, however, from the facts proved, that it was knocked out by something striking violently against it. The supreme court, commenting upon the findings relating to this feature of the case, points out that they did not justify the conclusion reached by the circuit court, and explains why they were insufficient, in the following language:

"If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then, upon the presumption that that seaworthiness continued, the conclusion reached might follow; but we are of opinion that precisely here respondents fail in their case."

In the present case, the claimant has introduced testimony tending to establish the seaworthy condition of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence arising out of the damaged con-

dition of the merchandise was that the voyage had been commenced with a vessel in an unseaworthy condition, the court would be compelled to hold that the claimant had sufficiently answered the prima facie case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract is the implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and it may be that, through some carelessness or negligence on the part of the carrier during the voyage, goods laden on board the vessel may suffer damage.

This brings us to a consideration of the behavior of the vessel after she left port. The testimony does not directly indicate any negligence on the part of the officers or crew in navigating the vessel, but it does seem to point to an open deadlight as the cause of the leak in the water-tight compartment. After the vessel had been beached at Port Harford, and while she was partially under water, a diver was sent down to examine her bottom and ascertain what was wrong with the vessel. He went down several times, and appears to have stopped the leak; for, after his final examination, all the bulkhead doors were secured from the inside, a cofferdam was built around the forward hatch, the water was pumped out, and the vessel floated. Forty-eight hours afterwards she had returned to San Francisco without any leak occurring on the return voyage, and, upon being examined on the dry dock at the Union Iron Works in San Francisco, she was found to be in a thoroughly seaworthy condition, aside from the effects of grounding. It is difficult to understand how a leak of such a serious character as to make it necessary to beach the vessel a few hours after its discovery could have been stopped so easily and quickly, if it had not been caused by some such aperture in the side of the vessel as an open deadlight, which being closed and properly fastened, and the vessel freed from water, she was again restored to a seaworthy condition.

But, even if this supposition as to the cause of the leak is correct, it does not necessarily determine the ultimate question whether the damage to the cargo from sea water was by reason of the negligence of the steamship company. The testimony is that all the deadlights of the vessel were properly closed and fastened before the vessel sailed from San Francisco. It is true that this testimony may be disregarded, if, under all the circumstances, it appears to be improbable. The witness who testified that the deadlights were closed may have been mistaken, or one or more of the deadlights may have been opened by some one after they had been closed and fastened by the person charged with this duty. Is the testimony improbable? The deadlights were located about six or eight inches under the guard or fender. As the vessel was loaded on this particular voyage, this guard or fender was a foot or a foot and a half above the water line. This would leave the deadlights from six to eight inches above the water when the vessel was in still water

and on an even keel. But, when the vessel was in motion and at sea, the water washed above the guard, and, of course, much more above the deadlight. The captain testified that the sea would wash over the guard, and away above it. He thought the sea would be above the guard four or five times a minute. If, then, a deadlight was open when the steamer set out on her voyage, the sea water must have commenced to flow through the opening very soon after she left her wharf; certainly when she reached the ocean outside the heads. The vessel sailed at 2 o'clock on the afternoon of April 29, 1888. At 8 o'clock on the evening of that day, the carpenter made his tour of inspection below, and found everything all right. There was no indication of water in the after between-decks at that time. It was not until 10 minutes past 2 on the morning of April 30th that the water tender discovered about a half gallon of water spread over a surface of three feet square on the floor of the engine room. He searched for the source of the water, and found that it had come through a small hole in the iron bulkhead of the starboard alleyway overhead. The hole was very near the bottom of the bulkhead and was about three eighths of an inch in diameter. At the time the attention of the water tender was attracted to the wet surface on the floor of the engine room, no water was coming through this hole, but a few minutes afterwards, when she rolled heavily to port, the water came through again. The flow was at first intermittent, conforming to the roll of the vessel. The captain testifies that this hole in the iron bulkhead, through which the water came into the engine room, was not three inches above the deck, in the alleyway of the compartment on the starboard side. This compartment was about 100 feet long by about 10 feet wide, and was stowed with cargo, probably of the miscellaneous character described in the libels. At 1 o'clock the captain was out on deck, but there was nothing at that time to indicate that there was anything wrong with the vessel. The officer of the deck reported that she had a little list to starboard, but there was nothing unusual in this condition, as the burning of coal from the port to the starboard side, or vice versa, would give the vessel a list from one side to the other. But, within an hour of the discovery of water on the floor of the engine room, the vessel took a permanent list to starboard, which she kept until she was beached. This testimony tends to show that the water had not been flowing very long into the compartment when the leak was first discovered. But, if the water came in through an open deadlight, when was the deadlight opened, and what opened it? The testimony tends to rebut the presumption that it could have been opened by any one after the vessel left port; but, on the other hand, if it had been broken open by the violence of some object coming into contact with it from the outside, there would have been some evidence of that fact in the condition of the deadlight after the accident, which the claimant could certainly have produced.

In the case of *The Majestic*, 20 U. S. App. 505, 9 C. C. A. 161, and 60 Fed. 624, the vessel was on a voyage from Liverpool to New York.

The baggage of the libelants was stowed in a compartment of the orlop deck. On arrival at New York, their trunks were found to be saturated with salt water, and damaged. During the voyage the vessel encountered some rough seas and passed through a quantity of wreckage. Soon after it was found that the after porthole in the compartment where the baggage was stowed had been broken, and that a large quantity of water had entered, and damaged the baggage. There were three portholes on each side of the compartment, which were closed in the usual way with thick glass and an iron cover, or dummy, screwed up tightly. The glass was broken in many fragments, and the iron dummy was forced from its hinges, and turned back. The district court (56 Fed. 244) held that the finding of two or three feet of water in the orlop compartment, where the baggage was stowed, was so extraordinary an occurrence that the burden of proof was upon the ship to satisfy the court, with a reasonable degree of certainty, that this occurred without her fault, and that the evidence in the case was not satisfactory on that point. The case was taken to the circuit court of appeals. That court held that:

"The facts that the glass was splintered into many fragments, and that the iron dummy was forced from the hinges and thrown backward, show that the accident must have been caused by a violent blow coming from the ocean. It is reasonable to infer that it was caused by an apparent and adequate cause, rather than by one which rests entirely upon surmise; and we are, therefore, led to conclude that a blow from one of the floating planks inflicted the injury. * * * It was an unanticipated peril of the sea."

In the present case, the evidence furnishes no such explanation of the extraordinary occurrence, and the court is compelled to decide the case upon the weight of presumptions. In fact, as the proof now stands, although claimant contends that the damage by sea water to the goods must be attributed to some accident or danger of the sea or of navigation, he has failed to show any accident, danger, or casualty of the sea from which the leak can be reasonably, or at all, inferred. Nor has he accounted for the leak at all, and, so far as the evidence in the case is concerned, the court is left in ignorance as to its cause. But, can it be said that the carrier, against whom a prima facie case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment by simply leaving the question as to whether or not the damage was caused by one of the excepted perils or dangers in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduce how and in what manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt. As was aptly said in *The Compta*, 4 Sawy. 375, Fed. Cas. No. 3,069:

"The carrier, to make good his defense, is bound to show that the damage arose from a peril of the sea. It is not enough for him to show that it might have arisen from that cause. He must prove that it did."

In the case of *The Centennial*, 7 Fed. 601, the carrier was held responsible, under circumstances closely analogous to those in the case at bar, for having failed to prove distinctly that the damage to the cargo was caused by a peril of the sea. The case was on appeal to the circuit court. The facts were as follows:

"The three-masted schooner *Centennial* sailed from Cardenas, bound to Boston, on the 28th of May, 1879, with 800 hogsheads of muscovado sugar, of which the greater part was the property of the libelants. The cargo was properly stowed and well dunnaged. According to the log book, and all the evidence of the officers and crew, the pumps were tried every four hours, and the vessel made no water of any consequence until June 3d. On that day, at 4 o'clock in the afternoon, there was no water in the hold. At 8 o'clock of the same evening there were $7\frac{1}{2}$ feet of water there, and the ship was apparently in immediate danger of foundering. Both sets of pumps were worked all that night by all hands, and in 11 hours the water had been lowered 2 feet. After this, the crew being exhausted, they kept watch and watch, and the forward pumps alone were kept in operation, and were able to prevent any increase above the $5\frac{1}{2}$ feet until the vessel arrived at Philadelphia, a port of necessity, on the 6th of June. Here the schooner was pumped out, and her cargo was discharged, and it was found that some of her seams and butts were slack. No extraordinary injury was discovered. She was calked and reloaded, and brought her cargo to Boston, but it had already suffered the damage which the district court has found to be justly chargeable to the vessel."

Lowell, Circuit Judge, said, in the introductory part of his opinion:

"The duty of ascertaining the facts of this case is a difficult and delicate one. That a great loss has happened is certain, but its causes are so obscure that every possible theory offered to account for it is open to most plausible objection."

Then, after stating the facts as recited above, he continued:

"The libellant introduced evidence tending to show that the schooner was of a model and build unsuited to the heavy cargo of sugar which she undertook to carry, and that the calking of her seams had been neglected. The claimant met these allegations, and, upon the whole evidence, the district judge was of opinion that the schooner was, in these particulars, sufficient and suitable for the voyage. I am of the same opinion. But behind this is the question how so much water came into the vessel without being discovered. The condition of the vessel, when she was examined, would not account for seven feet of water being found in the hold four hours after it had been pumped dry, or found to be dry."

After taking up and discussing the various theories as to the cause of the leak, the learned judge proceeds:

"The district judge held that the owners of the ship had not explained the damage sufficiently to satisfy him that it had occurred by a peril of the sea, within the true intent of the bill of lading."

In this conclusion the circuit judge fully agreed, for he found, as matters of fact, (1) that the vessel was reasonably fit for the voyage in respect to her build and calking, and (2) that the claimants (the shipowners) have failed to prove distinctly that the damage to the cargo was caused by perils of the sea; and he affirmed the decree of the district court holding the vessel liable for the damage sustained to the cargo of sugar.

In the case at bar, as in the case cited, the carrier sets up a peril of the sea, but fails to explain the cause of the damage sufficiently to justify the court in holding that the leak is attributable to any accident, danger, or peril of the sea or of navigation.

In *The Mascotte*, 2 C. C. A. 399, 51 Fed. 605, the same principle was affirmed. A libel had been brought against the steamship *Mascotte* for damages to the cargo. The district court entered a decree for libelants. In the course of his opinion (48 Fed. 119) the district judge (Brown) said:

"As respects the claim for damage to tea caused by oil, the bill of lading, as well as the master's testimony, shows that the chests were received on board in good condition. Some of the chests, on delivery, were, beyond doubt, oil-stained and defaced. All that the claimants can do to exonerate the ship has doubtless been done; but, after all, the evidence shows nothing more than that they cannot explain how the stains and defacing occurred. It negatives certain causes that might, under some circumstances, have produced the damage; but this is not, I think, sufficient to release the ship of her legal obligation. The ship has possession and control of the goods from the time they are delivered into her custody. If the goods are received in good condition, as this bill of lading shows they were, she warrants their delivery in like condition, unless damaged through the act of God, public enemies, the dangers of the seas, or through some other excepted cause. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 Sup. Ct. 469. The burden of showing that the damage arose from such an excepted cause is upon the ship. *Nelson v. Woodruff*, 1 Black, 156. As the *Mascotte's* evidence does not show this, but merely leaves the damage unexplained, I must, therefore, hold the ship liable for this item."

On appeal to the circuit court of appeals, that court affirmed the decree of the lower court in the following concise opinion:

"We agree with the learned district judge who decided this case in the court below that the libelants have a sufficient case for the recovery of their damages, by reason of nondelivery of their cargo in good order and condition. The burden of proof is on the steamship to overcome the effect of the acknowledgment in the bill of lading of the reception of the goods on board 'in good order and condition,' and the evidence introduced on her behalf is not sufficient to overcome the effect of this recital."

In *Hastings v. Pepper*, 11 Pick. 44, Chief Justice Shaw probably carried the rule to its utmost limit when he said that:

"Negligence and breach of contract being proved, the defendant is bound to stand the loss, unless he can prove clearly that the loss was in no way attributable to that cause, or, rather, to prove affirmatively, and beyond reasonable doubt, what was the cause of the loss."

The cases of *The Samuel E. Spring*, 29 Fed. 397, and of *The Lydian Monarch*, 23 Fed. 298, are also very much in point, and the vessels in both of those cases were held liable for failing to show that the damage to the goods shipped on board had been caused by a peril of the sea.

Counsel for claimant cites and quotes from the case of *Kenedy v. The R. D. Bibber*, 2 C. C. A. 50, 50 Fed. 841, the following language:

"If, on the whole, it is left in doubt what the cause of the injury was, or if it can as well be attributed to perils of the sea as to negligence, the plaintiff cannot recover."

But this language is plainly inapplicable to the case at bar, for the simple reason that the claimant has failed to establish such facts from which a peril of the sea can be reasonably, or at all, predicated.

The contention of claimant that the libelants, having alleged negligence, must prove it affirmatively, and that they cannot rely merely upon the *prima facie* presumption of negligence which the law raises

upon proof of the return of the goods in a damaged state, is not tenable; for, if this were so, it would do away entirely with the *prima facie* presumption of negligence against the carrier. As is well said in *Hall v. Railroad Cos.*, 13 Wall. 372:

"When a loss occurs, unless by act of God or of public enemy, he [the carrier] is always in fault. The law raises against him a conclusive presumption of misconduct or breach of duty in relation to every loss not caused by excepted perils. Even if innocent in fact, he has consented by his contract to be dealt with as if he were not so."

It would, therefore, be enunciating a somewhat novel doctrine to say that a shipper is called upon to prove affirmatively that which, upon certain preliminary proof, the law presumes against the carrier. I am of the opinion that the claimant (the carrier) has failed in his proofs to bring himself within the exception, claimed by him, of a peril of the sea.

It is further contended, with respect to the libel of the firm of Hellman, Haas & Co., that the loss sustained by them was paid by the insurance company—which is the real party suing in this case—prior to the dissolution, by the death of one of its members, of the insured partnership; and it is claimed that, in such a case, the surviving partners—the firm no longer being interested in the result of the suit—have no authority to sue, the authority of the surviving partners being limited to a settlement of the partnership affairs, as provided by sections 2458–2462, Civ. Code Cal. It is argued that, under such conditions, the insurer, having paid the loss and thereby become subrogated to the partnership rights during the lifetime of Jacob Haas, had the right to sue in the partnership name so long as the partnership existed, but that it could not sue, as it has done in this case, in the name of the surviving partners of the deceased partnership. When the insurance company paid the loss sustained by the goods shipped by Hellman, Haas & Co., it became subrogated in a corresponding amount to the assured's right of action against the carrier, without any formal assignment or any express stipulation to that effect in the policy of insurance, and might assert that right to sue in its own name in a court of admiralty. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469. It is also equally well settled that an insurer of goods is entitled, after he has paid the loss, to recover what he has paid, in a suit in the name of the assured (as in the case at bar) against the carrier. *Hall v. Railroad Cos.*, 13 Wall. 367. Having become subrogated to the right of the assured partnership during the lifetime of all the partners, the death of one of the partners subsequent to the loss and its payment by the insurance company should not prejudice its rights, or prevent it from recovering from the carrier for the loss sustained to the goods. The right to sue accrued before the death of the partner, and I am of the opinion that the insurance company has the right to use the name of the partnership firm in bringing this suit against the carrier.

It is also contended by claimant that the method employed by Hellman, Haas & Co. to ascertain the value of their damaged shipment,

which was by a sale at public auction, was not a proper one, and that the proceeds of that sale do not represent the true market value of the damaged goods. I do not understand that the regularity or fairness of the sale is impugned, nor that any more could have been obtained for them at private sale. It is difficult to see what good an appraisement would have subserved, for the goods, in their damaged, and some of them in their deteriorating, condition, had to be sold, and what they brought at public auction is probably the best indication of their actual market value. As was very correctly said in *The Columbus*, 1 Abb. Adm. 37, Fed. Cas. No. 3,041, by Betts, District Judge:

"Sale by auction is, in the great marts of commerce, so commonly resorted to by merchants to ascertain the value of deteriorated merchandise that it may almost amount to a usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages, and it is peculiarly fitting, in cases of this character, that the court should sanction and sustain it as the method best adapted to protect the interests of all parties concerned."

This contention will, therefore, be overruled.

The objection, that the steamer was not within the jurisdiction of the court when the libel was filed, it being claimed that she was without the Northern district of California, was also renewed upon the final arguments. The objection was urged, and decided adversely to claimant, when the exceptions to the libel were presented and passed upon. See opinion, 61 Fed. 213, 214. When the libelants put in their case, they introduced some testimony tending to establish that the vessel was within the jurisdiction of the court when the libel was filed. See opinion on motion for a judgment in favor of claimant, 75 Fed. 74, 75. Nothing that the testimony in the case has developed since the motion for a judgment in favor of claimant was denied has led me to alter my views and decision in this regard.

Upon the whole of the case, I am of the opinion that the libelants have made out their case, within the rules of law, against the claimant, and that the latter has failed to bring himself within any of the exceptions, provided by the shipping receipts or contracts of affreightment, which would relieve him from liability for the damages sustained to the various shipments made on board the steamer *Queen*, under the contracts referred to. Let a decree be entered in favor of libelants, and let the case be referred to the commissioner to ascertain the damages suffered by each shipment, unless the parties can reach some understanding and agreement respecting the amount of damages to be awarded.

THE THREE FRIENDS.

UNITED STATES v. THE THREE FRIENDS.

(District Court, S. D. Florida. January 18, 1897.)

ADMIRALTY PRACTICE—LIBEL OF FORFEITURE—RELEASE ON BOND.

A vessel libeled for forfeiture for violation of the neutrality laws may, in the court's discretion, be released on bond. And such release will be granted where the government is not ready for hearing, and there is no reason to suppose that the vessel will again violate the law.

This was a libel of forfeiture against the steam tug the Three Friends for alleged violation of the neutrality laws. The cause was heard on a motion by claimants for permission to give a release bond.

A. W. Cockrell, for claimant.

Frank Clark, U. S. Atty., and Cromwell Gibbons, Asst. U. S. Atty.

LOCKE, District Judge. The vessel being under attachment and in custody of the marshal under a libel for a violation of section 5283, Rev. St., the claimants move that they may be permitted to have an appraisement and give bonds so as to obtain possession of the vessel, pending the hearing of the cause. The district attorney opposes this motion, and cites in support of his opposition the case of *The Mary N. Hogan*, decided by Judge Brown of the Southern district of New York, and reported in 17 Fed. 813. It is also contended that, in case a vessel is libeled for a forfeiture, no bond can be accepted, and refers to section 941, Rev. St. The section referred to is only a limit upon the power of the marshal to stay admiralty process, and does not affect the action of the court. That the filing of a libel for forfeiture is such a declaration of a forfeiture that, without even a preliminary examination or *prima facie* showing, the claimant has no right to give a bond for his property pending a hearing, especially when the government declares itself not ready for a hearing, is so repugnant to any idea of the rights of private property, and so declaratory of arbitrary confiscation, that, were it an open question, it could not be entertained. But it has been carefully considered and determined. Justice Story, in the case of *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248, which was a libel for forfeiture, in which case it was contended that the court had no authority to deliver the property on bond in a case of this nature, says:

"I understand that in all proper cases of seizure under whatever statute made, the invariable practice in the district court has been to take bonds for the property whenever application has been made by the claimant for this purpose. No doubt has hitherto existed respecting the right of that court to take such bonds. * * * That practice, I understand, has been recognized and sanctioned by my predecessors in this court, and I should not now feel at liberty to disturb upon slight grounds a practice so well settled, whatever might be my own impressions as to its regularity. The practice has been of great public convenience, and to claimants in particular it has been peculiarly beneficial. * * * Whether there be any statute existing which authorized the delivery on bond or not is not, in my judgment, material. The cause was a civil cause of admiralty and maritime

jurisdiction, and nothing can be better settled than that the admiralty may take *fide-jussory* caution or stipulation in cases in rem, and may in a summary manner award judgment and execution thereon. The district court possesses this jurisdiction, and, being fully authorized to adopt the process and mode of proceeding of the admiralty, * * * had an undoubted right to deliver the property on bail, and to enforce a conformity to the terms of the bailment."

This, I consider, is the well-established law upon the subject, and I have failed to find any case where it has been questioned. In the case of *The Mary N. Hogan* this general law was not questioned, but it was held to be within the discretion of the court to grant or deny a release on bond, according to the circumstances of the case, and, while I concur fully in the views of the learned judge in that case, I consider that the circumstances of this case differ so materially that a different conclusion may well be reached. In that case the seizure was made immediately after the fitting out, and while preparing to leave; and when the motion was heard she was fully prepared to proceed on her alleged illegal voyage, and all circumstances pointed clearly to the conclusion that, if released, she would so proceed. In this case the libel charges a past offense several months prior to the seizure, and there is nothing to show, nor is there any intimation, but that at the time of seizure she was engaged in the legitimate prosecution of her regular business of towing on the St. Johns river. The case of *The Mary N. Hogan* at the time of that decision was ready for a hearing and immediate determination; in this case exceptions to the libel have been filed, raising important questions of law, in which the government is not ready for argument, and the consideration of which may cause more or less delay in the trial. There is no suggestion, intimation, or reason to believe that, if released on bond, this vessel would attempt any violation of law. Under the circumstances it is considered that the case does not present such unusual features as to call for an exceptional ruling upon the question of admitting to bail, and it is ordered that, upon an appraisalment being had, said claimants be permitted to enter in bond and stipulation as by law provided for the release of vessels under attachment.

THE THREE FRIENDS.

UNITED STATES v. THE THREE FRIENDS.

(District Court, S. D. Florida. January 18, 1897.)

No. 131.

1. NEUTRALITY LAWS—FORFEITURE OF VESSEL.

Under Rev. St. § 5283, forbidding the fitting out and arming of a vessel with intent that she be employed against a government with which the United States are at peace, no prior personal conviction of an offender is necessary to warrant a decree of forfeiture in rem against the vessel.

2. SAME.

This section, by forbidding the fitting out and arming of a vessel with intent that she shall be employed in the service of any foreign prince or state, "or of any colony, district, or people," refers to a body politic, which has been recognized by our government at least as a belligerent; and the section does not apply to the case of a vessel fitted out and armed to be employed in the service of insurgents or persons never recognized as a political body by our government.

This was a libel of forfeiture filed by the United States against the steamer *Three Friends* for alleged violation of the neutrality laws. A motion for permission to give bond for the release of the vessel was heretofore granted. 78 Fed. 173. The cause is now heard upon exceptions to the libel.

A. W. Cockrell, for claimant.

Frank Clark, U. S. Atty., and Cromwell Gibbons, Asst. U. S. Atty.

LOCKE, District Judge. This vessel has been libeled for forfeiture under the provisions of section 5283 of the Revised Statutes of the United States. The libel alleges that said steam vessel was on the 23d day of May, A. D. 1896, furnished, fitted, and armed "with intent that she should be employed" by "certain insurgents or persons in the Island of Cuba to cruise or commit hostilities against the subjects, citizens, or property of the said Island of Cuba, and against the king of Spain and the subjects, citizens, and property of the said king of Spain in the Island of Cuba with whom the United States are and were at that date at peace." To this there have been exceptions filed upon two grounds: (1) That forfeiture under this section depends upon the conviction of a person or persons for doing the acts denounced; and (2) that the libel does not show that the vessel was armed or fitted out with the intention that she should be employed in the service of a foreign prince or state, or of any colony, district, or people recognized or known to the United States as a body politic.

The first objection raised by these exceptions is easily disposed of by the language of the supreme court in the case of *The Palmyra*, 12 Wheat. 1, where, after elaborate argument, it is said:

"Many cases exist when the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class

of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam. * * * In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature."

The other question raised by the exceptions is more difficult, and requires a construction of the clause of section 5283, "with intent that such vessel should be employed in the service of any foreign prince or state, or of any colony, district, or people," and more particularly the significance of the words "colony, district, or people," and a determination whether the requirements of the law are satisfied by the allegations of the libel that the vessel was intended to be employed "in the service of certain insurgents or persons in the Island of Cuba"; and whether the statute admits a construction which would make a vessel liable to forfeiture when fitted out for the intended employment of any one or more persons not recognized as a political power by the executive of our nation. The section under which this libel has been filed was originally the third section of the act of June 5, 1794 (1 Stat. 381, c. 50), and the language at that time only contained the provision that the vessel should be fitted out with intent that said vessel should be employed in the service of any foreign prince or state, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state with whom the United States might be at peace. While that was the language of the act, the question came before the supreme court in the case of *Gelston v. Hoyt*, 3 Wheat. 328, and in speaking of a plea considered necessary for a defense to a suit for damage for this seizure under this statute it was held that such plea was bad, "because it does not aver the governments of Petion and Christopher are foreign states which have been duly recognized as such by the government of the United States." In this case there was no distinction made between the party in whose service the vessel was to be employed and the one against whom hostilities were intended, and the language of the court would fully justify the conclusion that they should both have been recognized, either as princes or states. Subsequently, as is stated by Mr. Wharton in his work on International Law, upon the outbreak of war between the South American colonies and Spain, upon a special message of President Madison to congress upon the subject, the words "or of any colony, district, or people" were added to the description of both parties contemplated,—both that one into whose employment the vessel was to enter and that one against whom the hostilities were contemplated. Has the addition of these words changed the character of the party intending to employ such vessel from that of a political power duly recognized as such, as is declared by the court in *Gelston v. Hoyt*, to that of a collection of individuals without any recognized political position? This question has been before the courts frequently, and several times been examined and commented upon; but in no case which I have been able to find has it been so presented,

unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive. Beyond question the courts are bound by the actions of the political branch of the government in the recognition of the political character and relations of foreign nations, and of the conditions of peace or war. The act of 1794, as well as its modification, the act of 1818, used the same language in describing the power or party in whose behalf or into whose service the vessel was intended to enter as was used in describing the political power against which it is intended that hostilities should be committed; and, as far as the language itself goes, it is impossible to say that in using the words in one clause of the sentence the political character and power were intended, while in another clause of the same sentence words used in exactly the same connection, and with apparently the same force and meaning, were intended to represent not the political power, but the individuals of a certain colony, district, or people.

It is contended that, although the original act of 1794 required the construction given it in *Gelston v. Hoyt*, that each party should be one duly recognized by the United States, yet the modification of 1818 so changed it that it could be held to apply to any persons, regardless of their political character, for whose service a vessel might be intended. It is understood that this modification was brought about by the special message of President Madison of December 26, 1816. The question presented by this message is clearly set forth in the language used. He says:

"It is found that the existing laws have not the efficacy necessary to prevent violations of the United States as a nation at peace toward belligerent parties, and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States."

In further explanation of the condition of affairs which called for this modification of this statute may be considered the letter of Mr. Monroe, secretary of state, to Mr. Forsythe, January 10, 1817, in which he speaks of vessels going out as merchant vessels and hoisting the flag of some of the belligerents, and cruising under it; of other vessels armed and equipped in our ports hoisting such flags after getting out to sea; and of vessels having taken on board citizens of the United States, who, upon the arrival at neutral points, have assumed the character of officers and soldiers in the service of some of the parties in the contest then prevailing. All of this correspondence shows that the effort at that time was to enforce neutrality between recognized belligerent parties. That the parties then in contest were recognized as belligerents, and a neutrality was sought to be preserved, is clearly shown by the first annual message of President Monroe in 1817. He says:

"Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been open to both, and any articles * * * that either was permitted to take have been equally free to the other."

It is considered that this shows what was in contemplation at the time of the enactment of the law of 1818, and that what was intended was to prevent the fitting out of vessels to be employed in the service of a colony, district, or people which had been recognized as belligerents, but which had not been recognized as an independent state, or which was not represented in the political world by a prince. There appears to be nothing in the remedy demanded at that time, or in the language used, to show that the words so added were intended to represent or be construed as referring to the individual people of any colony, district, or people, or any number of them, however designated, except as in their collective, representative, political capacity, any more than there is to show that the term "state" in the original was intended to refer to the individual people of the state. The language of the foreign enlistment act of Great Britain (59 Geo. III. c. 69, § 7) leaves no question as to the intention of parliament in that legislation, as it added to the words of our statute the words, "or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province or parts of any province or people." In order to give the statute under which this libel is brought the force contended for by the libellant it is necessary to eliminate from the provision that makes it necessary to declare how the vessel is to be employed the entire clause, "in the service of any foreign prince or state or of any colony, district, or people," or to read into it the language found in the act of Great Britain, or its equivalent. That it was the general understanding at the time of the passage of the original act that it was considered to apply only to duly-recognized nations is shown by the fact that in the case of *U. S. v. Guinet*, 2 Dall. 321, Fed. Cas. No. 15,270, under this same section (the first case brought under it), the indictment alleged fully in terms that both the state of the republic of France, in whose service the vessel was to be employed, and the king of Great Britain, were a state and a prince with whom the United States was at peace. In the case of *U. S. v. Quincy*, 6 Pet. 445, the supreme court says that the word "people" was used in this statute as simply descriptive of the power in whose service the vessel was intended to be employed, and is one of the denominations applied by the acts of congress to a foreign power. In the case of *The Meteor*, Fed. Cas. No. 9,498, where the original libel alleged that the vessel was fitted out with the intent that she should be employed in the service of certain persons to commit hostilities against the government of Spain, it was considered necessary to amend it by alleging that she was intended to be employed by the government of Chili, and in that case there was presented a certificate of the secretary of state, under seal, of the fact of the war existing between Spain and Chili, and that they were both nations with whom the United States were at peace.

In addition to the declaration of the supreme court in the cases of *Gelston v. Hoyt*, and *U. S. v. Quincy*, this question has been in-

cidentally under examination in several cases in the lower courts. In the case of *The Carondelet*, 37 Fed. 800, Judge Brown says:

"Section 5283 is designed in general to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized state or power *de jure* or *de facto*. Neutrality presupposes two belligerents at least, and, as respects any recognition of belligerency,—i. e. of belligerent rights,—the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace. The United States can hardly be said to be at peace in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the subjects, citizens, or property of a district or people, within the meaning of the statute. So, on the other hand, a vessel, in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign prince or state, or of a colony, district, or people, unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

In the case of *The Conserva*, 38 Fed. 431,—a case in which it was alleged the vessel was to be used in a contest between Legitime and Hippolyte,—Judge Benedict says:

"The libel in this case charges certain facts to have been done in connection with the vessel with the intention that the vessel be employed in the service of certain rebels in a state of insurrection against the organized and recognized government of Hayti, to cruise and commit hostilities against the subjects, citizens, or property of the republic of Hayti, with whom the United States are at peace. A violation of the neutrality which the United States are obliged to maintain between the rebels mentioned and the government of the republic of Hayti is the gravamen of the charge. But the evidence fails to show a state of facts from which the court concluded that the United States were ever under any obligation of neutrality to the rebels mentioned, or are now under any obligation of neutrality to the government of the republic of Hayti."

In the case of *U. S. v. Trumbull*, 48 Fed. 99, Judge Ross carefully reviews the different authorities, examines the question, and clearly indicates how he would have decided the question had it been necessary for the purpose of deciding the case before him. He says:

"Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed 'Neutrality,' and it was carried into the Revised Statutes, and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other."

In speaking of the case of *U. S. v. Quincy*, in which it was said that the word "people" "was one of the denominations applied by the act of congress to a foreign power," he says:

"This can hardly mean an association of people in no way recognized by the United States or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates."

In the case of *U. S. v. The Itata*, 5 C. C. A. 608, 56 Fed. 505, on appeal before the circuit court of appeals, the question was fully

and carefully considered in an elaborate opinion, and, although not found necessary to decide the question in this case, as the case was disposed of upon other grounds, it is considered to be apparent how the question would have been decided had it been necessary. The force of the word "people" as used in this statute is carefully examined, as well as all other questions, and it is considered that the force of the conclusion which must necessarily result from such investigations cannot be avoided.

In the case of *U. S. v. Hart*, 74 Fed. 724, Judge Brown expresses his view of this section by saying:

"Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace."

The same language is used by the court in the case of *Wiborg v. U. S.*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197; but it is contended in behalf of the libellant that this language was modified by the subsequent declaration, made in the same case, that the operation of this statute is not necessarily dependent on the existence of such state of belligerency. In using the latter language it would seem that the court had the entire statute under contemplation, and more particularly section 5286, Rev. St. (the sixth section of the original act), which plainly does not depend upon a state of belligerency or neutrality. This was the section then under consideration, as the immediate context and following sentence show, and was the section upon which the suit was based; and it cannot be considered that this language was intended to apply to another section, the construction of which was in no way called in question.

With this understanding of the language in that case, every judicial decision, remark, or ruling, where the question has been under consideration or examination, appears to be in favor of the position taken by the claimants in the exceptions. In the case of *The Mary N. Hogan*, 18 Fed. 529, and in the cases of the intended charge of that vessel, *Boxes of Arms and Ammunition*, 20 Fed. 50, it does not appear that this question was raised by the claimant or considered by the learned judge; and his language in the subsequent case of *The Carondelet*, where it was raised and discussed, may be accepted as presumptive proof of what his decision would have been had it been so considered. The same is true of the case of *The City of Mexico*, 28 Fed. 148, decided by me in this court. In that case the defense was upon entirely different grounds, and the force of the portion of the statute contended for—the necessity that there should be an intent not only that the vessel should be intended to commit hostilities, but that for such purpose she should be employed in the service of some political power—was entirely lost sight of and eliminated from the consideration of the case.

The only expression authoritatively given which I have been able to find opposed to the view of the claimant in his exceptions is that of a portion of the letter of the honorable attorney general to the secretary of state of December 16, 1869 (13 Op. Attys. Gen. U. S.

177), and cited in the case of *Wiborg v. U. S.* I do not consider that I should be doing myself justice to pass that by unnoticed, as it has raised more question in my mind, and called for and compelled more thought and consideration, than anything else connected with the case; but I feel compelled to reach a different conclusion than is there expressed. The general purpose and intent of that letter was to declare that the insurrection in Cuba was not a fitting opportunity to enforce the provisions of this law, inasmuch as we owed no duty to such insurgents to protect them from hostilities, or, rather, that any contest between Spain and such insurgents could not be considered as hostilities; but incidentally it was stated that a condition of belligerency was not necessary for the operation of this statute. It could not be considered that we owed such insurgents no such duty because we were not at peace with them, but because we had never recognized them as a colony, district, or people. The force and effect of the letter was that the Cuban insurgents had not been recognized as a colony, district, or people, and therefore this section did not apply. If they had not been then so recognized, or were not entitled to be so recognized, how can they now be so recognized or described as to come within terms of the statute in question? It is considered that the argument used in such letter to show that the statute should be held applicable to cases where there was no condition of belligerency, and but one political power recognized, would have been fully as applicable under the old law, when the case of *Gelston v. Hoyt* decided to the contrary. The fact that a vessel was fitted out to be employed in the service of a prince would not necessarily imply that such prince was a political power recognized by the United States any more than would the terms a "colony, district, or people," under the act of 1818. But the supreme court clearly held in that case that it must be alleged that such prince or state has been recognized as such by the United States. The same argument used therein would call for the application of this statute for the purpose of forfeiting any vessel fitted out to be employed by any person, individual, corporation, or firm for the purpose of committing hostilities against a state at peace, which would plainly not come within the provisions of the statute, however much it might be considered international policy or proper national conduct.

It is impossible, in my view of the construction required by the language used, to properly apply the term "a people," used in the connection in which it is found, to any persons, few in number, and occupying a small territory, with no recognized political organization, although they might procure the fitting out and arming of a vessel. I fail to find any grounds for giving this statute—a criminal one as it is—any but its ordinary application. The question presented is clear and distinct, are "certain insurgents or persons in the Island of Cuba" properly described by either of the terms a "colony, a district, or a people"; and, if so, which? The inconveniences which might arise from the political branch of our government rec-

ognizing such insurgents as a colony, district, or people having political existence, and as belligerents, cannot be considered in determining whether they are entitled to such description. This statute is a criminal and penal one, and is not to be enlarged beyond what the language clearly expresses as being intended. It is not the privilege of courts to construe such statutes according to the emergency of the occasion, or according to temporary questions of policy, but according to principles considered to have been established by a line of judicial decisions.

It is contended that if the principles embodied in the exceptions are declared to be the law, there can be no law for the prevention of the fitting out of armed and hostile vessels to stir up insurrections and commit hostilities against nations with which we are at peace; and that such conclusion would make the parties engaged in any such expedition liable to prosecution as pirates. In regard to the first of these points, it is considered that section 5286 is, as has been constantly held, intended to prevent any such expeditions, regardless of the character of the parties in whose behalf they were organized; the only distinction being that in that case it is necessary to bring a criminal suit, and prove overt acts, while under this portion of this section the intent is the gravamen of the charge, and the prosecution is against the vessel, regardless of the persons engaged in the fitting out, or the ignorance or innocence of the owners. This is not a case that can be or should be determined upon questions of public policy, and whether any parties subject themselves to prosecution for piracy or not should have no weight in its consideration. If they should be so subject, they would have the benefit of the necessity of proving piratical acts rather than intentions. It is certainly considered to be true that any such parties would be considered as pirates by Spain, and would be treated as such if found in any acts of hostility, regardless of any recognition this nation might give them by considering them as having any political character as a people.

Without attempting further argument, but regretting that the pressing duties of a very busy term of jury trials have prevented a fuller and more complete expression of my views, it is my conclusion that the line of judicial decisions demands that a construction should be put upon the section in question which would hold that it was the intention of congress in such enactment to prevent recognized political powers from having vessels prepared for their service in the United States; but that it was not the intention to extend such prohibition to vessels fitted out to be employed by individuals or private parties, however they might be designated, for piratical or other hostilities, where no protection could be obtained by a commission from a recognized government. In such case they would be held liable under the section which provides for the fitting out of a military expedition; or, if they were guilty of any piratical acts upon the high seas, they would become liable under the laws for the punishment of such acts. It is considered that at the time of the

amendment of 1818 this construction had been declared, and the language of the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers the existence of which had been recognized as belligerents, if not as independents, and who were entitled to the rights of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States, and, unless it can be so amended, should be dismissed; and it is so ordered.

Since writing the foregoing, the libel herein has been amended by inserting in place of "by certain insurgents or persons in the Island of Cuba" the words, "in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the king of Spain, in the Island of Cuba"; but it is considered that the objection to the libel in sustaining the exceptions has not been overcome, but that, although the language has been somewhat changed, the substance has not been amended in the material part, inasmuch as it appears clearly that the word "people" is used in an individual and personal sense, and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district, and can in no way change my conclusions heretofore expressed; and the libel must be dismissed.

THE NATCHEZ.

NEW ORLEANS NAV. CO., Limited, v. ST. LOUIS & N. O. ANCHOR LINE.

(Circuit Court of Appeals, Fifth Circuit. December 22, 1896.)

No. 475.

1. COLLISION—CREDIBILITY OF WITNESSES.

In cases of conflict as to the movements of vessels, superior weight, other things being equal, is to be given to the testimony of witnesses as to the movements of their own vessel over that of witnesses on other moving vessels.

2. APPEAL—ASSIGNMENTS OF ERROR.

An assignment that the court erred in allowing certain claims, which the evidence adduced by libellant did not substantiate, is too general to be considered.

3. SAME—REFUSAL OF NEW TRIAL.

The refusal of a new trial is not assignable as error in the federal court.

4. INTEREST—DEMURRAGE.

In cases of collision, where damages are given for detention, interest may be allowed thereon as part of such damage.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel in rem by the St. Louis & New Orleans Anchor Line against the steamboat Natchez (the New Orleans Navigation

Company, Limited, claimant) to recover damages resulting from a collision. The district court rendered a decree for the libellant, from which the claimant has appealed.

M. Marks, for appellant.

W. W. Howe, W. B. Spence, and C. P. Cocke, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. This is a libel for damages in a case of collision between the steamboat Arkansas City and the steamboat Natchez. The district court adjudged the Natchez in fault, and awarded damages therefor, and the claimant of the steamboat Natchez has appealed. The claimant's answer to the libel gives the following account of the collision:

"On the 12th day of July, 1893, the steamboat Natchez left the port of New Orleans about 5 o'clock p. m., bound for the port of Vicksburg, having on board a cargo of merchandise. That the said steamboat was then, and continued to be during her voyage, in all respects seaworthy, and properly manned, equipped, and supplied. That the steamboat Arkansas City left the port of New Orleans about the same time, and both boats proceeded up the Mississippi river. That the Natchez made a landing, and, while at such landing, the Arkansas City passed her. That, after making such landing, the Natchez proceeded on her voyage, and kept gaining on the Arkansas City. That both boats, as is usual to avoid strong currents, crossed and recrossed the river, both boats being on the same side of the river, and crossing and recrossing the river at about the same time; the Natchez being in the rear of, and gaining on, the Arkansas City. That about 11 o'clock p. m. on the night of July 12, 1893, the steamboat Natchez having then passed, and being on the upper side or end of, the point known as 'College Point,' was laying and running parallel with the shore about seventy-five yards out in the river. That the steamboat Arkansas City was at that time about seventy-five yards in advance of the Natchez, and more than one hundred yards to the larboard or left of the Natchez; so that there was ample room for the Natchez to keep on her course and pass the Arkansas City, as she had a right to do. That the pilot on watch on the steamboat Natchez blew one whistle, thus indicating to the pilot on watch on the Arkansas City that the Natchez would pass to the right or starboard side. That the pilot on watch on the Arkansas City, intending to prevent the Natchez from passing the Arkansas, did not respond to the signal given him, as he should have done, but changed the course of the Arkansas City to the starboard, and, after some time had elapsed, blew three short whistles, the signals of danger. That immediately thereafter the Natchez was stopped and backed, and never stopped backing until it was no longer necessary to back, but that her headway was such that it could not for some time be checked, and she continued for that time to move up the river; and the Arkansas City, having, as aforesaid, changed her course to the starboard, closed in on the Natchez, striking the Natchez at her forecastle chains, with the forward fender of the starboard water wheel of the Arkansas City, and breaking said fender. That thereupon the Arkansas City, working both wheels, went on and struck her bow in the bank."

Taking this statement to be true,—and the claimant is estopped from denying it,—there is no doubt that the Natchez (the overtaking steamboat) was in fault, unless, after the signal of the Natchez indicating her desire to pass to the starboard of the Arkansas City, the course of the Arkansas City was changed to the starboard, so as to prevent the Natchez from passing. On this point the evidence

of the master and pilot of the *Arkansas City* is positive that no change of course was made on the part of the *Arkansas City* after the *Natchez* signaled to pass. On the other hand, the master and pilot and some other officials of the *Natchez* are positive that such change in the course of the *Arkansas City* was made. The trial judge evidently found the preponderance of evidence to be in favor of the *Arkansas City*, and we think properly, because, as is well settled in case of conflict of witnesses as to the disputed movement of vessels in collision, actual or threatening, superior weight (other things being even) is given to the testimony of a vessel's own men as to her movements over that of those witnesses on other moving vessels. *McNally v. Meyer*, Fed. Cas. No. 8,909; *The Sam Sloan*, 65 Fed. 125-127; and numerous cases there cited. In *McNally v. Meyer*, *supra*, Judge Blatchford (afterwards Mr. Justice Blatchford) well says:

"Daily experience in the trial of collision cases shows that nothing is more unreliable than testimony from those on one moving vessel as to the absolute actions on another moving vessel. The irresistible propensity is to regard your own vessel as stationary with reference to the other vessel, and to attribute all deflecting movement to the other vessel. The other vessel, a moving object, is alone in the eye. Unmoving objects are not kept in view as tests of movements in the vessels. The testimony which results is honest, but illusory, deceptive, and unreliable. The only safe reliance, as a general rule, as to the course and deflections of a vessel, is the testimony of those who hold in their hands her wheel or her tiller. A change of bearing between two vessels, which may be the result of three things,—a change of course wholly by one, a change of course wholly by the other, or a change of course by both,—can give no reliable indication to an observer on either vessel who judges merely from looking at the other vessel as to which one of the three things has produced such change of bearing."

This disposes of the first assignment of error.

The second assignment is that the court erred in allowing certain claims in the libel which evidence adduced by libelant did not substantiate. The general character of this assignment relieves us of any necessity to consider it.

The third assignment is that the court below erred in refusing a new trial. This cannot be noticed.

The fourth assignment is that the court below erred in holding that the overtaking boat was running too close at the time she gave the signal to pass. We find no such ruling in the record, and none can be inferred, except, perhaps, from the general decree against claimant.

The fifth assignment of error is that the court "erred in allowing interest to libelant from the time of filing the libel on the judgment and decree rendered." It has been held by this court in *Railroad Co. v. Schneider*, 13 U. S. App. 655, 8 C. C. A. 571, and 60 Fed. 210, that a verdict assessing unliquidated damages, and allowing interest from judicial demand, is sufficiently specific where it appears clear such interest is allowed as part of the damages. The damages allowed in this case are, in the main, liquidated damages, to wit, specific sums of money actually paid for materials and repairs prior to the filing of the libel, and only one item in the

account allowed can be classed as unliquidated, and that is for detention or demurrage of the steamboat *Arkansas City* for two days, the allowance of which is made the ground of the sixth and last assignment of error.

The claim in the libel is for three days' detention on the up-trip, \$263 per day. This damage was specifically and sufficiently proved, and, from the view the district court evidently took of the case, was properly allowed, and interest thereon is in the nature of, and was intended as, damages. On the whole record, we find no reversible error, and therefore the decree of the district court is affirmed.

THE CITY OF CHESTER.

THOM et al. v. NORFOLK & C. R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 149.

1. COLLISION—IGNORING SIGNALS—EXCUSES.

It is no excuse for failure to answer a signal that the vessel for which it was intended heard it, but did not understand that it was for her, other vessels being in the vicinity. It is her duty to understand and heed such signals, especially when the vessel giving them is on converging courses with her, on her starboard bow, and has the right of way.

2. SAME—DUTY TO AVOID DANGER.

A vessel which fails to get an answer to her signals is not justified, though she have the right of way, in continuing onward until the danger point is reached. Her duty, especially in a crowded harbor, and when approaching a tug incumbered with a tow, is to take every care to avoid a course involving risk of collision.

3. SAME—TUG WITH STEAMER AND TOW—SIGNALS—MUTUAL FAULT.

A steamboat with a tow projecting in front was proceeding up Norfolk Harbor, near the Norfolk side, and was under engagement, by signal, with a tug and tow coming down outside of her. Another tug, crossing from the Portsmouth side to reach a wharf, blew two signals of one blast each, which were heard by the steamboat, but not answered, because supposed to be for another vessel. The tug, nevertheless, continued her course, crossed in front of the descending tug, and struck the steamboat's tow. *Held*, that both steamboat and tug were in fault, the former for failing to understand and heed the signal, and the latter for proceeding after failing to get an answer.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This was a libel in rem by the Norfolk & Carolina Railroad Company against the steamboat *City of Chester* (Alfred P. Thom, receiver of the Atlantic & Danville Railway Company, claimant), to recover damages resulting from a collision in Norfolk Harbor. The district court found that the *City of Chester* was alone in fault, and entered a decree for libellant. 68 Fed. 574. The claimant has appealed.

Richard Walke and Alfred P. Thom, for appellant.

Robert M. Hughes, of Sharp & Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge. This case comes up by appeal from the district court of the United States for the Eastern district of Virginia, sitting in admiralty. It is a case of collision, occurring in the harbor of Norfolk, between the Pinner's Point, a steam tug of the Norfolk & Carolina Railroad Company, and the steam tug City of Chester. The collision took place at 8 a. m., on a clear and bright day.- The City of Chester had in tow on her port side a large barge, loaded with railroad cars, which projected 40 feet beyond her bow. She was proceeding south, up the harbor. The Pinner's Point, without any tow, had left Trugien's Wharf, on the Portsmouth side of the harbor, and was making across the harbor, and across the course of the City of Chester, for the wharf of the Norfolk & Carolina Railroad Company, on the Norfolk side of the harbor. At the same time the steam tug Martha Helen was proceeding north, down the harbor, with two brigs in tow astern on a hawser, the tow being in all 400 feet long. The Pinner's Point had gone into the stream, and, when she was abreast of the Ferry Slip on the Norfolk side of the harbor, she straightened on her course for the Norfolk & Carolina Railroad wharf. To the north of this wharf are the wharves of the Bay Line steamers and of the Boston steamers. To the south of it are the wharves of the Compress Company, of the Norfolk & Southern Company, of Jones, of Lee, and of Campbell; and next to Campbell's wharf, south, is the Ferry Slip. The Pinner's Point was abreast of the Ferry Slip, and the Martha Helen had not quite reached it. The City of Chester was then abreast of the wharf of the Bay Line steamers. The distance between the Ferry Slip and the wharf of the Bay Line steamers is 2,250 feet, or 750 yards. So this was the distance between the City of Chester and the Martha Helen. The Pinner's Point was about the same distance from the City of Chester, and was four or five points off her starboard bow. The Martha Helen approaching the City of Chester had signaled her with two whistles, indicating that she would put her helm to starboard. The City of Chester had replied with two whistles accepting the signal. After this, when the Pinner's Point was in the position, and at the distance above stated, she blew one whistle to the City of Chester. This signal was not answered by the latter vessel, as she did not recognize that it was intended for her, but supposed it was for one of two steam vessels coming up astern of her. The Pinner's Point then blew a second signal of one whistle, with the same result. The Pinner's Point, no answer having been received to either signal, went on, passed in front of the Martha Helen, and blew another signal of one blast, which was responded to with one blast by the City of Chester. The latter then ported, and reversed her engines, but too late to avoid a collision. The Pinner's Point collided with the barge which was on the port side of the City of Chester, overlapping her bow some

40 feet, striking the barge on the port bow, at her own forward port bitts. The course of the City of Chester was 40 or 50 yards distant from the Norfolk line of wharves. The Martha Helen was on a course about parallel to hers, somewhat further off, about 125 yards out from the line of the wharves. The course of the Pinner's Point crossed the courses of both the other tugs. To recapitulate a little: The Pinner's Point being distant from the City of Chester, on her starboard bow, about 750 yards, blew one blast to her, and got no answer, and blew another, with the same result. She kept right on across the bow of the Martha Helen, blew another blast to the City of Chester, and in a moment came in collision with her, the Martha Helen's bow being then off the City of Chester's stern.

The district court held that the Pinner's Point had the right of way, and that it was the duty of the City of Chester, having the Pinner's Point on her starboard side, to keep out of her way; that not having done so, she violated old rule 19 (new 16), and is solely liable for the collision. We are of opinion that this is too harsh a judgment of the City of Chester. In the first place, she was incumbered with a heavy tow, and her movements more or less hampered. She was under engagement by exchange of signals with the Martha Helen to starboard her helm before the first signal from the Pinner's Point. She was 40 or 50 yards from the line of wharves on her port side, and had the Martha Helen a point and a half on her starboard bow, approaching on a line parallel to her course, the courses of the two being at a distance of 50 to 75 yards from each other. She could not, under these circumstances, have assented to the one blast of the Pinner's Point. If she had done so, she would have broken her engagement with the Martha Helen, and, by porting instead of starboarding her helm, would have run serious risk of collision with her. She did commit a grave fault in not responding to either the first or second signals of the Pinner's Point, and thus advising the Pinner's Point of her dilemma. She thus contributed to the accident. The *Lowell M. Palmer*, 58 Fed. 701; The *New York*, 53 Fed. 555. It is no excuse to say that she heard the signal, but did not understand that it was for her. It was the duty of the City of Chester to understand and heed the signal; especially was this the case as she knew that the Pinner's Point was off her starboard bow on a converging course with hers, and, under ordinary circumstances, entitled to the right of way. The *Great Republic*, 23 Wall. 31.

But the Pinner's Point was not free from fault. The paramount duty of every vessel in proximity to another vessel is to avoid the risk of collision, and to take every precaution to this end; and in harbors this duty is intensified, the utmost care and vigilance being imperatively required from all vessels. The rules of navigation are prescribed for the purpose of governing the action of approaching vessels in all ordinary cases. But notwithstanding the minute provisions of these rules, in construing and obeying them, due re-

gard must be had to all dangers of navigation, and to any special circumstances existing in any particular case, which may render a departure from them necessary in order to avoid immediate danger. Rule 24; *The America*, 92 U. S. 432. In the present case the *Pinner's Point*, under rule 19 (now 16), had the right of way, and under normal circumstances should have proceeded on her course. But this did not free her from obligation to take every care, and so to conduct herself as to avoid a course involving risk of collision. Even the fault of the other vessel could not free her from this. *The Maria Martin*, 12 Wall. 47.

In *The Catskill*, 38 Fed. 367, a collision had occurred between the steamer *Catskill* and a ferryboat, the *Baltimore*, the latter having the right of way. The *Baltimore* signaled the *Catskill*, and got no response. Nevertheless, she kept on her course, and did not stop and reverse until she was within 200 yards of the *Catskill*. See same case, 34 Fed. 660. The court, affirming Judge Brown, says:

"Under such a state of facts, the *Baltimore* is clearly in fault. Her navigator was not surprised by any sudden indication that another craft, which he supposed intended to obey the rules, meant to violate them. On the contrary, with a very plain intimation that the other vessel was willfully or needlessly continuing on a course which made collision imminent, he kept on in the hope that at the last moment she would discover her error, and seek to rectify it. For thus keeping on until the safety limit was reached and passed, the district judge held the navigator of the *Baltimore* in fault, and his decision is affirmed."

In *The Non Pareille*, 33 Fed. 524, Brown, J., says:

"There is no such thing as a right of way to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision, not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision. The duties of each vessel are defined with reference to that object, and, in the presence of immediate danger, both, under rule 24, are bound to give way, and to depart from the usual rule, when adherence to that rule would inevitably bring on collision, which a departure from the rules would plainly avoid."

See, also, *The Sunnyside*, 91 U. S. 222, 223.

So, in *The Aurania*, 29 Fed., at page 123, the court quotes as follows:

"Risk of collision means not merely certainty of collision if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision when it is clearly not safe to go on. *The John McIntyre*, 9 Prob. Div. 135. The distinction between the risk and the certainty of collision is fully commented on by Brett, L. J., in *The Beryl*, Id. 137, where it was held that the rules required effort to avoid not merely the certainty of a collision, but the risk of it, and that the obligation of the vessel that had the right of way to slacken or stop in order to avoid collision arose with the risk of collision, and not merely when it would otherwise be certain."

See, also, *The Khedive*, 5 App. Cas. 876.

In *The E. A. Packer*, 140 U. S. 369, 11 Sup. Ct. 794, a ruling by the house of lords in *The Memnon*, 62 Law T. (N. S.) 84, 6 Asp. 488, was approved, wherein it was declared that it is the duty of the vessel entitled to keep her course to comply with the rule as to slackening speed, or stopping and reversing, if necessary, and, if she fail to do so, the burden is on her to show that to continue her speed was the best and most seamanlike maneuver.

Apply these principles to the case at bar. The Pinner's Point saw the City of Chester with her tow, and the Martha Helen with her tow, approaching each other on parallel courses. They were between her and the wharf to which she wanted to go. Her movements in the harbor were unobstructed. She was approaching the course of a tug incumbered with a tow, and should have taken her incumbered condition into consideration. Mars. Mar. Coll. 378, and cases quoted. She blew her first blast to the City of Chester, got no response; blew again, with like result. This should have put her on her guard, and have indicated that something was out of the usual course,—something which required explanation. She should have obeyed the requirement of the third pilot rule:

"Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

Instead of doing this, the Pinner's Point went on her course, perhaps reducing speed a little, and, getting near to these two approaching steamers, put on full speed. She just cleared the Martha Helen. She blew another blast when certainly not more than 75 yards from the City of Chester, and collided with her; she by that time having gotten abreast of the Martha Helen.

It would appear that the protest of the acting master of the Pinner's Point, made a few days after the collision, indicated the situation which the neglect of the foregoing rule by the Pinner's Point, and her stubborn adherence to her right of way without an exchange of signals, had produced, when he declares that "the Pinner's Point increased her speed when near the City of Chester on the one hand, and the Martha Helen, on the other, to prevent being jammed between those vessels."

We are of the opinion that the fault was mutual, and that the damages should be divided. The decree complained of will be reversed, and the case remanded, with directions that a decree be entered as herein indicated.

THE WAVERLY.

(District Court, E. D. Wisconsin. January 11, 1897.)

1. SALVAGE—EXTENT OF RISK—STATE OF WEATHER.

The extent of the risk assumed in undertaking to tow a disabled vessel is not to be gauged by the results alone; and the fact that the towing line was speedily taken, and that no mishap occurred, is entitled to consideration only so far as it tends to show the state of the wind and sea.

2. SAME—COMPENSATION.

Fifteen hundred dollars allowed, upon a valuation of \$67,000, to a steamer and cargo, worth \$75,000, which, in threatening weather, at some risk, took in tow and brought to port a disabled propeller found in Lake Michigan, some 20 miles from the west shore, off the port of Milwaukee.

This was a libel by the North Michigan Transportation Company, owners of the propeller Charlevoix, against the propeller Waverly, to recover salvage for the services of the Charlevoix in taking in tow and conveying into port the Waverly, which was found disabled in Lake Michigan.

Markham, Nickerson & Harper, for libelant.
Schuyler & Kremer, for claimant.

SEAMAN, District Judge. There is no material conflict upon the determining facts in this case, aside from the allegation of the distance of the Waverly from Chicago, and from the west shore, when picked up by the Charlevoix; and in that regard I find no practical difficulty, as both the course of the Waverly prior to the accident, and the time occupied by the tow in approaching the west shore, concur in placing the location approximately 20 miles off that shore; and, from the course taken and the lights sighted after the tow commenced, it is apparent that the start was from a point about east of the port of Milwaukee. The Waverly was a freight steamer, and left Chicago on the morning of September 17, 1893, bound for Buffalo, with a cargo of 47,000 bushels of corn, and two schooners in tow. At about 7 p. m. a break occurred in the machinery of the steamer, by which, as described by the engineer, "the engine went through herself," and was completely disabled. The schooners were then released, proceeding under sail, and the steamer blew her signals of distress while the engineer was engaged in disconnecting the shaft. The steamer Charlevoix, carrying 60 passengers and a cargo of general merchandise and fruit, was on her trip from Northport to Chicago; and the signals being heard on their starboard bow, about a mile and a half away, answering signals were given, and she came up promptly within hailing distance. Although there are minor differences in the testimony of what was then said by the masters, respectively, all agree that assistance was called for, and that the matter of compensation was to be left to the owners for settlement. The Waverly rolled somewhat in the troughs of the sea, which was running from the southward. There was no storm, according to seamen's parlance. The libel avers only "a lump of a sea," and the

mate of the Charlevoix says a 10-mile breeze was blowing from the south. The master of the Waverly says "the wind was about southeast, a nice breeze," but that it was what "sailors would call threatening weather." The disabled steamer was not, perhaps, in imminent peril from the present state of the weather; but it is asserted that an unfavorable change of the weather, with the wind west or north-west, was indicated by the barometer, and in that event the sole dependence of this steamer for making a port of shelter or anchorage was upon a small foresail and mainsail,—conditions in which disaster might well be apprehended. On the other hand, there was sufficient sea to require care and skill, and involve some extent of risk to the Charlevoix in maneuvering to take the line, and in towing with the short line improvised for the purpose, the wind having increased and hauled to the west,—certainly more risk than would be incurred in her regular voyage. The extent of the risk which was assumed by the salvor is not to be gauged by the results alone, and the argument of the respondent to that end, upon the fact that the line was speedily taken, and that no mishap occurred, is entitled to consideration only so far as it tends to show the state of wind and sea. This service was rendered by a passenger steamer upon the urgent call of a disabled steamer. It was voluntary, prompt, and effective, and under circumstances which constitute salvage of the minor order, but not mere towage. The rules stated in the case of *The Spokane*, 67 Fed. 254, are clearly applicable here, the only differences being of degree,—the salvaged property here being about one-fifth the value there, and the service there being at the close of the season of navigation, and with greater distance and difficulties. The value of the Waverly and cargo is stipulated at \$67,000, and of the Charlevoix and cargo at \$75,000. The claimants tendered \$500, and it is urged in their behalf that such amount would be liberal compensation, and the allowance should be no larger; but the purposes of the rule of salvage which grants compensation in the nature of a reward would not be fulfilled by narrowing the allowance so closely to the rate of mere towage, and I am satisfied that \$1,500 may justly be awarded, under the circumstances shown. Let the libellant have decree for that amount and costs.

CHIATOVICH v. HANCHETT et al.

(Circuit Court, D. Nevada. January 25, 1897.)

1. REMOVAL OF CAUSES—PRACTICE—NOTICE OF PETITION.

No statute or rule of practice requires a defendant to give notice to a plaintiff of the filing of a petition for the removal of a cause from a state to a federal court.

2. SAME—FILING OF TRANSCRIPT—NOTICE—REMAND.

Failure to give notice of the filing in the federal court of a transcript of the record of a case removed from a state court, as required by rule 79 of the circuit court for the district of Nevada, constitutes no ground for remanding the cause.

3. SAME—TIME OF REMOVAL—STIPULATION EXTENDING TIME FOR ANSWER.

Where a stipulation, signed by a party or his attorney or counsel, is of binding force, a cause may be removed from a state to a federal court within the period to which the defendant's time to answer is extended by a written stipulation, though no order of court is entered thereon.

4. SAME—CITIZENSHIP.

A defendant, who is a citizen and resident of another state than that of the plaintiff, is entitled, under the act of 1887-88, to remove to the federal court a suit brought against him in the state court, although, at the time the suit was commenced, and the petition for removal filed, he was temporarily residing in the state where suit was brought.

Motion to Remand.

M. A. Murphy, for plaintiff.

Torreyson & Summerfield, for defendants.

HAWLEY, District Judge (orally). This is an action of libel, and was brought in the district court of Esmeralda county, Nev. The complaint was filed August 29, 1896. Summons was served on L. E. Hanchett August 31, 1896. On September 5, 1896, the district judge, for good cause shown, extended the time "to plead in the above-entitled action" to September 30, 1896. On September 26, 1896, Messrs. Torreyson & Summerfield entered their appearance in said action on behalf of the defendant L. J. Hanchett, and accepted "the time specified in the stipulation herein on file in which to plead to the complaint in said action." The terms of the stipulation referred to were "that the above-named defendants L. J. Hanchett and L. E. Hanchett shall have to and including the 15th day of October, 1896, in which to plead to plaintiff's complaint in the above-entitled action." On October 14, 1896, the defendants, by their attorneys, appeared in the district court solely for the purpose of applying to the court for an order removing the cause to the circuit court of the United States. The petition for removal was made upon the ground that the plaintiff was at the time of the commencement of the action, and still is, a citizen and resident of the state of Nevada, and that the defendants were at that time, and still are, citizens and residents of the state of California. The district court, upon the facts set out in the petition, the giving of a proper bond, etc., made an order removing said cause to this court.

The plaintiff moves to remand the cause upon several grounds: (1) That this court has no jurisdiction; (2) that the action was improperly removed; (3) that the facts stated in the petition are not

sufficient to entitle defendants to remove the cause; (4) that the time for the defendants to answer in the state court had expired before the petition for removal was filed; (5) that no notice of the filing of the petition for removal was served upon the plaintiff; (6) that defendant L. E. Hanchett was at the time of the commencement of the action, and ever since has been, and still is, a resident and citizen of the state of Nevada; (7) that defendants have not complied with rule 79 of this court requiring notice to be served on the plaintiff of the filing of the transcript from the state court.

The preliminary objections to the petition and manner of removal will first be noticed.

1. The petition for removal upon its face clearly states sufficient facts to justify the order made by the district court.

2. There is no statute of the United States, nor any rule of practice of this court, which required the defendants to give notice to the plaintiff of the filing of the petition for removal. In *Fisk v. Railroad Co.*, 8 Blatchf. 243, 247, Fed. Cas. No. 4,828, the court said:

"The learned counsel for the plaintiff seem to suppose that the solicitor is entitled to notice of the time and place of the presenting of the petition, but this is an error. The act prescribes no such practice, and it is otherwise under all the previous statutes providing for removals. No affidavits can be read before the state court in opposition. The application on the petition is *ex parte*, and depends upon the papers upon which it is founded, and, if they are regular, and conform to the requirements of the statute, the court has no discretion. The act is peremptory."

To the same effect, see *Stevens v. Richardson*, 9 Fed. 191, 194; *Whelan v. Railroad Co.*, 35 Fed. 849, 865; *Strasburger v. Beecher*, 44 Fed. 213.

In reply to plaintiff's contention that it was the duty of the state court, under the rules of practice in the said court, to require the notice to be given, it is enough to say that the right to the removal of the cause is one conferred by acts of congress, and does not in any manner depend upon the action of the state court. *Fisk v. Railroad Co.*, 6 Blatchf. 362, Fed. Cas. No. 4,827; *Hatch v. Railroad Co.*, 6 Blatchf. 106, 117, Fed. Cas. No. 6,204; *Brigham v. Lumber Co.*, 55 Fed. 881, 884. It is, however, proper to add, as was said by Blatchford, J., in *Wehl v. Wald*, 17 Blatchf. 342, 346, Fed. Cas. No. 17,356, that:

"If, as matter of discretion, a state court can or does require notice in any case of removal, such notice was dispensed with in this case by the state court, and, the matter being one of practice, it is for the state court to regulate its own practice, and this court will not review such a question."

3. Rule 79 of this court provides that:

"Whenever the proper proceedings have been perfected in a state court to remove a case from such court to this court, pursuant to any statute of the United States, either party may at any time thereafter, as of course, file the transcript required by law in this court, and serve written notice of such filing upon the adverse party or his attorney; and upon filing in this court satisfactory evidence of the service of such notice, the clerk shall enter the action upon his register, and thenceforth the provisions of rule 78 of this court shall be applicable thereto, and the same proceedings may be thereafter had as if the transcript had been filed by the party removing the case at the time prescribed by law."

Under prior rules, a cause, when removed from the state court, was liable to remain in the clerk's office until the next term of the court without being entered upon his register, and the result was, in many cases, to cause undue delay. Rule 79 was therefore adopted for the sole purpose of enabling either party to "speed the cause."

In *Delbanco v. Singletary*, 14 Sawy. 124, 130, 40 Fed. 177, this court, with reference to rule 79, said:

"Its sole object and purpose is to carry out the express terms of the statute for the advancement of justice and the prevention of delays in proceedings."

The failure to give the notice before the next term of court constitutes no ground for remanding the cause.

4. The preliminary objections being disposed of, we now reach the merits of the motion to remand. Was the petition for removal filed in time? The statute provides that, whenever any party is entitled to remove any suit "from a state court to the circuit court of the United States he may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." It is the settled law and practice of the United States circuit courts that an extension of time to answer by order of court, whether made on stipulation or not, extends the time for removal. *Rycroft v. Green*, 49 Fed. 177; *Phenix Ins. Co. v. Charleston Bridge Co.*, 13 C. C. A. 58, 65 Fed. 628; *Price v. Railroad Co.*, 65 Fed. 825; *Garrard v. Silver Peak Mines*, 76 Fed. 1, and authorities there cited. This point is conceded by the plaintiff; but his contention is that a mere stipulation of counsel, without any order of the court, is insufficient to extend the time for a removal, and cites authorities in support of this proposition. *Martin v. Carter*, 48 Fed. 596; *Schipper v. Cordage Co.*, 72 Fed. 803. But the question depends solely upon what "is required by the laws of the state or the rule of the state court in which such suit is brought." This court must be governed in its decision upon this point by the laws and rules of the court of the state of Nevada. By the laws of this state the supreme court is authorized to "make rules not inconsistent with the constitution and laws of the state for its own government and the government of the district courts." Gen. St. Nev. § 3612. In pursuance of that authority the supreme court adopted certain rules for the government of the district courts, among others that no agreement or stipulation of counsel should be regarded "unless the same shall be entered in the minutes in the form of an order by consent or unless the same shall be in writing subscribed by the party against whom the same shall be alleged or by his attorney or counsel." Rule 27, 20 Nev. 28, and 24 Pac. xi. In *Haley v. Bank*, 20 Nev. 410, 22 Pac. 1098, the court held that such rules were intended to be supplemental to the provisions of the statute as rules for the government of all proceedings in the district court, and that they should have the same force and effect as if they were incorporated in the statutory provisions of the state. No default could have been entered in the state court. The time

for defendants to plead had not expired. The petition for removal was filed in time. *People's Bank v. Aetna Ins. Co.*, 53 Fed. 161.

5. The next and last point to be considered is in relation to the residence of L. E. Hanchett. It is at least a debatable question whether the plaintiff is in a position to urge this ground of his motion. It is presented to the court upon an affidavit of plaintiff's counsel, based upon information and belief, that L. E. Hanchett was at the time stated, and for ten months prior thereto had been, a resident of Silver Peak, in Esmeralda county, Nev. If this affidavit is entitled to consideration, then it would, in justice to the defendants, be the duty of this court to also consider the ex parte affidavit of the defendant that he was only temporarily residing in Silver Peak, to attend to the business in which his father was interested; that his father had been detained in New York, and that affiant had been compelled to remain until his father's return; that he has always claimed his residence to be in Sacramento, Cal.; that at the time of leaving Sacramento he was in the employ of the Southern Pacific Company, and that he then obtained leave of absence, which permitted him to return to his position; and that, as soon as his father returns from New York, it is, and always has been, his intention so to do. This is supplemented by the affidavit of two other persons, who confirm the defendant's statement. Considering, for the purposes of this case, that this question has been properly presented, I am of opinion that a defendant who is a citizen and resident of another state from that of the plaintiff is entitled, under the act of 1887-88 to remove a suit brought against him in the state court, although, at the time the suit was commenced and petition for removal filed, he was temporarily residing in the state where the suit was brought. *Rivers v. Bradley*, 53 Fed. 305; *Brisenden v. Chamberlain*, 53 Fed. 307.

Motion to remand denied.

PIERCE v. MOLLIKEN.

(Circuit Court, N. D. California. January 18, 1897.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—EJECTMENT—VALIDITY OF LAND PATENT.

A complaint, in an action of ejectment, alleging that the plaintiff claims title to land exceeding \$2,000 in value, under a patent issued by the United States, and that the defendants deny the validity of such patent, or that it conveyed any title in or to the lands, is sufficient to show that the suit is one arising under the constitution or laws of the United States, and to give the federal courts jurisdiction.

Action in Ejectment. Demurrer.

Reddy, Campbell & Metson, for plaintiff.

Henry F. Crane and Philip Teare, for defendant.

MORROW, District Judge. This is an action in ejectment, to recover a tract of land in Contra Costa county, Cal. The complaint alleges, among other things, that the value of said tract of land exceeds

the sum of \$2,000, and that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of \$2,000; "that the title of the plaintiff to all of said tract of land, and his right to the possession thereof, accrued to and vested in him under and by virtue of a patent therefor which was duly and regularly issued to his grantor by the United States on or about the 28th day of February, A. D. 1893, under and in pursuance of the provisions of the statutes of the United States, and that said defendants deny the validity of said patent, and deny that it conveyed or conveys to the plaintiff or his grantor any estate, right, title, or interest in or to said lands, or in or to any part thereof." The demurrer raises the sufficiency of this allegation on the ground "that the complaint does not show that the construction of any constitutional provision, or of any specific federal law, or act of congress, is involved in said action." The act of March 3, 1875 (18 Stat. 470), provided "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States. * * *" The act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 434), re-enacted the foregoing provision, but limited the jurisdiction, in the amount involved, to cases "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." The jurisdiction of the circuit court has been sustained in cases in which the plaintiff's statement of his cause showed that he relied on some right under the constitution or laws of the United States. *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208; *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. 198; *Bachrack v. Norton*, 132 U. S. 337, 10 Sup. Ct. 106. In *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, the action was trespass to try title to a tract of land. The plaintiff claimed title under an execution sale upon a judgment record in the circuit court of the United States for the Northern district of Texas. The plaintiff alleged in his petition that, by reason of certain laws of the United States, and rules of the circuit court of the United States for the Northern district of Texas, which were specifically referred to, the judgment was a lien upon the property from the date of its rendition, or became such on the date the abstract thereof was recorded, and continued to be a lien up to the date of the sale by the marshal, by reason whereof plaintiff had a superior title, but that the defendants denied that the judgment was ever a valid lien on the property under said laws and rules, and that this constituted the controlling question in the case, upon the correct decision of which plaintiff's title depended. The supreme court held that the disposition of this issue depended upon the laws of the United States and the rules of the circuit court, and their construction and application were directly involved, and that the jurisdiction resting on the subject-matter was properly invoked. In *Hills v. Homton*, 4 Sawy. 195, Fed. Cas. No. 6,508, this court held that where, in an action, the title

to land in controversy, held under patents issued upon confirmed Mexican grants, depends upon a controverted construction of the patents, the circuit court has jurisdiction. In *Friend v. Wise*, the action was ejectment, commenced in this court in 1882 to recover possession of certain lands in San Joaquin and Calaveras counties, in this state. The complaint alleged that plaintiff's title arose under the constitution and laws of the United States; that plaintiff derived his title from a patent of the United States, and the defendants denied the validity of such patent. The defendant demurred on the ground that the court had no jurisdiction of the subject-matter set forth in the complaint, or of the persons of the defendants. The court (Judge Sawyer) overruled the demurrer, and, while no opinion was filed, the case went to trial, and resulted in a judgment in favor of the plaintiff, from which an appeal was taken to the supreme court of the United States, and the judgment was there affirmed. 111 U. S. 797, 4 Sup. Ct. 695, and 127 U. S. 457, 8 Sup. Ct. 1177. From this record, it must be presumed that the supreme court determined that the allegations of the complaint as to jurisdiction were sufficient.

It is contended by counsel for defendant that because the court, in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, said that the "suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws," it follows that the allegation in the complaint in this case that the "defendants deny the validity of said patent, and deny that it conveyed or conveys to the plaintiff or his grantor any estate, right, title, or interest in or to said lands, or in or to any part thereof," is insufficient to show jurisdiction. If this was the only allegation showing that the determination of the suit depends upon some question of a federal nature, the demurrer would be well founded. In the case cited there was no such allegation, but the complaint in this case shows further that by virtue of the patent the plaintiff asserts a right under the laws of the United States; and this is precisely what the supreme court determined, in the case referred to, the complaint or declaration should show, to sustain the jurisdiction of the circuit court. The demurrer is overruled.

CENTRAL TRUST CO. OF NEW YORK v. BENEDICT et al.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1897.)

No. 797.

JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—INTERVENTIONS IN FORECLOSURE RECEIVERSHIP CASES.

On July 1, 1885, the G. R. Co. made a first mortgage to the C. Trust Co., a New York corporation, and a second mortgage to B. and others, who were citizens of New York. Subsequently, on the same day, the G. R. Co. entered into a traffic agreement with the U. P. Ry. Co., by which it was provided that the G. R. Co. should be operated by the U. P. Ry. Co., and also that certain

cash in the treasury of the G. R. Co. and the proceeds of a part of the first mortgage bonds should be deposited with the C. Trust Co., to be expended, under the joint direction of the president of the U. P. Co. and the trustees of the second mortgage of the G. R. Co., in improving that company's road. The money was deposited, and a part of it spent, leaving a balance in the hands of the C. Trust Co. Thereafter A. and others, stockholders of the U. P. Co., brought suit against it, alleging its insolvency, and praying the court to settle all controversies between it and its creditors and leased lines, to marshal its assets, and liquidate its affairs. The G. R. Co. and other leased lines of the U. P. Co. were made parties, and its mortgages were set out in the bill. Receivers of the U. P. Co. and its leased lines were appointed under the bill. The C. Trust Co. then brought suit for the foreclosure of the first mortgage on the G. R. Co., and the same receivers were appointed in this suit. The trustees of the second mortgage of the G. R. Co. filed an intervening petition in the same courts in which both the suit of A. and others against the U. P. Co. and the C. Trust Co.'s suit against the G. R. Co. were pending, asking an allowance out of the balance of the fund in the hands of the C. Trust Co., as compensation for their services in supervising the disbursement of the fund. The C. Trust Co. answered the petition, objecting to the jurisdiction of the court, and also claiming a lien on the fund for its own services. A master reported that the trustees were entitled to the whole balance of the fund as compensation. *Held*, that notwithstanding the C. Trust Co. and the trustees were citizens of the same state, since the making of an order granting the trustees compensation out of the fund was properly incident to the granting of full relief in the suit of A. and others against the U. P. Co., and since the C. Trust Co. was a mere depository of the fund, and had no valid claim of its own against it, the court had jurisdiction to make such order for compensating the trustees out of the fund.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was an intervening petition filed by the appellees, James H. Benedict, Isaac H. Bromley, and F. K. Pendleton, in the circuit courts of the United States for the districts of Nebraska, Kansas, and the Western district of Missouri, which was subsequently heard and determined in the district of Nebraska. The controversy arose out of the following facts, concerning which there is no substantial dispute:

On July 1, 1885, the St. Joseph & Grand Island Railroad Company, a corporation of the state of Kansas, made its first mortgage to the Central Trust Company of New York, the appellant herein, as trustee, to secure an issue of bonds to the amount of \$7,000,000. At the same time, it made its second mortgage to the appellees, James H. Benedict, Isaac H. Bromley, and Frank K. Pendleton, as trustees, to secure an issue of \$1,679,000 second mortgage bonds. On July 1, 1885, the St. Joseph & Grand Island Railroad Company entered into an agreement with the Union Pacific Railway Company, dated on that day, known as the "Traffic Agreement." By that agreement, it was, in substance, provided that the railroad of the St. Joseph & Grand Island Company should be operated by the Union Pacific Railway Company, and that the earnings of the business should be divided between the two companies on a basis which was specified in the agreement. Said agreement contained, among other things, the following provision: "And it is hereby further mutually agreed by and between the parties hereto that whereas, the said party of the first part (the St. Joseph & Grand Island Railroad Company) now has the sum of about two hundred and eighty-five thousand (\$285,000) dollars in cash in the treasury, and that a certain number of first mortgage bonds, to wit, the amount of about four hundred thousand (\$400,000) dollars, have been reserved for improvements, it being the intention that the same shall be sold, and the proceeds, together with the sum of two hundred and eighty-five thousand (\$285,000) dollars, now on hand as above mentioned, shall be used and applied to the making of improvements, the purchase of steel rails, rolling stock, etc., for the railroad of said party of the first part: Now, then, it is hereby agreed that the said fund, amounting to about seven hundred thousand (\$700,000) dollars, as aforesaid, shall be deposited in the Central Trust Company of the City

of New York, to be used and expended for the purposes above mentioned, under the joint order of the president of the Union Pacific Railway Company, party of the second part, and a majority of the trustees mentioned in the second mortgage of the party of the first part above referred to." Under the foregoing provision of said agreement, moneys amounting in all to \$1,060,992.69 came into the possession of the Central Trust Company of New York, out of which there was drawn the sum of \$1,048,087.39, leaving a balance in the hands of the trust company at the time of the filing of the petition amounting to \$12,905.30. On October 9, 1893, Oliver Ames, 2d, and others, filed their bill of complaint in equity in the circuit court of the United States for the district of Nebraska, against the Union Pacific Railway Company and others, including the St. Joseph & Grand Island Railroad Company, alleging the insolvency of the Union Pacific Company, setting forth the nature of the liens upon and the claims against its property, and praying that the court would administer the trust fund, marshal the assets, ascertain the liens and priorities, appoint receivers to preserve the property as a system, and enforce the rights and equities of the complainants and all the stockholders and creditors of the Union Pacific Railway Company. Neither the Central Trust Company of New York, nor the appellees herein, Benedict, Bromley, and Pendleton, as trustees, were made parties to the bill. It was alleged in the bill, among other things, that the Union Pacific Railway Company owned \$2,301,500 of the capital stock of the St. Joseph & Grand Island Railroad Company out of a total issue of \$4,551,100, and that the railroad of the last-mentioned company was incumbered by the two mortgages hereinbefore described. Under this bill, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert were appointed receivers. On December 29, 1894, the Central Trust Company of New York, as trustee under the first mortgage of the St. Joseph & Grand Island Railroad Company, filed its bill of complaint for the foreclosure of said first mortgage against the mortgagor company, the Union Pacific Railway Company, and against Benedict, Bromley, and Pendleton, trustees in the second mortgage. On August 27, 1895, an order was made in that suit appointing the same persons receivers of the mortgaged property, who had been theretofore appointed under the bill filed by Oliver Ames, 2d, and others.

Prior to the entry of the last-mentioned order, and on August 6, 1895, Messrs. Benedict, Bromley, and Pendleton, trustees of the second mortgage of the St. Joseph & Grand Island Railroad Company, filed in the three courts in which the Central Trust Company's bill of foreclosure was pending, namely, in the circuit courts of the United States for the districts of Nebraska, Kansas, and the Western district of Missouri, their intervening petition to be allowed compensation for their services in supervising the disbursement of the fund that had been deposited with the Central Trust Company, in manner aforesaid, under the provisions of the aforesaid traffic agreement. They demanded, in substance, that the entire fund remaining in the hands of the Central Trust Company, to wit, \$12,905.30, be paid to them as compensation for their services. Upon this petition, the circuit court made an order, referring the petition and the answers thereto to the Honorable W. D. Cornish, who had been theretofore appointed as special master in the aforesaid cases, and directed that copies of the petition and order be served upon the Central Trust Company, as trustee under the first mortgage made by the St. Joseph & Grand Island Railroad Company. The Central Trust Company filed an answer, in which, among other things, it averred that the said intervening petition which had been filed "shows upon its face that this court has no jurisdiction to entertain the same." By the answer in question, the Central Trust Company also put in issue the extent and value of the alleged services that had been rendered by the interveners. It further alleged, at the conclusion of its answer, that it had a lien upon said balance in its hands for the amount of its reasonable compensation for its services in connection therewith, and for its expenses in respect thereto. The special master, to whom the case was referred, subsequently made his report, in which he found, in substance, that the fund unexpended was the property of the St. Joseph & Grand Island Railroad Company, subject to the provisions of the traffic agreement of July 1, 1885; that the receivers appointed in the above-mentioned suits had never taken actual possession of the fund; and that the petitioners were entitled to the whole fund, as compensation for their services. The Central Trust Company excepted to this report. The exceptions were overruled; the report of the master was confirmed; and an order was thereupon made

in accordance with the recommendations of the master, directing that the fund in controversy be paid to the interveners. From the order so made, the trust company has appealed.

Adrian H. Joline and Butler, Stillman & Hubbard, for appellant.
F. K. Pendleton and Parrish & Pendleton, for appellees.

Before CALDWELL and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principal question discussed by counsel in their briefs is whether the circuit court had jurisdiction to make the order from which the appeal was taken. In this behalf it is contended for the appellant that inasmuch as the circuit court could not have entertained a suit between the appellant and the appellees, both of them being citizens of the state of New York, and inasmuch as it had not acquired possession of the fund in controversy, either actual or constructive, it had no power to make the order appealed from, and the same is void. It may be conceded that the jurisdictional point would have great weight if the order made by the circuit court was not properly incident to the granting of full and complete relief in the suit of Ames et al. against the Union Pacific Railway Company et al., which is referred to in the foregoing statement, and if it was true that the Central Trust Company had an interest in the fund in controversy, other than that of a mere depository. But if the suit brought by Ames et al. against the Union Pacific Railway Company et al. was of such a nature as rendered it necessary or proper in that proceeding to administer upon the fund in controversy, and if, at the time the order was made, the trial court had before it all the parties who had a proprietary interest in the fund, and authority to control the disbursement of the same, then we do not see that the validity of the order can be successfully challenged. It admits of no doubt that the Central Trust Company (hereafter termed the "Trust Company") was a mere depository of the fund. It held it at all times as a banker, subject to the order of the president of the Union Pacific Railway Company and the appellees, or a majority of them, who were trustees in the second mortgage executed by the St. Joseph & Grand Island Railroad Company (hereafter termed the "Grand Island Company"). The trust company had no proprietary interest in or lien upon the fund in question. The traffic agreement named the trust company as the depository of the fund, but it gave it no power of control over the same, other than the power to disburse it pursuant to orders and directions from time to time given by the president of the Union Pacific Railway Company and the trustees in the second mortgage. The master properly held and reported that the fund belonged to the Grand Island Company, and that the appellees and the president of the Union Pacific Railway Company, the latter acting in an official capacity, were trustees of the fund, having the sole power to disburse it for the purposes named in the traffic agreement. In no aspect of the case, so far as we can see, was the trust company

given any authority to control the expenditure of the fund, or to refuse to pay drafts that might be drawn upon the fund by the trustees, who had been appointed to expend it. In a certain sense, the trust company was a mere subagent of the trustees, whose orders, when drawn upon the fund, it was bound at all times to honor. Such appear to have been the conditions under which the deposit with the trust company was made.

Passing to the second inquiry above suggested, we think it is manifest that the suit of Ames et al. against the Union Pacific Railway Company et al. was of such a nature and contemplated such relief that the circuit court, by an order made in that case, could properly dispose of the fund in controversy, especially after the appellees, as trustees in the second mortgage, had made themselves parties to the proceeding. It was a suit brought by the stockholders of an insolvent corporation to wind up the company on the ground of its insolvency, to adjust and settle all controversies between the Union Pacific Railway Company and its creditors, and between that company and its leased lines, including the Grand Island Company, and, generally, to marshal all the corporate assets, and to liquidate the company's affairs. When the appellees, Messrs. Benedict, Bromley, and Pendleton, made themselves parties to the Ames suit, and asked for an allowance against the fund in controversy, we do not perceive that there was any lack of power in the court to grant the relief prayed for, and to dispose of the fund. All parties who had a beneficial interest in the fund, or power to control its disbursement, to wit, the Union Pacific Railway Company, the Grand Island Company, and the trustees in its second mortgage, were then before the court, and, by virtue of this fact, the fund itself became subject to the orders of the court. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792; *Chaffee v. Quidnick Co.*, 13 R. I. 442; *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606; *Langford v. Langford*, 5 Law J. Ch. (N. S.) 60; *Schindelholz v. Cullum*, 12 U. S. App. 242, 249, 5 C. C. A. 293, and 55 Fed. 885; *Gluck & B. Rec.* p. 978. The result might be different if the trust company showed any substantial right to the fund which it could interpose, as against the Union Pacific Railway Company and the trustees in the second mortgage of the Grand Island Company, for whose benefit the fund was created. But such is not the fact. This record fails to disclose any such right. Inasmuch as the trust company held the fund merely as a banker, it does not appear that there was any reasonable foundation for the allegation that the trust company had a lien upon the balance of the fund in its hands. The record shows that the trust company is simply a depository of the fund, and that it holds it subject to the disposal of the parties last named. As against them and the Grand Island Company, the trust company can assert no adverse right. Moreover, occupying such a position, the trust company is not concerned in the question whether the appellees were entitled to compensation for their services as trustees in supervising the expenditure of the fund, nor in the further question whether the compensation allowed to them by the trial court was excessive. Having no valid claim of its

own against the fund, and being a mere debtor of the Grand Island Company, it is only concerned in the question whether the order made by the trial court will protect it from all further claims on the part of those to whom the fund belongs. We have no doubt that the order made will afford it such protection. The order appealed from is therefore affirmed.

WISE v. NIXON et al.

(Circuit Court, D. Nevada. January 25, 1897.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTIONS.

The mere fact that, in the progress of the trial of a case, it may become necessary to construe the constitution or laws of the United States, does not give the federal courts jurisdiction of such case; but the decision must depend on such construction, and this must appear by the complainant's statement of his own claim, irrespective of what the contention of the defendant may be. *Wise v. Nixon*, 76 Fed. 3, reaffirmed.

D. S. Truman and Torreyson & Summerfield, for complainant.
Robert M. Clarke, for respondents.

HAWLEY, District Judge (orally). This is a suit in equity to quiet title to two certain tracts of sulphur mining land, of 160 acres each, situate in Humboldt county, Nev. The complainant and respondents are residents of the state of Nevada. The jurisdiction of this court is sought to be maintained upon the ground:

"That this is a civil action arising under the laws of the United States."

A demurrer to the original complaint was sustained, and leave given to complainant to amend. *Wise v. Nixon*, 76 Fed. 3. A demurrer is interposed to the amended complaint upon the ground that:

"It appears on the face of said complaint that said action is not one arising under the constitution or laws of the United States. Said action does not in any manner involve the construction of the constitution, or of said alleged, or any, law of the United States."

The amended complaint presents substantially the same facts as were set forth in the original complaint. It is, however, more specific in its averments as to the contention of the respective parties relative to the proper construction to be given to the acts of congress which it is claimed will be involved upon the trial of the case. The various allegations on this point are argumentative in their character, and the conclusion of law is stated, as in the original complaint:

"That the title of said property and the rights of the parties hereto depend upon the construction of said above-mentioned acts and sections thereof, and the rights and title of your orator will be defeated by one of said constructions and sustained by the other proper claimed construction thereof."

The only additional fact stated in the complaint is that:

"It will be shown that said sulphur mining claims are not situated in any organized mining district in this state, and that said mines are contiguous to each

other, and that there is no statute mining law in Nevada regulating the doing of assessment work on mines, either situated in, or not situated in, any organized mining district, or relative to the marking of boundaries of mining claims, or relocations of mines, or on the original location of mines, or at all, by which any of the legal questions here involved can be determined."

The former opinion of this court, to which reference is made, is conclusive upon the point that this court has no jurisdiction of the case. The complaint presents questions of fact, and not of law. In addition to authorities cited in former opinion, see *Mining Co. v. Largey*, 49 Fed. 289. The mere fact that, in the progress of the trial, it may become necessary to construe the mining laws of the United States, does not necessarily give this court jurisdiction. In *Water Co. v. Keyes*, 96 U. S. 199, 203, the court said:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction."

The acts of 1887-88 with reference to the jurisdiction of the federal courts are different in several respects from the prior acts upon the same subject. The change was made, as has been frequently stated by the supreme court, "to contract the jurisdiction of the circuit courts of the United States." *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. 141; *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. 207; *Shaw v. Mining Co.*, 145 U. S. 444, 449, 12 Sup. Ct. 935; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 687, 14 Sup. Ct. 533; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 462, 14 Sup. Ct. 654. Under the acts of 1887-88, the circuit courts of the United States have no jurisdiction of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the complainant's statement of his own claim, irrespective of what the contention of the defendants may be. Even under the prior acts the question whether a party claimed a right under the constitution or laws of the United States was to be ascertained by the legal construction of his own allegations, and not by the effect attributed to those allegations by the adverse party. *Railroad Co. v. Mills*, 113 U. S. 249, 257, 5 Sup. Ct. 456; *Metcalf v. Watertown*, 128 U. S. 586, 589, 9 Sup. Ct. 173; *Mining Co. v. Turck*, 150 U. S. 138, 143, 14 Sup. Ct. 35. The same rule applies more comprehensively to the acts of 1887-88. In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 464, 14 Sup. Ct. 654, there were three different cases embraced in the decision. In two of them, to quote the language of the court, "the only reference to the constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void, because in contravention of the constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws. * * * The result is that in the first and

second cases the decrees must be reversed at the cost of the plaintiffs, and the cases remanded to the circuit court of the United States, with directions to dismiss the bills for want of jurisdiction." See, also, *Florida v. Charlotte Harbor Phosphate Co.*, 20 C. C. A. 538, 74 Fed. 578, 581. It is manifest, upon the face of the complaint, that this court cannot take jurisdiction of this case without giving the effect attributed to those allegations by the adverse party, which the recent decisions of the supreme court declare cannot be done. The demurrer is sustained and the bill dismissed, without prejudice to complainant's right to bring the action in the state court.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. et al. v.
DICKSON.

(Circuit Court of Appeals, Seventh Circuit. February 12, 1897.)

No. 364.

1. APPEALABLE DECREES—INTERLOCUTORY ORDERS—INJUNCTION.

The assembling of a prayer for an unnecessary injunction with a prayer for modification of a decree or order will not warrant a review of the decree or order, when a direct appeal therefrom is unauthorized by law.

2. SAME.

Whether an appeal lies from an order dismissing, without prejudice, an application for an injunction, *quære*.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The Fidelity Insurance, Trust & Safe-Deposit Company, one of the appellants, on January 2, 1894, filed its bill in the circuit court of the United States for the Southern district of Illinois against the Litchfield, Carrollton & Western Railroad Company for the foreclosure of a trust deed or mortgage upon its railway, issued to it as trustee to secure bonds to the amount of \$516,000, charging default on July 1, 1893, in payment of interest, asserting the insolvency of the railroad company, and asking for the appointment of a receiver. In compliance with the prayer of the bill, the court, on May 8, 1894, appointed C. H. Bosworth receiver, who duly qualified and entered upon the discharge of his duties. On the 4th day of September, 1894, upon the petition of the receiver, the trustee and the bondholders appearing and not opposing, a decree was entered authorizing the issue of receiver's certificates to an amount not exceeding in the aggregate the sum of \$125,000, which should be a first lien on the corpus of the mortgaged property, and entitled to priority of payment. The receiver was authorized to negotiate the certificates, or so many of them as should be necessary for the purposes authorized, at not less than 95 per cent. of their par value net to the receiver; and out of the proceeds to apply \$48,000 to the repair of the railway in the respects specified in the decree, \$12,000 to the payment of unpaid taxes and wages, as specified, and \$15,000 to the payment of obligations incurred or to be incurred by the receiver for other supplies, materials, repairs, and betterments indispensably necessary. The decree limited the expenditure at that time to the sum of \$75,000, reserving the right to authorize the issuance of the balance of the certificates of like date, and lien for the payment of other past-due claims for taxes, labor, and materials from time to time as the same should appear to be equitable. On February 4, 1896, upon the application of certain bondholders, other bondholders and the complainant appearing, the cause was ordered to be speeded, and, it appearing to the court that the physical condition of the property and railway was bad, and that no provision had been made by the bondholders for funds wherewith to repair the road, and that the receiver had been unable to market the certificates theretofore authorized at the price designated

in the decree of September 4, 1894, it was directed that the receiver have leave in his discretion to sell the receiver's certificates so authorized at not less than 90 per cent. of their par value, and also to apply all surplus earnings of the road above current operating expenses to necessary repairs and betterments. The receiver disposed of \$28,000 in amount of these certificates, and on the 28th of April, 1896, reported to the court his inability to sell any more of them, and suggested his resignation if one could be found who would be able to dispose of the unsold certificates. Thereupon the court appointed Joseph Dickson, the appellee, receiver of the road. This, it is said, was done upon the suggestion of one Nelson that he would purchase the remaining \$97,000 of certificates at 90 per cent. of their face value in the event of the appointment of Mr. Dickson. This appointment was made, it is said, against the protest of the bondholders, the stockholders, and the principal creditors of the road. The district judge, who, in the absence of the circuit judges, had made all these decrees, was absent from his district from and after May 8, 1896, and until after the entry of the decree or order of May 25, 1896, hereinafter mentioned, and from which the present appeal is taken. On the 23d day of May, 1896, the railroad company and the trustee, the appellants, filed their several petitions in the court below setting forth the history of the suit; charging certain facts tending to show that Mr. Dickson, as receiver, would represent conflicting interests, and was, therefore, not a proper person to hold the position; that the railway had been put in a fairly safe and operative condition; and that, as a decree of sale was to be expected at an early date, there was no immediate necessity for the issuance of further certificates under the order of September 4, 1894; and praying, in substance, that the order of April 28, 1896, appointing Joseph Dickson as receiver of the railroad, may be vacated and set aside, and that the order authorizing the issuance of receiver's certificates should be vacated or modified so as to prohibit the further issuance of receiver's certificates thereunder; and also praying that Dickson might be enjoined and restrained from receiving, taking, or managing the railroad, that Bosworth and Dickson might be enjoined and restrained from selling the receiver's certificates, and that Nelson, who had proposed to purchase the certificates, might be enjoined and restrained from purchasing the same, or any part thereof. This petition came on to be heard on the 25th day of May, 1896, before one of the circuit judges in the absence of the district judge, and the following order was thereupon entered: "On this day came on to be heard the petition filed herein on May 23, 1896, by said defendant, and, after hearing on the petition and argument of counsel, the court ordered that said petition be dismissed without prejudice." From that decree or order the railroad company and the trustee, complainant, appealed to this court.

Bluford Wilson, for appellants.

William Burry, for appellee.

Before WOODS and JENKINS, Circuit Judges.

JENKINS, Circuit Judge, after this statement of the facts, delivered the opinion of the court.

This appeal cannot be sustained. If it be assumed that the action of the circuit court, in appointing a receiver, or in the issuance of receiver's certificates, can, under any circumstances, be reviewed in this court, it is sufficient to say that the decrees or orders in that respect are not appealed from. The appellants, apparently concluding that such decrees or orders could directly be brought here for review only by appeal from the final decree in the foreclosure suit, seek by indirection to obtain their review by moving to vacate or modify them, coupling with their demand in that regard a prayer that the receiver sought to be removed from office might be restrained from continuing the management of the railway, and that he and the former receiver might be restrained from selling the receiver's certificates; and that Nelson, the proposing pur-

chaser, who was not, and was not sought to be, made a party to the suit, should be restrained from purchasing them. It is said that because such an injunction was asked and denied, although without prejudice, the decrees or orders are now before us for review by virtue of the statute allowing an appeal from an order denying an interlocutory injunction. If the decrees or orders in question had been vacated or modified as desired, no injunction would have been necessary. The removal of the receiver would have taken from him all authority in the management of the railroad. The modification of the order for the issuance of the receiver's certificates, limiting the issuing of them to those already marketed, would withdraw from the receiver all power to issue, and, if issued in defiance of the modifying order, the certificates would be inoperative to create any incumbrance upon the mortgaged estate or its revenues. Besides this, there was no suggestion in the petition that either Bosworth, who had resigned as receiver, and whose resignation had been accepted, or Dickson, the present receiver, had ever threatened or proposed to issue certificates otherwise than as directed by the court. It was also quite unnecessary and unwarranted to enjoin one not a party to the suit, and not sought to be made a party, from purchasing certificates which, if unauthorized by the court, would be but so much waste paper, so far as the mortgaged estate is concerned. The prayer for an injunction was not germane, is manifestly pretentious merely, and injected into the prayer of the petition without an allegation to sustain it, for the purpose, in case the decrees or orders should not be vacated or modified as desired, of seeking a review here of the decrees or orders from which no direct appeal will lie. The assembling of a prayer for an unnecessary injunction with a prayer for modification of a decree or order will not warrant a review of the decree or order when a direct appeal therefrom is unauthorized by law, even if we assume that an appeal from an order dismissing without prejudice an application for an injunction will lie. It is undoubtedly true that in general a decree dismissing a bill without prejudice is not appealable, and this because a decree is not final for the purposes of an appeal unless it terminates the litigation between the parties upon the merits (*St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6), and it can scarcely be truthfully said that a decree dismissing an appeal without prejudice purports to pass upon the merits of the bill. Whether, under the statute authorizing an appeal to the circuit courts of appeals from an order denying an interlocutory injunction, an order denying without prejudice an application for such writ of injunction would be appealable, we do not now decide. The appeal will be dismissed.

MERRILL v. NATIONAL BANK OF JACKSONVILLE.

(Circuit Court of Appeals, Fifth Circuit. December 8, 1896.)

No. 542.

APPEAL.—DISMISSAL.—DEGREE UNDER MANDATE.

An appeal, taken to the circuit court of appeals from a decree of the circuit court entered in accordance with the mandate of the former court upon a previous appeal, will be dismissed, even though an appeal lie to the supreme court from the decision of the circuit court of appeals.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

Duncan U. Fletcher, for appellant.

John C. Cooper, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. This case was before this court at the last term, and was then heard and determined upon its merits. 21 C. C. A. 282, 75 Fed. 148. In the decree then rendered we reversed the former decree of the circuit court, and remanded the cause, with instructions to enter a decree in accordance with the views expressed in the opinion of the court, in which opinion the decree to be entered was specifically outlined and determined. On entering the mandate in the circuit court a decree in exact accordance with our mandate was entered, whereupon T. B. Merrill, receiver, sued out the present appeal.

The appellee has moved to dismiss the appeal, on the ground that no appeal lies from a decree entered in the circuit court in accordance with the mandate of this court; and this motion should be granted. In *Stewart v. Salamon*, 97 U. S. 361, it was expressly decided that an appeal from the decree which the circuit court passed in accordance with the mandate of the supreme court upon a previous appeal will, upon the motion of the appellee, be dismissed, with costs. In *Humphrey v. Baker*, 103 U. S. 736, the precise question was again decided, and in the same way. *Stewart v. Salamon*, supra, has been continuously approved. *Mackall v. Richards*, 116 U. S. 45, 6 Sup. Ct. 234; *Gaines v. Rugg*, 148 U. S. 228, 242, 13 Sup. Ct. 611; *Railway Co. v. Anderson*, 149 U. S. 237, 242, 13 Sup. Ct. 843; *Smelting Co. v. Billings*, 150 U. S. 31, 37, 14 Sup. Ct. 4; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 259, 16 Sup. Ct. 291.

In opposition to the motion to dismiss it is urged that, under the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, an appeal lies to the supreme court of the United States from the decision of this court, and therefore the present appeal should be heard. If we concede that such appeal lies, we see in it no reason to vary from the uniform practice established by the supreme court in regard to second appeals in the same case.

The appeal is dismissed.

FARMERS' LOAN & TRUST CO. et al. v. McClure.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1897.)

No. 785.

APPEAL—REVIEW—SOLICITOR'S COMPENSATION IN FORECLOSURE PROCEEDINGS.

When a question of the value of the services of a solicitor, rendered in a suit for the foreclosure of a mortgage, has been decided, upon conflicting evidence, by the court in which the suit is pending, and which is familiar with the proceedings therein and the amount of services rendered, such decision will not be disturbed by an appellate court, in the absence of an obvious error of law, or a serious and important mistake in the consideration of the evidence.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. G. Taylor (J. M. Taylor, Herbert B. Turner, David McClure, and Louis B. Rolston were with him on the brief), for appellant.

John McClure, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an interlocutory decree, which granted an intervening petition of John McClure, the appellee, for compensation for services and expenses as solicitor for the complainant in a suit to foreclose a railway mortgage. Prior to July 30, 1895, the holders of a large majority of the bonds secured by the mortgage made on August 2, 1892, by the Pine Bluff & Eastern Railroad Company to the Farmers' Loan & Trust Company, as trustee for the bondholders, consulted the appellee, John McClure, an attorney resident at Little Rock, in the state of Arkansas, regarding the foreclosure of this mortgage. They were anxious to have it foreclosed, and attempted to persuade the Farmers' Loan & Trust Company to employ McClure as its solicitor to conduct the foreclosure proceedings. The estate of Amos C. Barstow, which held a majority of these bonds, advanced to McClure the sum of \$500 on account of his expenses and services, and he prepared a bill for the foreclosure of the mortgage upon the property of the railroad company. On July 30, 1895, the resident attorneys of the Farmers' Loan & Trust Company authorized him by telegraph to file the bill for the foreclosure of the mortgage upon the terms contained in a letter which followed the telegram. McClure filed the bill, but, when the letter was received, was unwilling to proceed with the litigation on the terms it disclosed. Before its receipt he had given notice of a motion for the appointment of a receiver of the property of the railroad company. After some correspondence between him and the attorneys for the trust company, he made a motion in the circuit court on August 19, 1895, for leave to withdraw from the case as a solicitor, because of differences arising between himself and the solicitors of the trust company, and the court took his application under advisement, and ordered him to continue to discharge his functions as a solicitor in the cause until the further order of the court. On October 12, 1895, he renewed his motion for leave to withdraw from the case, and the court granted it. On October 19, 1895, he filed an intervening peti-

tion in the case, and asked for an allowance of \$2,500 for services, and that the sum of \$500, which had been advanced to him for services and expenses therein by the estate of Amos C. Barstow, should be allowed, and repaid to that estate. The trust company answered the petition, testimony was taken, and upon a final hearing the court below decreed that McClure should recover of the Pine Bluff & Eastern Railroad Company \$2,500 for his services; that the estate of Amos C. Barstow should recover \$250, with interest; that these amounts were entitled to be secured by a lien upon the mortgaged property superior to that of the mortgage debt, and that they should be paid out of the proceeds of the sale of the property before that debt. The trust company and the railroad company have appealed from this decree.

The only question in this case is as to the amount which should have been allowed by the court below for the expenses and services of the appellee, as solicitor for the complainant, for preparing and filing the bill of foreclosure and conducting the subsequent proceedings in the suit until he was permitted to withdraw from it on October 12, 1895. We say this is the only question, because the \$250 allowed to the estate of Barstow is in reality but a part of the compensation for the expenses and services of McClure. Upon this question but two witnesses testified,—the appellee himself, and Mr. Hemingway, a witness called by the trust company. The testimony of the former fully sustains the finding and decree of the court. The testimony of the latter is that the value of his services was from \$500 to \$1,250. The court below was in a far better situation to determine which of these witnesses correctly estimated the value of the services rendered by this solicitor than this court can possibly be. The judge who entered this decree below was familiar with the proceedings in his own court, with the character of this litigation, with the controversies, if any, that had arisen in it, with the amount of services that had been rendered by each of the solicitors, and with every step that had been taken in the case. It is the settled rule of the federal courts that where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct; and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821; *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, and 58 Fed. 101; *Plow Co. v. Carson*, 36 U. S. App. 456, 18 C. C. A. 606, and 72 Fed. 387. In view of this principle, and in consideration of the great weight which ought to be given to the opinion of the trial court as to the value of the services of solicitors in cases pending before it, we are unwilling to disturb the decree in this case. Let it be affirmed, with costs.

FARMERS' LOAN & TRUST CO. v. McCLURE.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1897.)

No. 786.

1. PARTIES TO APPEALS—REFUSAL TO JOIN.

All parties to the record who appear to have an interest in a decree or order challenged by appeal must be given an opportunity to be heard on such appeal, but when it appears by the record that one of several parties jointly interested in a proceeding has been notified in writing to appear, and has failed to do so, or, if appearing, has refused to join, or where it otherwise conclusively appears by the record that such a party has had knowledge of, and refused to join in an appeal, the appeal taken by another party alone may proceed without him.

2. ALLOWANCE OF APPEAL—MISTAKE.

When the circuit court has made an order allowing an appeal on behalf of a party upon an erroneous appearance of counsel or under a mistake of fact, it may and should, upon learning the truth, vacate such order.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. G. Taylor, for appellant.

John McClure, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On July 30, 1895, the Farmers' Loan & Trust Company, as trustee for the bondholders under a mortgage made by the Stuttgart & Arkansas River Railroad Company on March 1, 1890, filed a bill in the circuit court for the Eastern district of Arkansas to foreclose that mortgage. The only defendant in that suit was the railroad company. On August 20, 1895, on the motion of the trust company, a receiver of the mortgaged property was appointed. On October 12, 1895, John McClure, the appellee, filed a petition of intervention in that suit, in which he prayed that an allowance of \$2,500 might be made to him as compensation for services as attorney for the complainant in the suit, and that \$500 might be allowed to the estate of Amos C. Barstow. On January 7, 1896, the court decreed that the appellee should recover of the Stuttgart & Arkansas River Railroad Company \$2,500 and his costs, that the estate of Amos C. Barstow should recover \$250 from the railroad company, that these amounts constituted liens secured upon the mortgaged property superior to the lien of the mortgage debt, that the receiver should issue certificates to these two creditors for the amounts so found to be due to them, and that he should ultimately pay the certificates out of the proceeds of the sale of the mortgaged property before he paid the mortgage debt. On February 1, 1896, J. M. & J. G. Taylor, as attorneys of the Farmers' Loan & Trust Company, and as attorneys of the Stuttgart & Arkansas River Railroad Company, prayed and were allowed an appeal to this court from this decree. On April 11, 1896, the circuit court made the following order:

"Now on this day, a day of the October term, 1895, it being made to appear to the court that the defendant the Stuttgart & Arkansas River Railroad Company

hath not prayed an appeal in this cause, and that said defendant never authorized J. M. & J. G. Taylor, as solicitors, to pray an appeal on its behalf, the order granting said appeal at the present term on the 1st day of February, 1896, is set aside, and held for naught, in so far as it grants an appeal to the Stuttgart & Arkansas River Railroad Company."

Upon this state of facts the appellee moved to dismiss the appeal in this case on the ground that the Stuttgart & Arkansas River Railroad Company is interested in the ruling and decree in issue, and is not before the court. The rule that all the parties to the record who appear to have an interest in the decree or order challenged must be given an opportunity to be heard on an appeal from it is too well settled to warrant discussion. The reasons for the rule are stated in *Masterson v. Herndon*, 10 Wall. 416, and in *Hardee v. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39. Two of them are: (1) "That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed;" and (2) "that the appellate tribunal shall not be required to decide a second or third time the same question on the same record." The fact that a mortgagor, who is a party to a record in a suit to foreclose his mortgage, is interested in every order or decree in such a suit which gives the claim of an intervener a priority over the mortgage, or a right to priority of payment out of the proceeds of the sale of the mortgaged property, seems obvious, because such an order or decree necessarily increases by the amount so paid the deficiency for which the mortgagor will remain personally liable after the sale of the property. This is clearly demonstrated in the opinion of Judge Shiras in *Gray v. Havemeyer*, 10 U. S. App. 456, 3 C. C. A. 497, and 53 Fed. 174, 178, and in *Davis v. Trust Co.*, 152 U. S. 595, 14 Sup. Ct. 693. The Stuttgart & Arkansas River Railroad Company is personally liable for the mortgage debt under the bonds and mortgage in this suit. If the property mortgaged does not realize at the sale the necessary amount to pay the mortgage debt, the railroad company will remain indebted for the deficiency, which will doubtless ultimately be evidenced by a judgment against it. If the interlocutory decree, which allows and gives priority over the mortgage debt to the claims of the appellee and of the estate of Amos C. Barstow, is affirmed, the judgment against the railroad company for the deficiency will be at least \$2,750 more than it will be if that decree is reversed. But the Stuttgart & Arkansas River Railroad Company is not a party to the appeal before this court. The attorneys who prayed an appeal on its behalf did so without authority, and the order of the court below, which set aside and vacated the order allowing the appeal on behalf of the Stuttgart & Arkansas River Railroad Company, dismissed that company from this proceeding. We have no doubt of the validity of that order. The power of the circuit court was ample to modify or vacate such an order when it had been induced by the erroneous appearance of counsel, and had been made by the court under a mistake of fact. When the truth came to the attention of the court, it was not only its province, but its duty, to correct the error, and make the

order which it would have made if it had known the facts. *Fisher v. Simon*, 32 U. S. App. 132, 14 C. C. A. 443, and 67 Fed. 387; *Lincoln Nat. Bank v. Perry*, 32 U. S. App. 15, 14 C. C. A. 273, and 66 Fed. 887; *Ex parte Roberts*, 15 Wall. 384.

But the Farmers' Loan & Trust Company had the right to appeal from the interlocutory decree, even if the Stuttgart & Arkansas River Railroad Company was unwilling to do so. The old remedy in such a case was by summons and severance. Where one of the parties jointly interested in a cause of action or proceeding refused to participate in the assertion of the joint rights of the parties, it was the practice for the other party to issue a writ of summons, by which the former was brought before the court, and, if he still refused to proceed, an order or judgment of severance was made, so that the latter could proceed alone. The effect of this judgment of severance was to bar him who refused to proceed from subsequently prosecuting the same right in another action or proceeding. This remedy was applied to writs of error. *Brooke*, Abr. 238, tit. "Summons and Severance"; 2 Rolle, Abr. 488, same title; Archb. Prac. C. P. 232; Tidd, Prac. 129, 1136, 1169; *Mastersson v. Herndon*, 10 Wall. 416. Mr. Justice Miller, in delivering the opinion of the supreme court in the latter case, declared that this remedy had fallen into disuse in modern practice, and was unfamiliar to the profession. He said that the supreme court did not attach much importance to the technical mode of proceeding called "summons and severance," and that it would hold an appeal good if it appeared in any way by the record that the party who had refused to join in the appeal or writ of error had been notified in writing to appear, and had failed to appear, or, if appearing, had refused to join. He said that there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it as to his own interest. It is plain that this is the practice which has been adopted by the supreme court of the United States, and it obviously ought to prevail in this court. The purpose of a summons and severance was to bar the party who refused to join or to take part in the appeal or writ of error from subsequently asserting his rights in another appeal or proceeding upon the same record. A notice to him to appear, and his refusal, or his refusal to proceed after he has appeared in the action, would undoubtedly be held by the supreme court, and must be by this court, to be a bar to subsequent proceedings on his behalf to assert the rights in which he is jointly interested. There was no formal notice to the Stuttgart & Arkansas River Railroad Company to appear in this case and take part in this appeal; but that railroad company did appear, and moved to set aside the appeal which had been allowed on its behalf. The order which it thus obtained, showing, as it does, the appearance of the railroad company in the court below to set aside the allowance of its appeal, shows conclusively its knowledge of the appeal, and its refusal to join in or proceed with it, as a formal notice and flat refusal to proceed could have done. For this reason we think the appeal ought not

to be dismissed, and the motion to dismiss is denied. Upon the merits, the essential facts of this case are the same as in *Farmers' Loan & Trust Co. v. McClure*, 78 Fed. 209, and for the reasons stated in the opinion in that case, which is filed herewith, the decree below is affirmed, with costs.

DODSON v. FLETCHER.

(Circuit Court of Appeals, Eighth Circuit. January 26, 1897.)

No. 827.

APPEAL—NECESSARY PARTIES—CITATION AND SEVERANCE.

All the parties to a suit or proceeding who appear from the record to have an interest in an order, judgment, or decree challenged in an appellate court must be given an opportunity to be heard there, before such court will proceed to a decision upon the merits of the case: and an appeal taken by one party only, without citation to or appearance by another party interested in the decree, will be dismissed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

John Fletcher, for the motion.

J. D. Cook, opposed.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. On March 7, 1896, the Wear & Boogher Dry-Goods Company, a judgment creditor of the Southwestern Arkansas & Indian Territory Railroad Company, filed a bill in the circuit court for the Eastern district of Arkansas against the latter corporation for the appointment of a receiver of its property, and for authority to such receiver to proceed with the construction of its railroad. On March 27, 1896, John G. Fletcher, the trustee for the bondholders secured by a deed of trust made by the railroad company on April 10, 1894, filed an intervening petition in this suit, in which he prayed that the trust deed might be foreclosed, and that the property of the railroad company might be sold, and its proceeds applied to the payment of these bonds. On April 13, 1896, T. M. Dodson, the appellant, filed his petition in intervention in this suit, in which he alleged that on December 4, 1895, he made a contract with the railroad company for the construction of its railroad by means of which he acquired a lien for \$12,054, which was still due to him upon his contract; and prayed that his lien might be declared to be superior to that of all the other parties in the suit. On April 30, 1896, Fletcher, the trustee for the bondholders, answered the petition of Dodson, denied the existence of his lien, and prayed that the lien of the trust deed might be found to be superior to that of all other parties to the suit. The question presented by the intervening petition of the appellant was heard upon the merits by the court below, and an inter-

locutory decree was entered, to the effect that he had a valid claim against the railroad company for \$12,054.90, which should be paid out of the assets of the company as other claims of the same class were paid, but that he had no lien upon the property of that company superior to the lien of the trustee, Fletcher. From this decree Dodson appealed, and caused a citation to be issued against John G. Fletcher alone. Fletcher moves to dismiss this appeal upon the ground that neither the railroad company nor the judgment creditor has been cited to the hearing of this case. The appellant meets this motion with a voluntary appearance in this court of the railroad company and of the receiver who was appointed by the court below in the main suit, but no citation has been served upon the judgment creditor, the Wear & Boogher Dry-Goods Company, nor has that company appeared in this court.

All the parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will proceed to a decision upon the merits of the case. *Masterson v. Herndon*, 10 Wall. 416; *Hardee v. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39; *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693; *Gray v. Havemeyer*, 10 U. S. App. 456, 3 C. C. A. 497, and 53 Fed. 174, 178; *Farmers' Loan & Trust Co. v. McClure* (decided by this court January 25, 1897) 78 Fed. 211. The reasons for this rule are that the successful party may be at liberty to enforce his judgment, decree, or order without delay against those parties who do not desire to have it reviewed, and that the appellate court may not be required to decide the same question more than once upon the same record. It is evident in this case that the Wear & Boogher Dry-Goods Company has a direct interest in the interlocutory decree which is here challenged. That decree, as it now stands, places the claim of the appellant upon a par with that of the dry-goods company, and adjudges that the two claims shall be paid pro rata from the proceeds of the property of the railroad company after the lien of the trust deed has been satisfied. If this court should reverse this decree, and enter one to the effect that the appellant has a lien upon the property of the railroad company paramount to that of the trustee for the bondholders, its effect would be to further postpone the claim of the dry-goods company to the payment of \$12,054.90, which now stands upon an equality with it. The dry-goods company was therefore a necessary party to this appeal, and, as it had no notice of its hearing, the appeal must be dismissed, with costs. It is so ordered.

UNION PAC. RY. CO. v. SCHIFF et al.

(Circuit Court, S. D. New York. January 27, 1897.)

1. PLEDGE OF SECURITIES—WRONGFUL REHYPOTHECATION.

A. pledged securities with B. as collateral, and B. wrongfully rehypothecated them, together with certain securities of his own, with C., to secure notes made by him to C. A., on learning thereof after B.'s insolvency, by taking up B.'s notes, acquired possession of all the securities, except a part of his own, which he left with C. as indemnity against claims, suits, and expenses. Both loans being overdue, A. sold B.'s securities, and applied the proceeds on B.'s notes. *Held*, that A. had a perfect right to do this, and did not thereby give B.'s receiver any right or claim on the securities left in C.'s hands.

2. SAME—JUDGMENT FOR CONVERSION.

Where a pledgee of securities has wrongfully rehypothecated them, and, after his insolvency, the owner has again obtained possession of them, by paying the debt for which they were rehypothecated, the fact that thereafter the owner recovers a judgment against the original pledgee for conversion of the securities does not vest the title thereof in such pledgee. If the judgment represents the securities, the rights of the parties will be protected by requiring the owner to indorse a suitable credit on the judgment.

This was a suit in equity, in the nature of a bill of interpleader, filed by the Union Pacific Railway Company, for its receivers, S. H. H. Clark and others, against Jacob H. Schiff and others, composing the firm of Kuhn, Loeb & Co., C. W. Gould, as assignee of the firm of Field, Lindley, Wiechers & Co. for the benefit of creditors, and Norman S. Dike, as receiver of the assets of the latter firm.

This cause has been several times before the court. The last time in June, 1896. 74 Fed. 674. The court then suggested that until the dispute with Kuhn, Loeb & Co. was adjusted, a decree establishing the right of the other parties would be a mere *brutum fulmen*. Pursuant to this intimation the counsel for the various parties agreed upon a settlement of the claims of Kuhn, Loeb & Co. and of Romulus R. Colgate. They further stipulated that pending the decision of the controversy between the complainant and the other defendants the securities in question shall be held by the Lawyers' Surety Company. The cause is now before the court for the sole purpose of determining the respective rights of the Union Pacific Company and of the defendant Dike, as receiver, and of the defendant Gould, as assignee, in the said securities. It is stated in the record that separate answers were filed by Kuhn, Loeb & Co., by Gould and by Dike. The answer of the latter is the only one submitted. None of the exhibits are returned, and but two are set out in full. As to the others counsel have agreed upon what is called "a summary or substantially accurate statement of their contents." The Dietz judgment declaring the assignment to Gould to be fraudulent and void appears not to have been offered in evidence, and the court is not advised as to the scope of the judgment or the grounds upon which it proceeds. This suit was commenced February 28, 1895.

E. Ellery Anderson, Artemas H. Holmes, and Holmes & Adams, for complainant.

Jasper W. Gilbert, Frederic A. Ward, James S. Bishop, and Alman Goodwin, for defendants Dike, as receiver, and Gould, as assignee.

COXE, District Judge. In May, 1891, the complainant, the Union Pacific Railway Company, borrowed from Field, Lindley, Wiechers & Co. \$500,000 upon two promissory notes each for \$250,000, dated, respectively, May 21st and May 22d, and payable six months after date. In July, 1891, the complainant borrowed \$350,000 more from the Field firm upon similar notes. As collateral security for the

payment of these notes the complainant deposited with the Field firm certain railroad bonds. Payments had from time to time been made on the notes, and on the 27th of November, 1891, there was due thereon the sum of \$687,025. The face value of the collaterals was \$1,573,000, and the actual value on November 27th was \$1,163,060, or \$476,034 more than the indebtedness. On the 7th and 14th of November, respectively, the Field firm borrowed of Kuhn, Loeb & Co. the sum of £50,000 sterling upon two sterling loan notes, payable 60 days from date. The notes provided, among other things, that Kuhn, Loeb & Co. might transfer them and the securities held therefor, and if upon a sale of the securities there should be a deficiency the Field firm was to pay it, and if there should be a surplus it was to be returned to the Field firm. To secure these notes the Field firm deposited with Kuhn, Loeb & Co. \$307,472 of the securities of the complainant, \$136,150 belonging to other parties and \$165,725 belonging to the Field firm; in all \$609,344. On November 27, 1891, the Field firm failed and made a general assignment to Charles W. Gould. This assignment was subsequently declared fraudulent and void by the state court, and the defendant Norman S. Dike was, on December 2, 1893, appointed receiver of the property of the firm. The character of the fraud upon which the court based its action does not appear. On the 27th and 28th days of November, 1891, the complainant tendered to the Field firm all the money due on said promissory notes upon the surrender of the notes and the bonds deposited as collateral security therefor, and on the maturity of the notes the complainant tendered to the Field firm the amount due thereon and demanded the return of its bonds, which was refused by the Field firm. About four days after the failure of the Field firm the complainant learned of the rehypothecation of its bonds with Kuhn, Loeb & Co., and, on the 1st of December, notified Kuhn, Loeb & Co. of its rights in the securities so pledged. On December 14, 1891, the complainant paid the sterling notes and Kuhn, Loeb & Co., having indorsed them "without recourse," transferred them and the securities therefor to the complainant upon the latter executing the paper of December 14th, which is no longer the subject of controversy. The substance of the agreement of December 14th, so far as it is necessary now to consider it, was that the complainant was to leave with Kuhn, Loeb & Co. \$170,000 of Oregon Short Line bonds as indemnity against claims, suits and expenses. On the 6th of April, 1892, other securities worth about \$123,000 were substituted for the Oregon bonds, and it is over these substituted securities that this controversy arises. Upon receiving the securities from Kuhn, Loeb & Co. the complainant shortly after December 14, 1891, delivered to the other parties whose property had been wrongfully rehypothecated by the Field firm their securities, or the value thereof, upon receiving from said owners their aliquot proportions of the cost of obtaining possession thereof. In January, 1892, the securities deposited by the Field firm were, in the ordinary course of business, sold by complainant and the proceeds, amounting to about \$165,721, credited to the Field firm. On the

7th of August, 1894, the complainant recovered a judgment in the supreme court of New York against the Field firm in the sum of \$552,961.

No criticism is now made of the conduct of Kuhn, Loeb & Co. They acted in entire good faith. The transaction with them was in the usual course of business, they being wholly ignorant of the fact that the collaterals offered for the sterling loans were misapplied by the Field firm. In case of nonperformance of the agreement by nonpayment of the notes or otherwise, Kuhn, Loeb & Co. had a right to sell the securities. In the ordinary course of business, had there been a failure to pay the notes at maturity, Kuhn, Loeb & Co. would have sold the securities, paid the notes and returned the surplus to the Field firm. Had they been informed that part of the securities belonged to other parties and that the Field firm had wrongfully misapplied them it would, upon proof of this fact, have been their duty to sell the Field securities first. The Field firm received \$494,000 in cash from Kuhn, Loeb & Co. Their property was in the hands of Kuhn, Loeb & Co. pledged to the payment of the debt. Would Kuhn, Loeb & Co., with full knowledge of the facts, have been permitted to discharge the Field debt with the complainant's property and return the Field property to the firm? It is thought not. Such a transaction would be a palpable fraud. It would, in legal effect, compel the complainant to pay the Field debt without a dollar of consideration. It would enable Field to defraud the complainant out of \$494,000, leaving the latter nothing but a naked cause of action.

That the complainant had the right to compel the application of the Field securities to the payment of the debt before resort was had to the securities of the complainant and other innocent parties is well settled. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Farwell v. Bank*, 90 N. Y. 483; *Gould v. Trust Co.*, 6 Abb. N. C. 381; *Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770. Thus all interest of the Field firm or its assignee was, or at least might have been, extinguished. The Field securities were wholly inadequate to pay the notes. The right of property in the complainant's bonds did not pass to the Field firm and it did not pass to Kuhn, Loeb & Co.; it remained with complainant, subject to the lien of the bankers. *Wheeler v. Newbould*, 16 N. Y. 392. When released from the latter lien by the payment of the sterling notes the bonds belonged to the complainant. If the Field firm had no balance with Kuhn, Loeb & Co., if they had no surplus, if they had no equities in Union Pacific's securities, it is difficult to see how their creditors or their receiver has any interest. All that the Field firm risked in the transaction was property worth \$165,721. By misappropriating the property of the Union Pacific and others they were able to get nearly \$500,000 from Kuhn, Loeb & Co.

It is argued that the Field firm and its representatives should receive back a percentage of their own securities not only, but also a percentage of the property of the Union Pacific amounting to \$61,494. If this position can be maintained the Field firm and its representative will realize a net profit from the loan of \$428,492.

Upon what principle of law or equity could the Field firm have claimed a return of any part of their inadequate collaterals or have based a right to levy a percentage upon the property which they had wrongfully misapplied? Their receiver stands in no better position than the firm. He succeeds to their rights and takes subject to all equities, liens, and incumbrances. *Yeatman v. Savings Inst.*, 95 U. S. 764, 766. If they could not treat the property of others as their own, neither can he. *Le Marchant v. Moore*, *supra*.

Can there be any doubt that when the Union Pacific offered to pay the notes at their maturity and demanded back its securities that it was entitled to receive them? Can there be a doubt that the rehypothecation of these securities only a week or two before the notes fell due was a fraud upon the Union Pacific's rights? Can there be a doubt that the perpetrators of this wrong should not be permitted to make a profit by it? The complainant was clearly entitled as between it and the Field firm to the pledged securities or their proceeds. The complainant's title was superior to that of any creditor or assignee of the Field firm who took subject to the prior equities of the complainant. No one but Kuhn, Loeb & Co. was in a position to dispute those equities, and they only to the extent of their advances, after reimbursing themselves first out of the Field property in their hands. *Hazard v. Fiske*, 83 N. Y. 287, 299. The right of the complainant to take up the sterling notes and require a transfer of the collaterals held by Kuhn, Loeb & Co. with subrogation to their rights does not seem seriously to be disputed. The notes authorized the transfer in express terms and the waiver of all right of action against Kuhn, Loeb & Co. would seem to be an admission that their action in this regard was proper. Indeed, it is asserted by the complainant and not denied by the defendants that "no party to the suit assails the title by which the bankers originally acquired, and, on December 14, 1891, held the notes and collaterals, nor the validity of their act of selling and transferring their title to plaintiff." If the Union Pacific succeeded to the rights of Kuhn, Loeb & Co., whatever they could do it could do. The sale of the Field securities to satisfy the Field notes was proper. What equity would have compelled Kuhn, Loeb & Co. to do it will not condemn the complainant for doing. The property which the complainant saved from the wreck was its own, surely it should not be required to deliver it to those who represent the wrongdoers. The defendants expressly admit that the railway company "had a right to compel Kuhn, Loeb & Company to sell them [the Field securities] before resorting to their own," but says the learned counsel, "that course was rendered impossible by their own act in becoming subpledgees and was conclusively surrendered by their own acts as such subpledgees." The court is unable to see why in being subrogated to the rights of the bankers the complainant lost its own rights; why it could not itself do what it had a right to compel the bankers to do. Even assuming that the complainant misconceived its remedy it is not easy to perceive why its mistake inured to the benefit of the defendants.

It is said that from the sale of all the pledged property there arose a surplus for all of the owners—the Field firm among the rest—and that complainant cannot now proceed as if there had been a legal marshaling of the securities. The proposition is not strictly correct in fact, as there was no sale except of the Field securities. But assuming that the proceeding was tantamount to a sale, it is thought that the argument proceeds upon the erroneous assumption, that all of the securities stood upon an equal footing, and that the party responsible for the fraud upon the other owners had the same equities as they. If the proper adjustment of surplus was not made, the Field firm and its representatives have no right to complain. They have not been injured or misled. That their securities should go to the last dollar to pay their debt before the property of innocent parties, wrongfully converted by them, should be resorted to is manifest. That these securities were sold and the proceeds so applied is also true. If the margin due to others was not adjusted with reference to this application of what moment is it to the representatives of the Field firm? The other owners might complain but how are the defendants injured? So far as they are concerned it is not easy to see what formalities were omitted which were necessary to foreclose their entire interest.

Again, it is argued that the complainant has lost the right to hold its own securities because two years and eight months after it obtained possession of them it recovered a judgment against the Field firm for conversion, the damages amounting, in the aggregate, to \$552,961. In support of this position a recent decision of the appellate division of the second department of the supreme court of New York is cited. *Dietz v. Field*, 41 N. Y. Supp. 1087. If the doctrine there enunciated is applicable to the present controversy it precludes the complainant from holding even the excess in value of its own bonds, and prevents any recovery whatever. It must relinquish every advantage and rely solely upon a worthless judgment against an insolvent firm.

It is argued by the complainant that this is not the doctrine of the federal courts, and the sententious language of Mr. Justice Miller, in *Lovejoy v. Murray*, 3 Wall. 1, 16, is quoted in support of this contention, as follows:

"In reference to the doctrine that the judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle. The property which was mine, has been taken from me by fraud or violence. In order to procure redress, I must sue the wrongdoer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask—the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice."

The decision of the appellate division is strongly supported by authority and is entitled to great respect; whether it would be the judgment of the supreme court of the United States in similar circumstances it is unnecessary to determine, for the reason that it is

clearly distinguishable from the present controversy upon the facts. Briefly, the facts were these: An application was made in the action which resulted in the appointment of Dike as receiver to compel him to deliver to the Union Pacific Company certain bonds which he had recovered of I. and S. Wormser, and also to pay to the company certain money which he had recovered of the Wormser firm. This was after the judgment of August, 1894, and also after the company had sued the Wormser firm for the conversion of the bonds. It was held that the commencement of these two actions of conversion was an election to let the bonds go and recover their value instead. In the present case, on the contrary, the complainant plainly elected in December, 1891, to follow the securities. It obtained possession of them, and has never relinquished it except so far as it permitted a part to remain as security with Kuhn, Loeb & Co. In the Wormser case the defendant Dike had recovered the property by a judgment of the court, and it was actually in his possession when the complainant sought to retake it. Here the property is in the possession of the complainant not only by virtue of the original ownership, but also by virtue of the transfer of the sterling notes for which it was pledged as collateral. The right to that ownership has been uniformly and consistently maintained. Had Kuhn, Loeb & Co. surrendered all the collaterals, the complainant retaining possession ever since, could the receiver recover them upon the theory that the judgment two years afterwards wrested the title from the complainant and vested it in the receiver? It is thought not. The election took place in December, 1891, when complainant determined to take its bonds even at the cost of paying the sterling loans. From that day to the present the complainant has had possession of them. It is of no moment that some of the bonds were left with Kuhn, Loeb & Co. as security. None the less were they the complainant's bonds. In contemplation of law it is precisely as if all the securities had been delivered to the complainant, and the receiver were suing to recover them upon the theory that the subsequent judgment gave him title. It is thought that such an action could not be maintained. If the Field firm had appeared in the action against them and pleaded the set-off, the proper reduction, undoubtedly, would have been made. To hold that a judgment recovered in this manner operates to take from the complainant property which he owned and had actually in his possession for more than two years, is going much further than any adjudication with which the court is familiar. The facts in the present action make it very clear that there was no election to abandon the remedy against the bonds but, on the contrary, to hold them against all comers. Assuming that the complainant has recovered for the conversion of these bonds it is not too late to correct the mistake. The judgment has not been paid and the amount of the recovery may yet be credited thereon.

To recapitulate: The court cannot resist the conclusion that it would be unjust to divide among the creditors of the Field firm property which belonged to the complainant and which was fraudulently misapplied by that firm. The sole cause of the difficulty

was the wrongful act of the Field firm. The loss to the complainant by reason of that act will, in any event, be large. A court of equity should not add to this loss at the behest of those who represent the original wrongdoer. It should not deprive the complainant of its property upon narrow or technical grounds. The complainant has done no wrong; it has been guilty of no fraud. To turn over the remnant of its securities, which the complainant by diligence and activity was able to save from the wreck, to the successor of the fraudulent firm, would seem most inequitable. If the judgment represents the securities in controversy the rights of all parties will be protected by compelling the indorsement on the judgment of a suitable credit as a condition precedent to the delivery of the securities.

The complainant is entitled to a decree for the delivery to it, or its receivers, of the property now held by the Lawyers' Surety Company.

RITTER v. ULMAN et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 174.

1. INJUNCTION—ESTOPPEL BY ACQUIESCENCE—CUTTING TIMBER.

One R. agreed with the E. Co. for the purchase of certain timber lands, and, with its consent, began to cut the timber. Shortly after this agreement, and before the formal contract of sale was executed, certain parties, claiming the land, notified R. of their claim, and forbade him to cut the timber. They then brought an action of ejectment against the E. Co., and, upon a bill filed against it, obtained an injunction restraining it from cutting timber on the land. Later, but within little more than a year from the making of R.'s agreement with the E. Co., the claimants brought an action of ejectment against R., and, upon a bill filed, obtained an injunction restraining him from cutting the timber, which injunction R. moved to dissolve. *Held*, that there had been no such acquiescence on the part of the claimants as to estop them from claiming an injunction against R. 72 Fed. 1000, affirmed.

2. APPEAL—DISCRETION OF COURT—DISSOLUTION OF INJUNCTION.

An appellate court will not interfere with the exercise of the discretion of a chancellor in refusing to dissolve an injunction, either absolutely or upon condition of giving security, unless there is manifest error in the conclusion reached by him.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Malcolm Jackson and Edgar P. Rucker, for appellant.

S. L. Flournoy (James H. Ferguson, on the brief), for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The appellant in 1894 purchased from the trustees of the Elkhorn & Sandy River Land Company the timber of certain kind and character growing on a tract of land of about 6,000 acres, in

McDowell county, W. Va., described as the "Watershed of Brown's Creek." The contract of purchase was formally executed 31st July, 1894. The appellant, however, under a verbal agreement, had already commenced to cut timber off the land. On 27th July, 1894, Jaeger, one of the appellees, verbally and in writing notified Ritter, the appellant, that he claimed a part of the land the timber from which the land company had undertaken to sell, and forbade him to cut any timber on it. Subsequently the appellees brought their action of ejectment against the trustees of the Elkhorn & Sandy River Land Trust, and a number of other parties, claiming that they were owners of a tract of land of 150,000 acres, granted to Robert Pollard, by patent dated 20th March, 1795, and held by them by virtue of sundry mesne conveyances, and that the defendants were trespassing thereon. After said suit was instituted, a bill was filed in the circuit court of the United States for the district of West Virginia, on 22d July, 1895, praying an injunction against the defendants in the ejectment suit, restraining them from cutting timber on the lands claimed by plaintiffs in said suit, which injunction was granted. Ritter was not a party *eo nomine* in these suits. An action of ejectment was then brought against Ritter and a large number of other persons, by the appellees, on 18th September, 1895, and, on 30th December following, a bill was filed praying a similar injunction against Ritter, and a preliminary injunction was granted, with a rule to show cause why it be not made permanent. Ritter applied to the court to dissolve and annul this injunction, or, if the court refuse to dissolve the same absolutely, then to dissolve the same upon allowing the defendant, Ritter, to give such bond or security as the court may deem proper for the protection of such rights and interests as plaintiffs may have in the subject of litigation, or, if this be refused, then to modify the injunction to such extent as the defendant may show himself entitled to. The court refused to dissolve the injunction, either absolutely or on terms, or to modify it in any way. 72 Fed. 1000. This is assigned as error, and the case comes here under this assignment.

The appellant in the court below based his application for the dissolution of the injunction on two grounds: First. That he had been misled by Mr. Strother, the attorney at law and in fact of one of the appellants, who had advised him to go on cutting the timber. This is denied positively by Mr. Strother. Such conduct on the part of an attorney, who was at the time actively asserting the rights of his principal, is, to say the least, improbable. The judge below solved the matter on the denial of Mr. Strother. It is to be presumed that he knew the persons. We will not disturb his conclusion. Second. Ritter, in his motion, relied upon the delay of the complainants in applying for an injunction for so long a time while they knew, or had the means of knowing, that he was cutting timber, and he contends that this shows acquiescence on their part in his acts. In order to constitute the estoppel, or quasi estoppel, by acquiescence, the party, with full knowledge or notice of his rights, must freely do what amounts to a recognition of

the transaction, or must act in a manner inconsistent with its repudiation, or must lie by for a considerable time, and knowingly permit the other party to deal with the subject-matter under the belief that the transaction has been recognized, or must abstain for a considerable time from impeaching it, so that the other party may reasonably suppose that it is recognized. Pom. Eq. Jur. § 965; *Simmons v. Railway Co.*, 159 U. S., at page 291, 16 Sup. Ct. 1. But it appears in the record that at the very beginning of his enterprise, even before the date of his contract with his vendors, Ritter had prompt and decided notification from complainants not to go on these lands, and not to cut the timber, which notification was repeated to him in person, followed up by suit in ejectment and by bill for injunction against his vendors and against himself. There was no standing by and permitting him to invest capital, settle plant, and spend money, without objection or protest. There was prompt notice and objection, and whatever he did after that was at his own peril. The complainants had a right to expect that their notice and remonstrance would bring fruit, and, when they discovered that, notwithstanding these, he persisted in the acts they deemed unlawful, they invoked the assistance of the law court and the preventive process of the court of equity long before, under the statute of limitation, their right would be barred. They cannot be charged with acquiescence.

But is it contended that the court erred in not dissolving the injunction on terms, and in not permitting the appellant to give bond for the timber he should cut *pendente lite*? The granting or the refusal of an injunction rests in the sound discretion of the court. *Poor v. Carleton*, Fed. Cas. No. 11,272. It is a power requiring great caution, deliberation, and sound discretion, and involves responsibility. The right set up must be clear, the injury must be impending, and so threatened that it can be averted only by the preventive process of the court. The judge who granted this injunction has had great and unusual experience. He was possessed of all the facts of the case, and of the peculiar circumstances surrounding it. His exercise of his discretion, no doubt, was the result of calm deliberation. It could only be set aside for manifest error in the conclusion he reached. He concluded, as a matter of fact, with all the affidavits filed in the case before him, that the land in dispute here were chiefly valuable for the timber upon it; that cutting the timber would naturally destroy its chief value; that not only was the timber in itself specially valuable, but that it was necessary to utilize and develop whatever coal there was in the land. Under this conviction, he determined to preserve the status quo. We are not prepared to say that he erred.

The decree of the circuit court is affirmed.

CENTRAL TRUST CO. v. CARTER et al.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 525.

1. RAILROAD REORGANIZATION AGREEMENT—REORGANIZATION COMMITTEE'S AUTHORITY.

The holders of the bonds of an insolvent railway company entered into a trust agreement with certain persons, constituting a reorganization committee, and a trust company, by which such reorganization committee was authorized, in very broad terms, to procure the sale of the railway; to adjust, by arbitration or otherwise, the rights of a construction company which had contracted to build the road; to negotiate and compound with holders of claims against the railway, and provide for payment thereof; and to borrow money, and pledge as security the bonds deposited under the agreement. This committee entered into an agreement with certain parties holding claims against the railway company and the construction company, some of whom had obtained judgments declaring contractors' liens in their favor against the railway company, by which agreement these claims were assigned to the committee, and certain securities of the railway company, held by the construction company, were released, in consideration of the promise of the committee to deliver to such claimants negotiable certificates for certain sums, payable in cash, and secured by the bonds deposited with the committee. The claimants performed their part under this agreement, but the committee never delivered the certificates. Subsequently the railway was sold under foreclosure, and the court decreed, upon an intervening petition by the claimants who had assigned their claims to the committee, that they were entitled to be paid the amount of the promised certificates out of the proceeds of sale applicable to the payment of the bondholders, from which decree the trustee for the bondholders appealed. *Held*, that the agreement made with the claimants, who had at least apparent rights against the railway, was within the authority of the committee, and, though the certificates were never delivered, such agreement should be treated as a mortgage on the bonds, and the claimants were entitled to be paid out of the proceeds of the sale.

2. SAME—FUND IN COURT—INTERVENING PETITION.

Held, further, that the possession by the court in which the foreclosure suit was pending of the fund applicable to the payment of the bonds was sufficient to authorize it to entertain the petition of the claimants asserting a mortgage lien upon such bonds.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

An original bill was filed by appellant in the circuit court against the Chattanooga Southern Railway Company for the appointment of a receiver, and to foreclose a mortgage executed by the railway company to secure certain bonds by it issued. An order was duly made by the court consolidating that cause with the suit of E. Summerfield against the railway company. On the 18th day of September, 1892, a decree was passed foreclosing the mortgage, and ordering a sale of the property. Sale was made by the special commissioner February 14, 1895, which was confirmed by the court March 16, 1895, in the following decree:

"Decree Confirming Sale, and Ordering Conveyance and Possession.

"It appearing to the court by the report of Joseph W. Burke, special commissioner to make the sale of the above-stated railway, that he did, on the 14th day of February, 1895, at Gadsden, in Etowah county, state of Alabama, expose for sale the said Chattanooga Southern Railway, with all its rights, properties, appurtenances, and franchises, and that the same was purchased by the reorganization committee of said railway, as the purchasing committee, to wit, H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, at and for the price of four hundred thousand dollars, subject, however, as recited in said decree under which said sale was made, to certain preferential liens and claims, and to all and singular the terms and conditions in said decree set forth; and it further appearing that said purchasers have made the

payment of fifty thousand dollars, in cash, to said Joseph W. Burke, special commissioner, as provided in said decree; and it being shown to the satisfaction of the court that the statements in the report of said special commissioner of the sale of said property are true, and no objections being made to the confirmation of said report: It is therefore considered, ordered, and decreed by the court, on motion of counsel for complainant, Central Trust Company of New York, that the said report of said special commissioner be, and the same is, in all respects confirmed, and the sale made by him on said 14th day of February, 1895, to said H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, the purchasing committee, as joint tenants, and not tenants in common, of all and singular the railway, equipment, property, and franchises of the Chattanooga Southern Railway Company, as described in and by the decree of foreclosure entered in this cause on the 18th day of September, 1892, at and for the sum of four hundred thousand dollars (\$400,000), by said purchasing committee bid, be, and the same is in all things ratified, approved, confirmed, and made absolute; subject, however, to all the receiver's debts, preferential claims, and equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of this court to adjudge and declare what receiver's or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the bonds issued under said mortgage, including the claims set up by the intervention of Carter & Rogan and others, or of the holders of certificates issued under the contract exhibited thereto, if hereafter so adjudged by the court. * * * It is further ordered, adjudged, and decreed that the special commissioner, Joseph W. Burke, be, and he is hereby, authorized and directed, on request of said purchasers, to sign, seal, execute, acknowledge, and deliver a proper deed or deeds of conveyance to the said purchasing committee, or their nominee, conveying all and singular the railway, equipment, property, and franchises of the said Chattanooga Southern Railway within the states of Tennessee, Georgia, Alabama, and all property, rights, and franchises that the said Joseph W. Burke, as receiver of said Chattanooga Southern Railway Company, has acquired during the time of his receivership, free from any equity of redemption of the said Chattanooga Southern Railway Company, or any party to this suit, or any one claiming by, under, or through the said Chattanooga Southern Railway Company, or any party to this suit. The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell said property this day confirmed to said purchasers, if they fail or neglect fully to complete such purchase and comply with the orders of this court in respect to full payment and performance of their said bid, or to pay into court, in accordance with such decree of sale, all such sums of money hereafter ordered by this court to be paid into its registry to discharge any and all such debts, liens, or claims as the court may adjudge and decree ought to be paid out of the proceeds of sale in preference to the bonds secured by the mortgage of the Chattanooga Southern Railway Company herein foreclosed.

"In open court this 16th March, 1895."

The Chattanooga Construction Company of West Virginia entered into a contract with the railway company for the construction of the road, and, not being paid by the railway company for work and labor performed and materials furnished in the progress of the work of construction, filed its petition of intervention in the consolidated causes, by which it sought to recover against the railway company the sum of \$328,518.23. This intervention is still pending, undetermined, in the circuit court. Appellees, as contractors, constructed a portion of the road, and, being unable to collect the amount due them for work and labor done and materials furnished, filed their suit against both the railway company and the construction company to recover the same, in the superior court of Walker county, Georgia; and judgment was duly rendered in their favor, November 24, 1892, for the principal sum of \$34,818.60, and interest for \$3,078.25 to the date of judgment. A contractor's lien was decreed to exist against the property of the railway company, including the railway, and the same was ordered sold to satisfy the judgment. On being informed of the pendency of the foreclosure suit in the United States court, the judge of the superior court of Walker county ordered a suspension of further proceedings, and the sale did not take place as originally ordered. On or about November 26, 1892, the Merchants' National

Bank of Chattanooga, appellees, et al., filed a bill in the United States circuit court for the Eastern district of Tennessee, at Chattanooga, against the construction company, for the appointment of a receiver; for an accounting and ascertainment of the debts of the construction company, and the marshaling of its assets. In the suit a receiver was appointed on the 30th day of December following. There appears in the record an instrument, entitled "Trust Agreement," bearing date February 1, 1892, to which the holders of the first mortgage bonds of the Chattanooga Southern Railway Company, the Atlantic Trust Company, and H. A. V. Post, Russell Sage, and associates are parties. By this trust agreement, Post, Sage, and associates were nominated and constituted a reorganization committee. The Atlantic Trust Company was designated as a depository to take charge of all bonds deposited with it by the bondholders; the bonds to be held by the depository for the use, and subject to the orders, of the reorganization committee. When the reorganization committee made the contract with appellees hereinafter set forth, on, to wit, February 17, 1893, there was on deposit with the Atlantic Trust Company, subject to the order of the committee, \$819,000 principal, par value, of the first mortgage bonds of the railway company, secured by mortgage executed to the appellant as trustee. In December, 1894, the Mercantile Trust Company became the successor of the Atlantic Trust Company, receiving the bonds theretofore deposited with the latter. On February 14, 1895, the day the road was sold by order of the court, there was on deposit with the Mercantile Trust Company \$1,418,000 principal, par value, of such bonds; and on February 17, 1896, the entire issue of bonds, to wit, \$1,440,000, was on deposit with said trust company, subject to the order of the committee. Pending the litigation in the United States circuit court at Chattanooga, the reorganization committee entered into the following contract with the Merchants' National Bank, appellees, and others, for the adjustment and settlement of their respective claims:

" * * * This agreement, made and entered into on this February 17, 1893, by and between T. B. Redmond, J. B. Carter, R. M. Rogan, partners under the firm name and style of Carter & Rogan, and Dun, Armstrong & Co., of the one part, who hold claims and liens on the property of the Chattanooga Southern Railway and the Chattanooga Construction Company of West Virginia for work and labor done and material furnished in the building and construction of the said railroad, said parties of the first part to this agreement, hereafter called 'Contractors,' and the reorganization committee of the Chattanooga Southern Railway, composed of H. A. V. Post, Russell Sage, Henry L. Lamb, Walter Stanton, and Newman Erb, parties of the second part, hereafter called 'Committee,' witnesseth:

"First. The parties of the first part hereby severally sell, transfer, and assign, for the consideration herein named, to the aforesaid committee, all their debts, claims, demands, equities, liens, and remedies now held and owned by them, or either of them, in law or equity, against the Chattanooga Southern Railway and the Chattanooga Construction Company of West Virginia, or either of them, and the claims to be transferred free from all claims for attorney's fees; and the assignee has the right to use the name of the assignor in bringing any suit or suits in any court to enforce the payment of the several debts assigned, or the liens thereto attaching, but the assignee will assume all the cost of such suit or suits. The committee assume the payment of all the court costs heretofore incurred by the contractors in enforcing said demands. The assignments are made without recourse on the contractors. The claims hereby assigned are as follows:

T. B. Redmond, debt and interest to February 17, 1893, sued on in superior court of Walker county, Ga.:

Principal	\$26,019 34
Interest to February 17, 1893.....	2,368 59
Total	<u>\$28,387 93</u>

Carter & Rogan, judgment Walker county superior court, dated November 24, 1892, with interest to Feb. 17, 1893.....

\$38,430 20

Carter & Rogan for S. H. Flowers' account.....	\$ 309 21
Interest to February 17, 1893.....	18 00

\$ 327 21

Dun, Armstrong & Co., notes and accounts, with interest from Feb. 17, 1893.....	\$13,072 58
Dun, Armstrong & Co., for D. W. Liddell, subcontractor.....	\$ 3,986 27
Interest from April 24, 1891, to February 17, 1893, at 8% (Alabama rate)	563 75
Total	\$ 4,550 02
J. E. Moore, notes.....	\$ 936 20
Interest from February 11, 1891, to February 17, 1893, at 8 per cent.	154 04
	\$ 1,090 24
J. M. Langston, notes May 24, 1891.....	\$ 378 40
Interest to February 17, 1893.....	52 33
Total	\$ 430 73

"And the parties of the first part agree to make any other and further transfer and assignment of said claims which may be required by the committee, so as to fully invest in said committee title to said claims, and to deliver over to said committee notes and other evidences of said indebtedness hereby transferred and assigned, as hereafter provided.

"Second. A decree has been drafted in the case of the Merchants' National Bank v. The Chattanooga Construction Company of W. Va., which is signed and assented to, and will be entered on the records as of this date.

"Third. The party of the second part, in payment for the claims hereinbefore transferred, agrees to issue to said parties of the first part, respectively, negotiable certificates, payable in cash, for one-half in amount of said debts, principal and interest, so transferred,—said certificates to be issued by said committee, and payable within sixty days after decree is entered in the United States circuit court at Atlanta confirming the sale of the Chattanooga Southern Railway, and payable not later than December 1st, 1893, in any event, and to bear six per cent. interest per annum from this date; and said certificates shall recite that they are secured by the bonds and other securities deposited with said reorganization committee, and held by the Atlantic Trust Company of New York, and shall be countersigned by the said trust company. The said committee also agrees to issue to said parties of the first part, respectively, other negotiable certificates for the other one-half in amount of said debts so transferred; said certificates to entitle the holders thereof to the same securities, pro rata, as the depositors of first mortgage bonds of the Chattanooga Southern Railway with said committee are or shall be entitled to under the agreement by which said bonds were deposited with said committee; said certificates to be also countersigned by said Atlantic Trust Company.

"Fourth. The certificates above provided for shall be delivered to J. H. Barr and Foster V. Brown, as trustees, and be delivered to the first parties herein only when and as the notes and other evidences of the debts hereinbefore transferred are delivered over to said trustees for said committee. Said certificates shall be issued to said trustees, and in such amounts, as the said several contractors shall direct, and be delivered by the said trustees to such persons as the contractors may direct. * * *

The bank, appellees, and their associates performed in good faith their part of the contract, as appears by the following order of court, which directed the receiver of the construction company to make a formal assignment of its claims against the railway company to the committee:

"Merchants' National Bank et al. vs. Chattanooga Construction Company.

"In this case, it being made to appear to the court that the claims sued on in this case have been transferred and assigned by complainants to the reorganization committee of the Chattanooga Southern Railway (said committee known as the 'Post Committee'), and that this assignment was made by and with the consent of the defendant, and in the assumption by the said reorganization committee of the debts sued on in this cause, and certain other debts of said construction company, and as part consideration for said assumption the complainant and defend-

ant have agreed that all claims of defendant, of whatever nature, kind, and character, owned by it against the Chattanooga Southern Railway for the building of the Chattanooga Southern Railway, equipping it, or on any other account whatever, as well as any and all equity it may or might own in any of the bonds of the Chattanooga Southern Railway, should be assigned to said reorganization committee, and it appearing to the court that this is a proper arrangement to be made: It is therefore decreed by the court, all parties agreeing thereto, that the receiver of the Chattanooga Construction Company of West Virginia be, and he is hereby, authorized and directed to make a formal assignment of said claims above referred to, conveying to said committee all the rights and claims of said company in and to said assets of the defendant company. The costs of this cause will be paid by the defendant company, and the receiver is allowed for his services and that of his attorney the sum of \$500, to be taxed as a part of the costs of the cause, which amounts have been paid, and the suit dismissed and stricken from the docket."

In compliance with the order of court, the receiver assigned the claims of the construction company to the committee, and the latter accepted the assignment, and received the assets of the construction company, including 74 bonds, of the denomination of \$1,000 each, of the railway company. The reorganization committee failed to deliver to appellees, as contemplated by its agreement, a negotiable certificate for one-half of their indebtedness; and, to enforce the payment of their claim, they filed a petition in intervention in the consolidated causes, praying that they be ordered to be paid out of the proceeds of the sale of the railway, before the payment of the bonds of the railway company, the sum of \$19,378.81, with interest. The reorganization committee and appellant were made parties to the proceeding, and a copy of the petition was served upon their respective counsel. The committee appeared specially for the purpose of filing a motion to dismiss the intervention for want of jurisdiction. Appellant interposed a demurrer to the petition, and also answered. The petition of appellees and answer of appellant were referred by the court to W. P. Hill, Esq., special master, who reported in favor of the allowance of appellees' claims. The report concludes as follows: "I find that the proceeds of the sale of this road which would go, after the payment of the expenses of the receivership and other debts already adjudged preferential, to the bondholders, is equitably charged with the payment of interveners' claim, to wit, the sum of \$19,378.70, with interest at 6% from February 17, 1893; this being one-half of the debt." The report of the master was excepted to by appellant, and the exceptions, together with the demurrer of appellant to the petition in intervention, and the motion of the reorganization committee to dismiss the same, were overruled by the court, and the report confirmed, on the 18th day of June, 1896. The confirmatory order concludes: "It is further ordered that, out of the proceeds of the sale of said railway applicable to the bonds of said railway company, the said John B. Carter and R. M. Rogan, as partners under the firm name of Carter & Rogan, do recover and be paid the sum of nineteen thousand three hundred and seventy-eight dollars and seventy cents (\$19,378.70), as principal, with interest from February 17, 1893, thereon, at the rate of six per cent. per annum, and all costs of this proceeding, and that the same be paid into court for the use of said interveners by the purchasers of said railway, in conformity with the order confirming the sale of said railway, within twenty days from this date, and that in default thereof said interveners may apply to the court for relief, as provided in said order of confirmation. The costs are adjudged against the respondents in said intervention."

From this decree the Central Trust Company alone prosecutes an appeal.

H. B. Tompkins and R. C. Alston, for appellant.

Alex. C. King and J. J. Spalding, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

This appeal brings up for review the decree rendered by the circuit court sustaining the master's report, and ordering the payment

of appellees' claim out of funds required to be paid into court by the purchasers of the railway. Appellant contends that the reorganization committee was without power to make with appellees the contract of February 17, 1893, and hence the latter are not entitled to the payment of their claim out of the proceeds of the sale of the railway. The reorganization committee had only such power to contract with appellees as was conferred upon it by the trust agreement of February 1, 1892, and appellees, in dealing with the committee, were chargeable with notice of the terms and provisions of that agreement. To the trust agreement there were three parties,—the holders of the first mortgage bonds of the Chattanooga Southern Railway Company; Post, Sage and others, constituting the reorganization committee; and the Atlantic Trust Company of New York. The first paragraph of the agreement makes each holder of any of the bonds who shall deposit them with the Atlantic Trust Company a party to the agreement, and by the twenty-third paragraph it is provided:

"The deposit of securities, and receipt of certificates issued therefor, shall have the same effect as if the holders of such certificates had actually subscribed to this agreement."

The holders of all bonds issued by the railway company, amounting to \$1,440,000, had, prior to the decree complained of, deposited their securities with the Mercantile Trust Company, which had become the successor of the Atlantic Trust Company; and they thus became, by the terms of the first and twenty-third paragraphs, above referred to, parties to the trust agreement. Any contract, therefore, entered into by the reorganization committee in the execution of its trust, and within the scope of its delegated authority, became valid and binding upon the bondholders, upon the familiar principle that the acts of an agent, done and performed within the scope of his agency, bind the principal. Did the committee exceed its authority in negotiating with appellees? An inspection of the trust agreement will disclose the comprehensive powers with which the reorganization committee was invested. It was authorized to procure, by any and all legal means, the sale of the railway, and to assist in the prosecution of, and become a party to, all suits instituted for that purpose; to purchase, as joint tenants for and in behalf of the bondholders, the property, at any sale made under a decree of foreclosure, at a price within its own discretion. The Atlantic Trust Company was instructed by the terms of the agreement to hold the bonds deposited with it, subject to the order and discretion of the committee, or to dispose of the bonds as the committee might direct. The latter was authorized to designate one or more of its members, or any other person, to attend any judicial sale, and bid off the property, and was generally empowered to employ such agents or attorneys as it might deem necessary and proper. In the event of a purchase of the railway, the committee was authorized to take possession of the property and operate it until a new company should be formed, and full power was conferred upon it to do all acts and things necessary and proper, in its judgment, to execute the provisions of the trust agreement. The committee was

further empowered to carry out the plan of reorganization without foreclosure, if it could be lawfully done. Paragraphs 15 and 16 of the agreement are as follows:

"(15) The relations and rights of contractors and of the Chattanooga Construction Company are to be determined by a court or courts of competent jurisdiction, or by the assent of the said parties of the second part, or by arbitration, as the said parties of the second part may determine; and the said parties of the second part are hereby authorized and empowered to negotiate and compound with the holders of claims against the said railway, and to make due provision for the payment and adjustment of the same, upon such terms as they shall find to be reasonable and proper, to the end that the said corporation shall be free and clear from the obligations thereof. (16) The parties of the second part shall have power to borrow such money, not exceeding twenty per cent. of the par value of bonds and coupons deposited hereunder, as may be necessary for the carrying out of this agreement, and, as security for the payment of such money, to pledge the said bonds and coupons deposited hereunder, and to contract for the extension of the time of the payment of such loans from time to time."

The powers conferred upon the committee appear to be as ample and comprehensive as language can make them. Armed with such authority, the committee entered into the compromise agreement of February 17, 1893, by the terms of which appellees and others agreed to transfer and assign to it the claims, which they, respectively, held against the railway company and the Chattanooga Construction Company; that of appellees being in the form of a judgment recovered by them in the superior court of Walker county, Ga. The agreement not only embraced a settlement of the claims of the individuals subscribing it, but further contemplated and provided for the assignment to the committee of the claims held by the Chattanooga Construction Company against the railway company. In consideration of the settlement, and transfer to the committee of the evidences of indebtedness held by the parties, the committee agreed to issue to appellees, in payment of that part of their claim involved in this suit, a negotiable certificate, payable in cash. This method of payment was expressly authorized by the following clause of the agreement:

"Third. The party of the second part, in payment for the claims hereinbefore transferred, agree to issue to said parties of the first part, respectively, negotiable certificates, payable in cash, for one-half in amount of said debts, principal and interest, so transferred,—said certificates to be issued by said committee, and payable within sixty days after decree is entered in the United States circuit court at Atlanta confirming the sale of the Chattanooga Southern Railway, and payable not later than December 1st, 1893, in any event, and to bear six per cent. interest per annum from this date; and said certificates shall recite that they are secured by the bonds and other securities deposited with said reorganization committee, and held by the Atlantic Trust Company of New York, and shall be countersigned by the said trust company."

Agreeably to the stipulation of the parties, the claims were duly assigned to the committee. Appellees completely performed their part of the contract, and, notwithstanding the acceptance by the committee of the claims so assigned to it, there was an utter failure on its part to issue to appellees the negotiable cash certificate required by the terms of the agreement. The committee is passive, and not complaining of the decree. But the contention is advanced by appellant that the committee, in negotiating with appellees, exceeded its authority, and its acts are therefore not binding upon

the bondholders. Appellant insists that the authority of the committee was limited to the settlement of claims against the railway company, and only such as were entitled to priority of payment over the bondholders. And it maintains that the claim of appellees was against the Chattanooga Construction Company, and that such a demand, although for work done and materials furnished in the construction of the railway, did not operate as a lien upon the property of the railway company. Whether appellees, as contractors, in their effort to fix a lien upon the railway, conformed to the requirements of the Georgia laws, and whether the judgment recovered by them in the superior court of Walker county, Ga., may be held to be a lien superior or inferior in rank to that of the mortgage under which the bondholders claim, are questions which we do not deem it necessary to determine. It is nevertheless true that the judgment, upon its face, recites the existence of a contractor's special lien upon the road and other property of the Chattanooga Southern Railway Company, and that the court ordered a sale of the property to satisfy the decree. Hence the question of the existence of the lien was necessarily involved in some doubt and obscurity, the solution of which was remitted to the judgment and determination of the reorganization committee, by the terms of its power of appointment. The settlement with appellees might therefore be easily sustained on the ground that the discretion vested in the committee justified it in the compromise of a claim of doubtful validity. *Market Co. v. Kelly*, 113 U. S. 199, 5 Sup. Ct. 422; *Llano Imp. & Furnace Co. v. Pacific Imp. Co.*, 13 C. C. A. 625, 66 Fed. 526; *Brooks v. Dick*, 135 N. Y. 652, 32 N. E. 230. The authority with which the committee was clothed in reference to all matters touching the settlement of claims against the railway company, and in perfecting the scheme of reorganization, was practically unlimited; and why the authority should not embrace within its scope the settlement of appellees' indebtedness, we are at a loss to understand. The answer of appellant to the intervening petition of appellees contains no charge or intimation of fraud or bad faith on the part either of the committee or appellees, and the settlement effected, being plainly within the limit of the authority delegated to the committee, should not be disturbed.

In the contract of settlement with appellees, as already stated, the committee agreed to issue them a certificate, payable in cash, for one-half of their indebtedness, and, further, that such certificate should recite that it was secured by the bonds and securities deposited with the committee. The certificate not being issued to appellees as required by the agreement, upon well-recognized and established equitable principles the agreement should be upheld and enforced as a mortgage upon the bonds. Thus, in *Morrow v. Turney's Adm'r*, it is said by Mr. Chief Justice Walker, as the organ of the court:

"The bill shows that there was an agreement; and if it was an agreement to give a mortgage, predicated upon the consideration of a debt contracted on the faith of the agreement, it will be upheld and enforced, between the parties and

their representatives, as a mortgage, upon the principle that equity will consider that as done which ought to have been done." 35 Ala. 137; *Glover v. McGilvray*, 63 Ala. 508; *Riddle v. Norris*, 46 Mo. App. 512; *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490; 13 Am. & Eng. Enc. Law, p. 608; 1 Jones, Liens, § 27.

The only question remaining for consideration is whether the court erred in entertaining the intervening petition of appellees, and decreeing payment of their claim out of the proceeds of the sale of the railway. It will be observed that when the petition was filed the original foreclosure suit was pending in the circuit court. That court had foreclosed the mortgage, and decreed the sale of the railway, and was, at the time the master's report was confirmed, engaged in administering the fund arising from the sale. Appellees were claiming a mortgage lien on the bonds, and the holders of those bonds were entitled to the proceeds of the sale of the road, after the payment of preferential claims. The claim of appellees should be held to constitute an equitable charge upon so much of the proceeds of sale as was directed by the court to be ultimately distributed among the holders of bonds. And what court was more competent than that to adjust and settle the conflicting claims to the fund in its custody? "It is well settled," says the supreme court, "that, where property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control (*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 201, 11 Sup. Ct. 61), and that, when assets are in the course of administration, all persons entitled to participate may come in, under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction would be lacking if such proceedings had been originally and independently prosecuted." *Rouse v. Letcher*, 156 U. S. 49, 50, 15 Sup. Ct. 266; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638. We find no error in the decree of the circuit court, and it is therefore affirmed.

KING v. BUSKIRK et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 172.

DISSOLUTION OF INJUNCTION—JUDGMENT AT LAW FOR DEFENDANT.

When, upon a bill in equity filed as ancillary to an action of ejectment, a preliminary injunction has been granted restraining the defendant from cutting timber upon the land in controversy, for the purpose of preserving the status quo pending the litigation, and a verdict and judgment are afterwards rendered for the defendant in the action of ejectment, it is proper for the court, in the exercise of its discretion, upon being informed of such verdict and judgment, to dissolve the injunction.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Maynard F. Stiles, for appellant.

Z. T. Vinson, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up by appeal from the circuit court of the United States for the district of West Virginia. In March, 1895, the present appellant brought his action of ejectment against a number of persons, among them the appellees, Buskirk and Mullins. As ancillary to this suit, the appellant, on the 31st May, 1895, filed his bill against these two defendants, claiming ownership in a tract of 500,000 acres; that the defendants were setting up title to a part of this land under deeds arising from sales alleged to be fraudulent; and that they were preparing to cut off the timber on said lands, which were chiefly valuable because of this timber. The bill prayed an injunction pendente lite. Answers having been filed, the cause was heard on the motion for injunction. The injunction was granted, and an appeal therefrom taken to this court, which affirmed the decree of the circuit court, February 4, 1896. *Buskirk v. King*, 18 C. C. A. 418, 72 Fed. 22. On 31st December, 1895, the appellant filed another bill in equity, in the circuit court of the United States for the district of West Virginia, against these same defendants, and impleaded with them Lorenzo D. Chambers and Margaret L. Chambers. In this bill he set up his title to the said 500,000-acre tract; charged that the defendants had by fraudulent acts of Chambers, commissioner of school lands, become possessed of a pretended title to part of said lands, and that the merchantable timber was being cut therefrom; that an action of ejectment had been brought by him against said defendants; and that complainant had obtained an injunction against the cutting of the timber on a part of said lands; and prayed an injunction against the defendants as to the rest of the land claimed by them. Upon the filing of this bill, a temporary injunction was granted as prayed for. On 26th February, 1896, the two causes above referred to were consolidated. The action of ejectment to which these suits in equity were ancillary came on to be tried before a jury on 14th January, 1896. The defendant Mullins and two others having severed their defense from the other defendants, the issue was made as to them; and on 30th January, 1896, the jury, under instructions of the court, found a verdict for the defendants. On 27th February of the same year, Mullins and Buskirk, in the consolidated equity cases, filed what is called a "plea," verified by affidavit, in which was stated the fact of the trial of the action of ejectment and its result in the instruction of the court to the jury to find for the defendants, and that judgment was entered thereon on 27th February, 1896, and the further fact that the land in said ejectment suit sought to be recovered from the said defendants is the same land mentioned and described in the bills praying for injunction, and, on that state of facts, praying the judgment of the court, whether they should be called upon further to answer the bill. Thereupon the court dissolved the injunction. A modification of the order was subsequently made, but not in any way affecting the purport of the order dissolving the injunction. Thereupon an appeal was

taken to this court upon the several assignments of error set out in the record. It is not necessary to discuss these in detail.

The granting of an injunction on a bill filed ancillary to an action of ejectment is a departure from the ancient practice in equity. *Pillsworth v. Hopton*, 6 Ves. 51; *Norway v. Rowe*, 19 Ves. 147. It is the product of modern practice. It is not a matter of absolute right, nor does such an injunction issue as a matter of course. There must appear *prima facie* a title in the complainant; and there must also appear danger of irreparable injury, such injury as cannot be compensated in money. Nor must the court look only to the injury threatened the complainant. It must also consider the interests of the defendants. "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. * * * The right must be clear; the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction." *Truly v. Wanzer*, 5 How. 142, 143. It is for the chancellor to say, after an examination of the claim of title in the complainant, whether the showing *prima facie* is such as to render it proper to preserve the status quo. *Poor v. Carleton*, Fed. Cas. No. 11,272. When such an injunction is granted, it goes upon the idea that the property should be preserved until one or the other of the parties shows the best title to it, and to prevent irreparable mischief. But if it be made to appear to the chancellor, after injunction granted, that the injury is not of the irreparable character alleged, or that compensation may be afforded in damages, or that the title set up by complainant is not good, and that such has been the verdict of a jury, there can be no reason why the injunction should not be dissolved. See *Russell v. Farley*, 105 U. S., at pages 441, 442. If the bare fact that a party sets up a claim to land will entitle him to an injunction against the party in possession, restraining him from all use whatever of it, pending a long and expensive litigation, irreparable injury may be done to defendants in such a suit. Take the case of a person who has gone into quiet possession of land under what seems a good title, and who has expended sums of money in its use and improvement. Has he less claim on the protection of the court than one who sets up an old claim, long dormant, and seeks to oust him? And if the chancellor has been judicially satisfied that the title set up by the complainant is not a good title, or that the great preponderance of probability is with the party in possession, must he, nevertheless, keep the defendant out of its enjoyment?

In the case at bar, action of ejectment was tried before the judge who heard the motion to dissolve the injunction. He knew the full merit of the complainant's title, and, after hearing it, he instructed the jury to find for the defendant. The so-called "plea" simply put the facts before him in regular form,—the fact that a jury had heard the case at law, and, under the instructions of the court, had found the title of the plaintiff in ejectment invalid. It must not be treated as a formal plea. It was more in the nature of an affidavit on which is based a motion to dissolve an injunction. Under

these circumstances, the court exercised its discretion, and, to prevent irreparable mischief to the defendants, dissolved the injunction. No other action was taken on the so-called "plea." The cause is still pending. No error is perceived in this.

The appellant was allowed a supersedeas bond, with provision, however, that the defendant, by giving bond, could continue his cutting of timber notwithstanding the supersedeas. In this the court exercised its discretion. Both provisions of the order terminate with the promulgation of this opinion, and no practical result could now be reached if this court reviewed it. The decree of the circuit court is affirmed.

SOUTHERN PAC. CO. v. BOARD OF RAILROAD COM'RS OF CALIFORNIA et al. (UNITED STATES, Intervener).

(Circuit Court, N. D. California. November 30, 1896.)

No. 12,127.

1. CALIFORNIA RAILROAD COMMISSION—CONSTITUTIONAL LAW—UNLAWFUL DETERMINATIONS—POWER OF COURTS—INJUNCTIONS.

The constitution of California provides (article 12, § 22): "The state shall be divided into three districts, * * * in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have power, and it shall be their duty, to establish rates of charge for the transportation of passengers and freight, by railroad and other transportation companies, * * * to hear and determine complaints against railroad and other transportation companies, * * * and enforce their decisions and correct abuses through the medium of the courts. * * * Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such commissioners, or shall charge rates in excess thereof, * * * shall be fined not exceeding \$20,000 for each offense, and every officer, agent or employee, of any such corporation or company, who shall demand or receive rates in excess thereof, or who shall in any manner violate the provisions of this section, shall be fined not exceeding \$5,000, or be imprisoned in the county jail one year. In all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable. * * *" The act of the legislature (April 15, 1880) passed to carry this provision into effect provides for serving upon a railroad affected a schedule of rates, adopted by the commission, which becomes effective in 20 days after service. *Held* that, under these provisions, the board of railroad commissioners is invested with administrative, as well as judicial and legislative, powers; and its duties are not so far discharged by the adoption and service of a schedule of rates as to leave nothing further to be done, and to put it beyond the jurisdiction of a court, in proceedings to restrain the enforcement of an unlawful determination.

2. SAME—SCHEDULES OF RATES.

Held, further, that a resolution of such board as to the propriety and necessity of a certain reduction of rates, which has not, however, been embodied in a schedule, and is not intended to be acted upon, without further investigation (as to which the solemn declaration of the commissioners must be taken as true by the courts), does not afford a basis for the action of a court to restrain the enforcement of such resolution, on the ground that the proposed rates are unreasonable.

3. SAME—UNREASONABLE SCHEDULE—INJUNCTION.

Held, further, that the functions of such commission are not so purely legislative that it is not amenable to the control of the courts, when it attempts to enforce a tariff of rates which is unjust and unreasonable.

4. SAME.

Held, further, that a suit to restrain the enforcement, by such commission, of an unreasonable schedule of rates, is not a suit to restrain criminal prosecutions.

5. SAME—LEASED LINES—ESTOPPEL—ILLEGAL CONTRACTS.

Held, further, that, where such commission has dealt with a corporation, operating lines of railroad under leases from other corporations, as an existing transportation company, by serving upon it a schedule of rates, and requiring it to conform thereto, it cannot afterwards, as an answer to a suit by such corporation to restrain the enforcement of the rates, object or inquire into the validity of the leases, under which the corporation operates its lines, or the power of the lessor companies to make them; nor have the principles applicable to suits between parties to illegal contracts, in *pari delicto*, any application to such a case.

6. SAME—ESTOPPEL—ILLEGAL COMBINATION.

Held, further, that such commission, having dealt with such an existing transportation company, is also estopped to object, in a suit by it, that it is an illegal combination.

7. SAME—CONSTITUTIONAL LAW—FOREIGN CORPORATIONS.

Held, further, that the above-stated provisions of the California constitution were not intended as conditions upon the exercise of their powers, within the state, by foreign corporations, nor as amendments of the charters of domestic corporations.

8. SAME—AMENDMENT OF CORPORATE CHARTERS—PROPERTY RIGHTS—FEDERAL GUARANTIES.

Held, further, that the power to amend the charters of corporations, which may be reserved, is not a power to withdraw from them the guaranties of the federal constitution, nor to affect any rights not given them solely by their charters. It does not extend to affecting the property acquired in the exercise of their functions.

9. SAME—POWER OF STATE TO FIX RAILROAD RATES.

Held, further, that, while a state has power to regulate railroad rates, such power, as well as the right of a railroad company to control its business, stops at injustice, the state having no right to fix a rate unreasonably low, though it may prevent a railroad from fixing one unreasonably high.

10. SAME—UNREASONABLE RATES—UNCONSTITUTIONAL PROVISIONS.

Held, further, that the provision of the constitution making the rates fixed by the commission conclusively just and reasonable is in conflict with the fourteenth amendment to the constitution of the United States, and void, but is so clearly separable from the rest of the provisions relating to the commission that it does not render them invalid.

11. SAME—NOTICE OF FIXING OF RATES.

It seems, further, that the provisions of the constitution, if correctly interpreted, as not requiring notice to the railroads of a proposed fixing of rates, are not, for that reason, invalid.

12. SAME—UNLAWFUL DISCRIMINATION.

Held, further, that, under the interpretation of the above-recited constitutional provision by the supreme court of California, which is binding on this court, and which holds the words "transportation companies" to include individuals, such provisions are not void, as discriminating between corporations and individuals.

13. SAME—CONCLUSIVENESS OF RATES.

Held, further, that the constitutional provision making rates conclusive is not equivalent to directing them to be made unreasonable.

14. SAME—DECISIONS OF COMMISSION—INTEREST OF MEMBER.

Held, further, that the interest, as a shipper, in the rates fixed, of one of the commissioners who takes part in fixing them, but whose vote is not necessary to the decision, does not render such decision invalid.

15. SAME—PRIOR PLEDGE BY MEMBER OF COMMISSION.

Held, further, that the fact that a member of the commission had pledged himself, before his election, to make certain changes in rates, which are embodied in schedules by the commission, does not necessarily affect the validity of such schedule, since the real question is as to the reasonableness of the rates fixed.

16. SAME—WHAT ARE REASONABLE RATES.

Held, further, that rates for railroad transportation are not alone unreasonable when they amount to practical confiscation, nor necessarily reasonable when they allow any dividend, however small; but a railroad company is entitled to be reimbursed its charges and expenses, and to receive, besides, an adequate return upon investment.

17. SAME—OPERATING EXPENSES.

Held, further, that in ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments, but the cost of reasonable renewals and improvements of roadbed, track, and equipment should be included in the operating expenses.

18. SAME—REASONABLENESS OF RATES—SOUTHERN PACIFIC RAILROADS.

Held, further, in view of the facts appearing in this case, as to the receipts and expenditures of the Southern Pacific Company, taking into consideration the proper division of charges between it and its lessor companies, under its various leases, that no reduction should be made in its rates, and that the enforcement of a reduction, determined upon by the board of railroad commissioners, should be restrained.

The Southern Pacific Company is a corporation organized under a special act of the legislature of Kentucky, and operating, under leases, a number of railroads, in California and other states and territories, constituting its Pacific System.

On September 12 and 13, 1895, the board of railroad commissioners of California, acting under the powers conferred on it by section 22, art. 12, of the constitution of California, and by the act of the legislature of April 15, 1880, passed two resolutions, the first of which, adopted unanimously, and known as the "Grain Resolution," was as follows:

"Resolved, that the rates at present existing for the transportation of grain in California by the Southern Pacific Company, and its leased lines, as established by grain tariff No. 2 and all subsequent amendments thereto, be, and the same are hereby, reduced 8 per cent.; and the secretary of this board is hereby directed forthwith to prepare for publication by this board a schedule of rates in accordance herewith; and, when so prepared, the same shall be published at once, and take effect as soon thereafter as allowed by law, and that on the adoption of the revised general freight tariff of said company, herein provided for, any further per cent. deduction due said grain tariff, as provided herein, shall be given."

The second, adopted by the votes of Commissioners La Rue and Stanton, against the vote of Commissioner Clark, and known as the "25 Per Cent. Resolution," was as follows:

"Resolved, that the present rates of charges for the transportation of freights in California by the Southern Pacific Company and its leased lines are unjust to the shippers of the state. Therefore be it resolved, that the present rate of charges for the transportation of freights in California by the Southern Pacific Company and its leased lines be subjected to such an average reduction as including all reductions made therein since December 1, 1894, shall equal an average reduction of 25 per cent. upon said rates, as in existence on said December 1, 1894. Resolved, that this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force on or before January 1, 1896. And be it further resolved, that, if the necessities of the case so require, this board will at once proceed to the ascertainment of the proportion of the reduction due any commodity which, by reason of its nature, requires to be moved between now and the time herein fixed of the taking effect of said general reduction."

On October 14, 1895, the Southern Pacific Company filed its bill against the board of railroad commissioners, seeking to enjoin the en-

forcement of these resolutions, and obtained a temporary restraining order, with an order to show cause why it should not be continued. The United States also intervened in support of the prayer for an injunction; and affidavits and other proofs were submitted by all parties, with full arguments upon the question of the continuance of the injunction.

W. F. Herrin (J. C. Martin, J. E. Foulds, E. S. Pillsbury, and John Garber, of counsel), for complainant.

W. F. Fitzgerald, Atty. Gen. of California (Robt. Y. Hayne and W. W. Foote, of counsel), for defendants.

H. S. Foote, U. S. Atty.

McKENNA, Circuit Judge. This suit is brought against the board of railroad commissioners, to enjoin them from enforcing a certain resolution reducing the rates on grain and other freight on the lines of railroad operated by complainant. The bill is too long to quote in full; hence I shall give only such summary of its important allegations as will assist the understanding of this opinion.

It alleges the jurisdictional facts and the official character of respondents, and that the complainant is a corporation, and was incorporated and organized by an act of the commonwealth of Kentucky, empowering it to operate the lines of railroads described, and operating them as one system, generally known as the "Pacific System," of complainant. That it has a paid-up capital stock of \$120,934,170, distributed among 150 shareholders. The lines of railroads are given by name, with their respective mileage and termini. That certain of said roads have an outstanding indebtedness, incurred for their construction and equipment, represented by interest bearing bonds, and secured by mortgage. The amount of indebtedness and the annual interest are given. That, by the leases to it, complainant is required to operate and maintain said roads in good repair, pay taxes, and provide for the payment of the interest aforesaid, which amounts, in the aggregate, to \$8,420,000 or thereabouts. That to some of said roads complainant is obliged to pay a certain rent, and to pay certain sums to the government of the United States. The amount of rent and such sums are given, and, as far as necessary, will be referred to hereafter. That none of the lessor companies, except the California Pacific Company and Northern Railway Company, have, for more than a year last past, received or been entitled to any profit or net income whatever, or been able to pay any dividend to stockholders. That the rent received by the California Pacific Company and Northern Railway Company, after deducting necessary payments of interest and expenses, amounts to less than $2\frac{1}{2}$ per cent. per annum upon their respective capital stock; and that this must be expended in betterments and additions which are necessary for the proper operation and equipment of the road. That the cost and value of the properties largely exceeds the bonded indebtedness respectively thereon. That complainant has invested \$4,832,491.78 in the purchase of property necessarily used and necessary to be used for and in con-

nection with the operation of said roads as said Pacific System, and of said amount the sum of \$4,000,000 is invested in California. That, in order to enable complainant to operate said road, it must receive income sufficient to pay expenses, interest, etc., and is entitled to some profit. That complainant is engaged in state and interstate traffic; and that the rates of the latter have been fixed in pursuance of the provisions of the act to regulate interstate commerce; and that the rates on state traffic have been fixed as to the roads in California and Oregon by the board of railroad commissioners of said states, and in Nevada and the territories, in accordance with the laws thereof, respectively. That the rates upon freight arising and transported entirely in California are now lower, both actually and relatively, than the rates on freight arising and transported entirely within either of the other states, and, when established, were no more than sufficient to operate said roads down to the commencement of the year 1894; and that in that year an unusual depression in business occurred, so reducing the business of the complainant as to render its income insufficient to pay expenses, as hereinbefore set forth. That said depression, it is alleged on information and belief, will not be relieved; and that the business will not be increased during the present or the next ensuing year. That from time to time reductions have been made in rates, and from January, 1889, to June, 1895, to the amount of more than 35 per cent. A table, showing the reduction by years, is given in the bill. That the total receipts and expenditures of the Pacific System, during the calendar year 1894, were as follows:

Receipts	\$31,458,522 64
Expenditures	31,734,785 34

Showing a deficiency of..... \$ 276,262 70

—The items of receipts and expenditures are given. That the total receipts for the first six months of the current year (1895), from the 1st day of January to the 30th day of June, for the Pacific System, were as follows:

Receipts	\$14,836,125 77
Expenditures	16,312,302 16

Leaving a deficiency of..... \$ 1,476,176 39

—The items are given. That there has been, at all times, economy of operation; and that the operation of said road as a system is a convenience to the public. The number of officers employed is alleged to be 71, who received a daily compensation of \$16.25; total yearly compensation, \$361,079.04. All its other employes, numbering 15,064, received an average daily compensation of \$2.54; total yearly compensation, \$11,972,667.73. That these rates were not unreasonable. That the rates in force upon the several railroads operated by complainant have been fixed according to circumstances and conditions surrounding the traffic, and with a careful regard to those conditions which affect their relative adjustment and classification, and are fair to shippers, and, in many cases, are fixed at the actual cost of transportation by reason of water and railroad

competition. That, notwithstanding the premises, the board of railroad commissioners did, on the 12th and 13th days of September, 1895, pass and adopt the resolutions complained of. They are set out in the bill, and, as the 25 per cent. resolution is given hereafter, I omit that here. The grain resolution is as follows:

"Resolved, that the rates at present existing for the transportation of grain in California by the Southern Pacific Company, and its leased lines, as established by grain tariff No. 2, and all subsequent amendments thereto, be, and the same are hereby, reduced 8 per cent.; and the secretary of this board is hereby directed forthwith to prepare for publication by this board a schedule of rates in accordance herewith; and, when so prepared, the same shall be published at once, and take effect as soon thereafter as allowed by law; and that on the adoption of the revised general freight tariff of said company, herein provided for, any further per cent. reduction due said grain tariff, as provided herein, shall be given."

—That the portion of the resolution having reference to the grain rates was adopted by a unanimous vote, and the remainder thereof was adopted by the vote of Hugh M. La Rue and James I. Stanton; William R. Clark voting against same. That, pursuant to the resolution, a schedule of the grain rates was prepared, and served on complainant on the 26th day of September, 1895; and that the board is proceeding to prepare a schedule of other rates, and will, not later than January 1, 1896, enforce them, unless restrained.

Complainant avers: That there is no reason to believe that there can be and will be an increase of complainant's business, and that the rates and reductions were resolved on arbitrarily and without evidence, and will be unjust, unfair, and unreasonable, and confiscatory of the property rights of complainant and its lessors. That such rates will require complainant to carry many classes of freight at less than cost, and that such loss cannot be made good. That they cannot be adopted without irreparable injury, and will cause a diminution of revenues, as nearly as can be ascertained, of \$1,600,000 per annum, and will be insufficient to pay expenses, as aforesaid, so that traffic can be conducted with safety, and, on information and belief, avers that the deficiency of the next ensuing year will exceed the sum of \$4,000,000. That the injurious effect will extend to the interstate business of complainant to the amount of upward of \$250,000. The reasons and manner are stated.

The bill gives the names of the California roads, and their mileage, the bonded indebtedness, and the amount of annual interest, their total receipts and expenditures, by items for the year 1894, and the first half of the year 1895.

The receipts for 1894 were.....	\$20,993,488 39
Expenditures	20,558,991 34

Leaving a surplus of.....	\$ 434,497 05
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The total receipts for 1895 (ending June 30th).....	\$ 9,932,611 82
Expenditures	10,796,303 11

Leaving a deficiency of	\$ 863,691 29
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And it is alleged: That, under the proposed rates, there would have been for 1894, instead of a surplus, a deficiency of \$1,340,502.95; and the deficiency of 1895 would be increased to \$1,681,914.57. That

there is no reason to expect a compensating increase of business, and hence during the next ensuing year there will be a deficiency of \$2,363,829.14 on the California roads. That the defendants threaten a reduction in the rates of passenger fares, which are already just and reasonable. That Mr. La Rue and Mr. Stanton took the following pledge before election, and were elected in consequence thereof:

"Resolved, that the charges for the transportation of freights in California by the Southern Pacific Company of Kentucky and its leased lines should be subjected to an average reduction of not less than 25 per cent.; and we pledge our nominees for railroad commissioners to make this reduction."

—That Mr. La Rue is a raiser of agricultural produce, and a shipper thereof, and hence interested against complainant. That complainant has not consented to their acting, but protested against it. That the provisions of the constitution of the state of California, and the act of the legislature in aid thereof, are in violation of section 1 of the fourteenth amendment of the constitution of the United States. The particulars will be indicated hereafter. That defendants will proceed to promulgate and enforce the rates of freight as aforesaid, and that complainant will be harassed by a multiplicity of suits to enforce the same or the penalties of the constitution of the state. That the suit is of a civil nature, and that the matter in dispute exceeds, exclusive of interest and costs, \$5,000, and that it is a cause arising under the constitution and laws of the United States.

There is the usual prayer for injunction pendente lite and perpetual.

There were filed with the bill affidavits supporting its allegations, and a temporary restraining order was granted, and also an order to show cause why it should not remain pending the suit. Upon the hearing, refuting affidavits were filed by respondents, and against these, and in support of the bill, complainant also filed other affidavits. There were also presented voluminous extracts from the testimony taken by the Pacific Railway commission, to show a wasteful and extravagant construction of certain of the roads, and also a diversion of the revenue to dividends, instead of being employed in debt paying. There were also introduced the leases to the Southern Pacific Company, and its annual report to its stockholders, showing the operations of its proprietary lines and those operated under leases; a very full exposition of its expenses and receipts.

The case has been elaborately argued; how elaborately is indicated by the fact that, when put into printed form, the arguments of complainant's counsel occupy 1,147 pages, and those of respondents' 1,031 pages. It is needless to say that counsel were all able, and that they neither abused nor wasted the opportunity given to them, nor neglected a single topic which could illustrate or expound the intricate problems involved in the controversy. The United States attorney, Mr. Foote, also presented a full and strong argument on behalf of the government's intervention, and its right to an injunction against the commissioners. The evidence and the arguments had to be considered by me, and this accounts, in part, for the time

I have taken for decision. In part, it is accounted for by other and imperative demands on my attention. This opinion will be long, and, while there is justification for it, I have, nevertheless, leaned against too elaborate an exposition; but I hope, in avoiding prolixity, I have not slighted any essential proposition, or failed to make my meaning plain.

The many propositions urged upon my consideration may not, with clearness, be tabulated or presented in a determined order. Some, however, naturally assume a precedence, and of these the two following are earnestly and ably urged by the counsel for respondents, as settling the controversy: (1) That the action on the grain resolution is completed, and hence the board of railroad commissioners has no further office to perform; or, putting it another way, the schedule has become the law of the land, to be enforced by suit by the proper state officers, or by the shippers. (2) As to the other resolution, which may be called the "25 Per Cent. Resolution," action has not gone far enough. It is claimed to be but a resolution of inquiry, upon which action is not yet determined.

Section 22 of article 12 of the constitution of California is as follows:

"The state shall be divided into three districts, * * * in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight, by railroad and other transportation companies, * * * and enforce their decisions and correct abuses through the medium of the courts. * * * Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such commissioners, or shall charge rates in excess thereof, * * * shall be fined not exceeding \$20,000 for each offense, and every officer, agent or employee, of any such corporation or company, who shall demand or receive rates in excess thereof, or who shall in any manner violate the provisions of this section, shall be fined not exceeding \$5,000, or be imprisoned in the county jail one year. In all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable, and in any action against such corporation or company for damages sustained by charging excessive rates, the plaintiff, in addition to the actual damages, may, in the discretion of the judge or jury, recover exemplary damages. Said commission shall report to the governor, annually, their proceedings, and such other facts as may be deemed important. Nothing in this section shall prevent individuals from maintaining actions against any of such companies. The legislature * * * may confer such further powers on the commissioners as shall be necessary to enable them to perform the duties enjoined on them in this and the foregoing section. * * *"

The legislature passed an act in aid of the constitution, which is entitled "An act to organize and define the power of the board of railroad commissioners," approved April 15, 1880.

Section 11: "Whenever said board, in the discharge of its duties, shall establish or adopt rates of charges, * * * pursuant to the provisions of the constitution, said board shall serve a printed schedule of such rates * * * upon the * * * corporation affected thereby, and upon such service it shall be the duty of such * * * corporation to immediately cause copies of the same to be posted in all its offices, stationhouses, warehouses, and landing-offices affected by such rates, * * * in such manner as to be accessible to public inspection during usual business hours. Said board shall also make such further publication thereof as they shall deem proper or necessary for the public good. * * * The rates of charges established or adopted by said board, pursuant to the constitution and this act, shall go into force and effect on the twentieth day after service of said schedule."

In this action we are concerned only with the acts of the board of railroad commissioners, performed, performing, or to be performed. With the rights shippers have, we are not concerned. The grain schedule was served, and the 20 days prescribed by statute, after which the rates should go into effect, had not expired when the bill was filed. Were there yet any acts or duties to be performed by the board? It is very clear that, if there was nothing left to be performed,—if the rates had become the law to be enforced by other officers than the commissioners,—there was nothing to be enjoined in a suit against the commissioners.

The constitution is certainly not clear, and interpretation must be exercised by a very careful consideration of its language. After providing for the election of railroad commissioners, it enumerates their duties as follows (which I shall number for the purpose of distinction and reference): Said commissioners shall have the power, and it shall be their duty: (1) To establish rates of charges for transportation of passengers and freight by railroad and other transportation companies, and publish the same from time to time, with such changes as they may make. (2) To examine the books, records, and papers of all railroad and other transportation companies, and for this purpose they shall have the power to issue subpoenas and all other necessary process. (3) To hear and determine complaints against railroad and other transportation companies, to send for persons and papers, to administer oaths, take testimony, and punish for contempt of their orders and processes, in the same manner and to the same extent as courts of record, and to enforce their decisions and correct abuses through the medium of the courts. (4) Said commissioners shall subscribe (? prescribe) a uniform system of accounts to be kept by all such corporations and companies. It is under the third of the said enumerated provisions of the board that there is an implicit direction to "enforce their decisions and correct abuses through the medium of the courts." Let us repeat its language in connection with the direction and injunction to the board.

"Said commissioners shall have the power, and it shall be their duty, * * * to hear and determine complaints against railroad and other transportation companies, to send for persons and papers, to administer oaths, take testimony, and punish for contempt of their orders and processes, in the same manner, and to the same extent, as courts of record, and to enforce their decisions and correct abuses through the medium of the courts."

It appears, therefore, that the board may hear and determine complaints. What complaints? Surely these may be as broad as the board's powers are, and as various as the misconduct of transportation companies. Upon whose complaint? Must the board wait as a court does to be invoked? Is it not a different instrumentality from a court? An active, seeking, supervising one,—the eye and the activity of the state,—expected to see and do what private interests may overlook, or be deterred from doing? I think so. But grant I am wrong; the board has the further power to correct abuses. What abuses? Only those complained of, or those, besides, which it discovers? If only those complained of, the phrase "to correct abuses" is but a repetition of the phrase "to enforce

their decisions." Primarily, we may not assume that it is superfluous, and reflection on the purposes of the constitution convinces that it was not intended to be. It must be construed as an independent gift of power, giving the commissioners as ample administrative powers in proper places as judicial and legislative powers in proper places. That this construction will make the board more efficient there can be no doubt, and I am not disposed to interpret any ambiguity so as to take away a valuable power, and one so consistent with, and, maybe, necessary to, the purposes for which the commission was created. The first contention is, therefore, not good.

The second contention is that the 25 per cent. resolution is only one of inquiry, not one of definite action, or, necessarily, one even of intended action. The attorney general says: "It is a kind of declaration, not binding upon the railroad commissioners as a body, or upon anybody else." He also says: "It does not amount to anything. It is the schedule, after all, which is the law." But it would seem that this is but a part of the sweeping contention that the railroad commissioners are not amenable to restraint at all; not, it is claimed, before a schedule is prepared and served, because their functions are then legislative; not after a schedule is prepared and served, because their function is done, and their acts are law, the enforcement of which must be restrained, if at all, by suits against other officers than them,—in other words, that the function of the commissioners is that of the legislature of the state, and, like the legislature, not amenable to the control of the courts. If this is so, it would seem from many precedents of suits against commissioners that it results from provisions peculiar to the California commission, and not from anything inevitably incident to the function or the office.

In support of this contention, a great many cases have been cited and reviewed, which I need not comment upon. They, undoubtedly, decide that the purely legislative functions of any official body cannot be controlled by the courts, but, in the case of railroad commissions, the supreme court of the United States has distinguished executive from legislative functions, and has asserted the power to restrain the latter when their attempt is to enforce a tariff of rates which may be unjust and unreasonable. Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047. In the latter case the powers of the court were clearly defined, and I shall quote from it fully. The same broad contention was made in that case that is made in this, and to it the court replied, through Mr. Justice Brewer, as follows:

"It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government, and beyond examination by the courts. * * *

And, after further comment:

"The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between carriers and shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

After reviewing a number of cases, the learned justice continued as follows:

"These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was therefore within the competency of the circuit court of the United States for the Western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission."

And, marking the limits of the powers of the court, he further said:

"As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation."

We are brought back to the inquiry concerning the duties which are devolved on the board of commissioners, and these, we have seen, are not only to enact provisions of regulation of rates, but to enforce them; and hence, certainly, when the former is done, and the latter is threatened, the courts have power to review the regulation, and, to use Justice Brewer's words, "condemn or sustain this act of quasi legislation."

The broad contention of respondents cannot therefore be sustained. May the special one (to quote the attorney general), that the 25 per cent. resolution is "a kind of declaration not binding upon the railroad commission as a body, or upon anybody else"? In an absolute sense, the resolution is not binding on the railroad commission or on any one else. It would not be even if a formal schedule

were prepared; not even if the schedule was served. Its obligation only attaches upon 30 days after service. It cannot be enforced until then. It need not be obeyed until then. But the object of the suit is to prevent that occurrence,—to arrest its obligation; not as an executed exercise of power, but as a threatened exercise of power. The question, then, is, is the resolution of this character, as tested by the Reagan Case? "It is not the function of the courts," says that case, "to establish a schedule of rates. * * * Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation." Does this mean that the power of the courts is confined to review only? What judgment is to be exercised is beyond their control. A regulation being determined by a board of railroad commissioners, then an inquiry as to its reasonableness will be entertained, and judicially sustained or condemned as it is that or not that. Is the 25 per cent. resolution such a determination? The resolution is as follows:

"Resolved, that the present rates of charges for the transportation of freights in California by the Southern Pacific Company and its leased lines are unjust to the shippers of the state. Therefore, be it resolved, that the present rate of charges for the transportation of freights in California by the Southern Pacific Company and its leased lines be subjected to such an average reduction as, including all reductions made therein since December 1, 1894, shall equal an average reduction of 25 per cent. upon said rates, as in existence on said December 1, 1894. Resolved, that this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force on or before January 1, 1896. And be it further resolved, that, if the necessities of the case so require, this board will at once proceed to the ascertainment of the proportion of the reduction due any commodity which, by reason of its nature, requires to be moved between now and the time herein fixed of the taking effect of said general reduction."

The language of the resolution is positive as to the necessity of the reduction, and as to the amount, and upon what consideration and evidence it was based Mr. La Rue recites in his affidavit as follows: That the reduction in grain rates established, and the further reduction upon all other classes of freights generally proposed, were not resolved arbitrarily, but after a complete individual and official investigation of the existing rates upon the various roads, and of the effect thereof upon the commerce of the state, upon the earnings and expenses, the revenues, the fixed charges, bonded indebtedness, and net income of said lines of railroad of said corporations; that a full and complete hearing, covering a number of days, was accorded complainant, who appeared by attorney, and that a large number of witnesses were examined; that the grain and other rates were fully investigated, and from such investigation affiant affirms his belief that the grain and other rates in existence on the 12th of September, 1895, on said railroads, "were and are excessive, exorbitant, and discriminative, and were and are a burden upon and unjust to the shippers of California"; that the grain reduction, and reduction in other rates, "as is indicated in said resolution, would be fair, just, and reasonable, both to the shippers of the state and to each and all of the alleged lessors of said

complainant owning lines of railroad within the state of California, and within the jurisdiction of said board and to said complainant." There are repetitions of these allegations in other paragraphs. Language can hardly be clearer or stronger. It opposes to the allegations of the bill by the utmost explicitness of statement (repeated in several ways), that the rates are unjust, discriminative, and burdensome. And this conviction is expressed upon an individual and collective investigation into all the elements of judgment regarding the interests of the roads and the interests of the state. I repeat, language can hardly be clearer or stronger. It is a confident declaration of knowledge, and seems to leave, as to the totality of the reduction, no fact to be inquired about,—none of its justice, none of the duty and purpose of the board. It would seem, therefore, to bear the test of the Reagan Case. But, in other affidavits, Mr. La Rue and Mr. Stanton aver that they did not intend the resolution as a final judgment of the board, but that the board intended a more definite and particular investigation into the conditions of the several railroads forming the Pacific System of complainant, and that regulation or nonregulation will depend upon that investigation; and more explicitly and emphatically have they stated this through their counsel. Mr. Hayne said:

"They say [the commission] that they do not consider it binding, and are not going to do anything without further consideration, which, of course, may lead to very different results. The service, if it is to be made, has to be made by their order, by their authority; and they have not yet even made up the schedule which is to be served. They come here, high officers of state, and swear they are not going to take the action without a further, full, free, and fair investigation."

I am disposed to accept this as true and sincere. Indeed, I do not know how not to do so, regarding them, as they must be regarded, as truthful; nor do I care to risk the slightest embarrassment to them as officers in any proper investigation of the complainant, or any of its constituent roads, the results of which cannot be put into force, even if it was desired to, except in a direct and open way, and the detriment of which, if any, can be arrested before it fall.

The respondents object to the remedy of the bill, and insist that no injunction can be granted, because the things to be restrained, it is claimed, are criminal prosecutions, and them a court of equity cannot enjoin. The answer to this contention is that this is not a suit to restrain a criminal prosecution. It is a suit to restrain an asserted illegal action of the board of railroad commissioners, which will injuriously affect the interests and property rights of the complainant. Besides, the contention is fully answered by authority. Justice Miller, in his concurring opinion, in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 459, 10 Sup. Ct. 703, laid down certain principles in the form of propositions which should govern the class of questions with which this case is concerned. After stating the power of the legislature, either directly or through the agency of a commission, to regulate rates, and the limitations of such power to be that the rates should not be so unreasonable as to practically destroy the value of the property, or so exorbitant as to be in utter disregard of the rights of the public, said:

"(4) In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

"(5) But until the judiciary has been appealed to, to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to, both by the carrier and the parties with whom he deals.

"(6) That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character, and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the services rendered.

"(7) That, until this is done, it is not competent for each individual having dealings with the carrying corporation, or for the corporation, with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

The respect which Justice Miller's opinions on any proposition receive would justify me in resting my decision of this point on his views; but he is supported by Mr. Justice Brewer, in the Dey Case, 35 Fed. 866; also, by the Gill Case, 156 U. S. 659, 15 Sup. Ct. 488, where his words are quoted and approved, and by the implied authority of the Reagan Case and other cases.

There are two other propositions made by the respondents, which precede the consideration of the "merits," properly so called. They are as follows: (1) That the leases executed by the several lessor companies to the complainant, by the terms of which all of their franchises and property were transferred, are void, because executed without express congressional or legislative authority, and therefore ultra vires of the purposes for which those corporations were created, to wit, the six California corporations, namely, Central Pacific Railroad Company, the Southern Pacific Company of California, Southern Pacific Coast Railway Company, the Northern Railway Company, and the Northern California Railroad Company, without the authority of the California legislature, the Central Pacific Railroad Company, and the Southern Pacific Railroad Company, without express congressional authority. (2) That the so-called "Pacific System" is an unlawful combination, in violation of section 20 of article 12 of the constitution of the state.

These propositions are countered by the complainant by the objections that the board of commissioners cannot be heard to make either proposition,—not the first, because the leases are not open to collateral attack on the ground of ultra vires in this proceeding, and under the circumstances of this case; that the sovereign alone can object; and that they must be held valid until declared otherwise by a direct proceeding; not the second, because the board of railroad commissioners has dealt with, and its proceedings and orders are against, the Southern Pacific Company, and not the several or any of the lessor companies. These counterpropositions should be first considered, and, if well made, will save an inquiry of the strength of the others, and many independent ones which have been

argued at length and with ability by counsel. The consideration falls under two heads: (1) Abuse of powers,—acts in excess of its conditions and limitations. These, it is conceded, are not subject to collateral attack. (2) Total want of power without limitation or qualification. These, it is asserted, are open to collateral attack by anybody, and the ground of it is said to be an antagonism to public policy.

The cases cited by respondents' counsel undoubtedly establish that a railroad company has only the powers conferred by its charter, and that contracts in excess of these are void, and, if void as to one party, void as to all parties. For this doctrine, however, the decisions of the supreme court are sufficient. Mr. Justice Gray said, in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 40, 11 Sup. Ct. 481:

"Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only, and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation, there is no occasion to refer to decisions of other courts; because the judgments of this court, especially those delivered within the last twelve years by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations."

The learned justice then reviews the cases, and sums up as follows:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws, which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws."

This must be accepted as law. But is it applicable to the case at bar? The instance upon which it was expressed arose out of a controversy between the parties to the act, which was held to contravene public policy, and of like kind were the cases cited and reviewed. The contract, being void as to one of the parties, was void as to all. But the case at bar is not between the contracting parties,—not between the Southern Pacific Company and its various lessor companies. It is concerned alone with the acts of the state, as affecting the property of one of its citizens or residents. There is no element of antagonism to public policy, as that is understood and involved in the cases cited. There are no contracting wrongdoers seeking to avoid or enforce an act of misfeasance. The case of *Central Transp. Co. v. Pullman's Palace Car Co.* hence lacks an

essential analogy to the case at bar. It, besides, seems inapplicable, not only from the essential nature of the board of railroad commissioners, but from the terms of the constitution of the state. The power and duty of the board is "to establish rates of charges for the transportation of passengers by freight and other transportation companies" (section 2, art. 12, Const.); and the act in aid of the constitution continues the idea, and provides as follows:

"Sec. 14. The term 'transportation companies' shall be deemed to mean and include: First. All companies owning and operating railroads (other than street railroads) within this state. * * * The word 'company,' as used in this act, shall be deemed to mean and include corporations, associations, partnerships, trustees, agents, assignees and individuals."

It was admitted in the argument that the board of commissioners dealt with transportation companies as they existed, as a fact, not with the validity of their existence. It is easily conceivable that, if the latter were necessary, confusion and weakness of administration would result. On the argument, the following colloquy occurred between counsel, Mr. Garber, one of the counsel for complainant, and Mr. Hayne, one of the counsel for respondents:

"Mr. Garber (among other things): Even if the state of California, in the exercise of its police power, and the power to regulate rates and charges of these companies, could itself have gone back of the concrete fact of operation and transportation and use by the companies, it has not conferred upon this commission any such power. Every feature, every line of this constitutional provision, and of the statute re-enforcing it, negative any such thought, in my judgment. Mr. Hayne: That is, that the commission should inquire into—Mr. Garber: Into the validity of this lease. I say they have no power to do it. Mr. Hayne: We do not say that the commission has that power, but we say that, when the complainant comes before the court, the court has it."

And it was further admitted that the questions of ultra vires and public policy and fraud, which had been discussed in court, the commission had not the power to entertain. But it was claimed that the validity of the leases, and their character, became a link in complainant's chain of title,—a condition of its right, if I understand the claim, of its appeal to a court of equity. But this is not so. The condition of its appeal to a court of equity is that it has assumed to be, and that the state has assumed it to be, a transportation company, and has dealt with it as such,—regulated properties in its possession as such. In question of its rights? Certainly not; but only in regulation of them. And how can a court judge of the regulation but as the commissioners did? And what rights or wrongs of the complainant can the court consider which the commissioners could not? If complainant could be regulated, it can complain of that regulation. It and the commission were not parties to an illegal contract, from which the law will give no relief; leaving them where they put themselves, as in the cases cited by counsel. The board of railroad commissioners is a governmental agent, performing a duty, executing a power. It acts (either administratively, judicially, or legislatively; it is not necessary now to consider which) for the state. Ought it to say—can it be heard to say—that any person can be an outlaw to its action? Would this not be an absolute perversion of its powers? Can the commission,

being bound by a fact, or having the right to assume a fact in its action, yet question the fact when its action is complained of? A negative is so self-evident that it seems to be weakened by an attempt to support it. Certainly analogies from cases of wrongdoers help us nothing. The law (which is the state), for wisest policy, will give no help to wrongdoers. They being in *pari delictu*, the law gives aid to neither. But would not it be anomalous, if nothing more, for the law itself to claim to be in *pari delictu* with anybody, and that, too, by proceedings in *invitum*, and then assert irresponsibility or immunity by it? As I have said, a negative seems self-evident, and the greatest difficulty I have found in the contention of respondents is in the ability and earnestness of the counsel who urge it, and I pass it now, with something of the feeling that I may not understand it, and, because not understanding it, do not appreciate its strength.

The commissioners dealt with the Southern Pacific Company. Their notices were served on it; their hearings were granted to it; and the grain schedule was served on it. The object of the other resolution is the regulation of it. It is only its officers, agents, or employes who can be fined or imprisoned for violation of such regulation, for it is only they who can demand or receive rates in excess of those prescribed. The strength of this reasoning was felt somewhat by counsel for the respondents, and it was sought to be answered by saying that the Southern Pacific Company was the agent of its lessor companies. If this, as an argument, be not *felo de se*, its inadequacy is apparent. If accepted fully,—and it must be, if at all,—the civil and criminal responsibilities would be staggering. I think, therefore, that, as the Southern Pacific Company was regulated, it may complain of that regulation; that, if its possession and management of the railroad properties could be assumed or accepted as valid by the board of commissioners for the purpose of regulation, they may be by the court in order to review the justness of that regulation. This is consistent and rational,—makes effective the constitution and the laws, and gives full and efficient exercise to and execution of the powers of the board. Further than this I do not now consider it necessary to go. Maybe further than this I cannot go, for beyond this there are serious questions.

A railroad commission is a state instrumentality, having the power, and obliged, as a duty, to regulate the rates on railroads of the state. It may do so on one and all, according to the conditions and circumstances of each. Surely so if the roads be under separate ownership and management, and may be so when united in ownership or management. It is seriously disputable if any road can remove itself from amenability to regulation, even if it have the power to lease. Under the power to lease, the operation of the road may be transferred, but transferred with all legal burdens on its head, with all the compulsory submissions to which it is subject. However, these questions may be passed now to puzzle a future consideration, as well as that other and even more serious one, of what makes the value of a railroad. The question came up in the Ames Case, 64 Fed. 165, but only came up,—but not answered. Is it what

it cost, or what it could be built for, or what it can charge, if not regulated?

This view makes it unnecessary to consider whether the act of the state of California passed in 1861, and amended in 1863 (St. 1863, p. 613), which reads as follows: "Any railroad corporation organized under the act to which this is amendatory, shall have the right to lease the whole or any portion of their road to any other corporation organized under this act, or to grant to any such corporation the right to use in common any portion of their road,"—or the act of April 3, 1880 (St. 1880, p. 21), entitled "An act permitting and authorizing railway and other corporations organized under the laws of this state, or of any state or territory, or any act of congress of the United States of America, to do business on equal terms,"—confers on railroads the power of leasing, or that the latter act is unconstitutional, because its object is not expressed in its title, or to determine the other controversy raised on the statutes of the state of Kentucky incorporating the Southern Pacific Company.

It is also contended that the constitution applies to all corporations, foreign and domestic, and that its provisions are binding upon both, without, as I understand counsel, the right of objection on the part of either to their invalidity, for the following reasons: (1) On foreign corporations, even though void as to domestic ones, because it is a condition of their doing business within the state; (2) on domestic corporations, because it is an amendment to their charters, and hence an exercise of the reserve power of the state to alter and amend them. If the contention is true, what limitation is there to the power of the legislature? All constitutional restraints seem to be abolished by it, and corporations, foreign and domestic, are subject to the will of the legislature. As to foreign corporations, counsel for respondents declare this: "It is not a question of power," says one of the counsel; "it is a question of will." If it is a question of will as to foreign, it is also a question of will as to domestic corporations; and the only admitted exception to its exercise is the physical taking of the property of the corporation,—of a railroad corporation (to make the application to the kind we are considering), of its rails and cars. It may put such conditions on their use as it pleases, and these, though they would be invalid as unconstitutional exercise of power against a natural person or a co-partnership of natural persons owning or using the same kind of property. This is a serious discrimination, and even if the power to make it be granted, when we should come to interpret the legislative will, we well might object to imply it from anything but the clearest language definitely used. That the California constitution had such intention can hardly be contended. That it contemplated or implied conditions upon foreign corporations or domestic ones cannot be contended. It was a regulation, not of corporations, but of railroads, no matter by whom owned or managed. This disposes of the contention, certainly, as to foreign corporations. I cannot take the power to do a thing for the exercise of it, and put conditions and discriminations in the con-

stitution which are neither expressed in it, nor contemplated by it. As to domestic corporations, if anything further be necessary (and the reasoning is applicable to foreign corporations), it is found in the Railroad Tax Cases, 13 Fed. 722-789. It is there said that the power of amendment of the charter of corporations, or of the law under which they are formed, is not a power to withdraw from them the guaranties of the federal constitution.

"Whatever the state may do," Mr. Justice Field, sitting as circuit justice, said, "even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations, certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure. It may make the grant subject to modifications, and impose conditions upon its use, and reserve the right to change these at will. But, whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances. The state grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause, it retains power only over that which it grants. * * * The reservation relates only to the contract of incorporation, which, without such reservation, would be irrevocable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the supreme court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of a corporation acquired in the exercise of its faculties is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

And Judge Sawyer said, on page 777:

"The legislature, under the various guaranties of the constitution, state and national, can only take away, limit, enlarge, or modify that which it gave. And what is given in the creative act is, simply, its capacities; its legal faculties, including all such as are essential to its corporate existence; all those powers which are strictly corporate, being those powers which can only be given by legislative act; powers not possessed by natural persons or partnerships, acting in their natural, individual, or associate characters, independent of legislation. These strict corporate powers I attempted to define in *Orton's Case*, 6 Sawy. 187, 32 Fed. 457."

The cases cited by respondents' counsel to sustain their contention are distinctly different from the case at bar. In all of them, except those especially noticed hereafter, the power exercised was the ordinary governmental and sovereign one of taxation (*Tomlinson v. Jessup*, 15 Wall. 456; *Hamilton Gas, Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90; *People v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645; *Mayor, etc., of New York v. Twenty-Third St. Ry. Co.*, 113 N. Y. 311, 21 N. E. 60; *Railway Co. v. Maine*, 96 U. S. 499), or an administrative regulation of the affairs of the corporation to secure creditors and stockholders (*Sinking Fund Cases*, 99 U. S. 700), or an exercise of a right under the laws of Massachusetts to regulate the right of fishery (*Holyoke Co. v. Lyman*, 15 Wall. 500). In all of these cases the impediment to the exercise of the power was the charters of the respective corporations, and their sanctity as contracts. It was held that there was not impairment of their

obligations as contracts, because the right of amendment formed part of the contract, and was of the same obligatory character.

In *Greenwood v. Freight Co.*, 105 U. S. 13, the instance of the exercise of this right was the repeal of the act of incorporation. There was no question of control over property, or its uses, and what existed over either by the right of repeal of the acts of incorporation is explained in the *Railroad Tax Cases*, *supra*, and will be referred to hereafter.

In *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, the law, under which the corporation plaintiff was organized, provided a special commission to fix water rates. By the constitution of the state, subsequently adopted, that power was given to the board of supervisors of San Francisco. It was held to be a valid exercise of the reserve power to alter or amend the law. The power, abstractly, to regulate rates was not involved (only by what instrumentality, whether by the commission or by the supervisors); and the corporation contended for the commission, because the law incorporating it was a contract, and inviolable. The court, speaking by Mr. Justice Waite, said:

"Long before the constitution of 1879 was adopted in California, statutes had been passed in many of the states requiring water companies, gas companies, and other companies of like character to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we see no reason why such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the legislature, not the courts."

As to the power of the legislature to fix prices, the court cited and followed *Munn v. Illinois*, 94 U. S. 113, which, at that time, had not been directly modified, as it came to be afterwards, but, with caution, said:

"What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered; for that proposition is not presented by this record. *The objection is here, not to any improper prices fixed by the officers, but to their power to fix prices at all.*"

I put the last sentence in italics because it distinguishes the case from that at bar. In that at bar the contention is that the railroad commission has the power to fix any prices, or, rather, any rates, proper or improper, and that corporations must submit as a condition of their existence.

Stone v. Wisconsin, 94 U. S. 181, *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, and *Tilley v. Railroad Co.*, 5 Fed. 664, were cases of rates; but they all followed *Munn v. Illinois*, and were affected by its error, to wit, that the power of regulation of rates was unlimited in the legislature, and hence, this being the extent of the power, it could be exercised, if not expressed in the charter of the corporation, under the reserve right of amendment. But when this power became limited, as it did become limited, first by cautious expressions, as in *Waterworks v. Schottler*, *supra*, and the *Railroad Commission Cases*, then by confident contrary enunciation, as in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup.

Ct. 462, 702, constitutional limitations, and all rules which direct justice in the courts, were necessarily observed and enforced. Mr. Justice Waite's monitory words in the Schottler Case have been given. In the Commission Cases he advanced beyond caution, and came nearer to affirmation. He said:

"From what has been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can they do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Finally, in the Minnesota Case, the supreme court definitely modified *Munn v. Illinois*, and confined the power of the regulation to that which was just and reasonable, giving to the courts the ultimate power of review, and holding that any enactment which takes away this offends the constitution of the United States by depriving the corporation of its property without due process of law, and depriving it of the equal protection of the laws.

By many decisions since, this has become the settled law, and hence we are brought to the doctrine of the Railroad Tax Cases, and are convinced of the correctness of its soundness, that "whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution,"—a doctrine, rational, consistent, safe, giving to property, and all interests in it, protection against an arbitrary will, and not denying or dissipating the safeguards of the constitution by refined and metaphysical distinctions.

This disposes of what may be termed the "preliminary contentions" of respondents. There are others which will be considered hereafter. There are some urged by complainant. The most extreme one it is difficult to state succinctly and make it understood. The counsel who made it concedes the power of regulation, but very guardedly defines its limits. He says it cannot be exercised to transcend the prohibitions of the fourteenth amendment of the constitution, and, stating it more directly, says, claiming to quote Mr. Justice Field, in *Railroad Co. v. Smith*, 128 U. S. 179, 180, 9 Sup. Ct. 49, that its only rightful exercise is "to prevent extortion by unreasonable charges, and favoritism by unjust discrimination." This, counsel says, is the fullest power the state has, either by legislature or commission, and the fullest power the state, in reason, should want or exercise. To bring into clear prominence his idea, he stated the value of a railroad to be what it could earn without interference with its rates, under what he termed the normal play of natural and economic laws, and if, exercising this liberty, it treat all alike, then a reduction of its rates would be a taking of property without compensation, or depriving it of the equal protection of the laws. An explanation of these economic laws we need not make, but it is certain that they are not the same for a road which has no competitors as for a road which has competitors, —not the same for monopoly as for competition. In the former

case what certainty would there be of a reduction of rates? That would depend upon the railroad's sense of its own interests and the public interests. This sense might or might not be an enlightened one, might or might not be a liberal one, and economic laws might, therefore, plead in vain for observance. I do not say that they would, but might; and does not experience of the disposition and conduct of men admonish that all power is at times abused? The right—abstract right—of the state, therefore, to reduce rates, seems to be a necessity. Whether it should, in any case, be exercised or not, is another question. Does the right exist? That I think it does, I may have sufficiently indicated in considering the contentions of respondents, and it is only necessary to give my views more definiteness.

We have already seen that *Munn v. Illinois* was the pioneer case. What it decides, there is no dispute about. The controversy is over how much of it is overruled. The complainant says all of it, and that, by later decisions, the court has adopted and established the views of Mr. Justice Field's dissenting opinion. In the matter with which we are now concerned, I might question the correctness of counsels' interpretation of Mr. Justice Field's opinion, but I prefer to consider, though very briefly, the cases more directly. *Munn v. Illinois* was a case concerning the reduction of warehouse rates,—not so indisputably a public interest as railroads. It established two propositions: (1) That of the power of the state to regulate property devoted to a public use. (2) That the exercise of this power to settle rates of charge was a legislative prerogative, not a judicial one; that is, there was no review of them by the judiciary. What they were fixed at they could remain fixed at, even though unreasonable, and that the only relief was in the justice of the people, expressed through another legislature. The first proposition, as to the power of the state, has not been overruled. The second proposition, as to its right of exercise without judicial review, has been overruled, and the relations of common carriers and the state established in excellent equipoise. The power of the state stops at injustice. The rights of a railroad stop at injustice. The state may not fix a rate unreasonably low. It may prevent a railroad from fixing one unreasonably high. If the law gives a railroad privileges, it exacts from it duties. It exacts that it serve all at reasonable charge; serve all faithfully, and without favor or discrimination.

The other contentions of the complainant either deny the legality of the commission or the legality of its action. Under the first, it is urged: (1) That the provision of the California constitution, which makes the rates conclusively just and reasonable in all controversies, civil and criminal, is in conflict with the fourteenth amendment of the constitution of the United States. (2) Being void, and being also indissolubly blended with the provisions creating the commission, these are also void. (3) That no notice to the railroads is provided for. (4) That the provisions of the constitution apply to railroads owned by railroad corporations and com-

panies, and not to railroads generally, and that its penalties have also the same discrimination, and hence the complainant is deprived of the equal protection of the laws. Under the second, it is urged that two of the commissioners (La Rue and Stanton) took such a pledge, before election, as to disqualify them from acting, and that La Rue was interested, because a shipper of grain, and hence a judge in his own case; and because the board acted arbitrarily, and contrary to the evidence, or any evidence adduced before the board. It is, in effect, admitted, or, at any rate, it is established by authority, that the provision which gives conclusiveness to the rates fixed by the commissioners, is void; but it is claimed that it is clearly separable from the power to establish rates. The power, and the effect of the exercise of the power, as evidence, and the penalties which may follow from disobedience, are clearly separable, and, being so, one cannot vitiate the other.

In *Reagan v. Trust Co.*, supra, similar contentions were made against a statute of the state of Texas, which established a railroad commission, gave it power to establish rates, made them conclusive as evidence, and prescribed penalties for their disobedience. The enactments were as fully connected and dependent as the provisions of the California constitution. Passing on the contentions, the court said, by Mr. Justice Brewer:

"It is familiar law that one section, or part of an act, may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as a law, unless it is evident, from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, the invalidity of these two provisions may be conceded, without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads, and to regulate rates, was the prime object of the legislation. This is fully accomplished, whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply prima facie evidence of what is just and reasonable. The matters of penalty, and the effect, as evidence, of the rates, are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission, and given it power over railroads without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties; but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment."

It is, however, further urged that the conclusive provision was the main inducement of the others, and that the latter would not have been adopted independently of the others; and, to sustain this view, extracts are given from the speeches of certain of the members of the constitutional convention. They are too long and too many to quote. It is enough to say that they do not go that far, and, besides, the speakers were but a few members of a large convention, and, besides, again, they can be no index of what intention the people had by their adoption of the constitution.

The objection that the provision of the California constitution creating the board of railroad commissioners is invalid, because they do not require notice to the railroads, is certainly doubtful as law,

if it be not disputable as a correct interpretation of those provisions. As law, the objection seems to find some support in the Minnesota Case. The case came up on writ of error to review the decision of the supreme court of Minnesota (37 N. W. 782). That court had decided that it was the expressed intention of the statute of the state that the rates recommended and published by the commission created by it should not simply be advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are equal and reasonable charges. In other words, to quote from the opinion of the supreme court of the United States, "although the railroad is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable." It was on account of this meaning of the act that the supreme court held it to conflict with the constitution of the United States. Mr. Justice Blatchford, in comment on the provisions of the statute, said:

"No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it, by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at."

But it is manifest that this was urged as removing an objection to the final conclusion of the court, not as an essential or basic condition of itself. This conclusion was that "the question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination"; and, if deprived of it, the company's property is taken without due process of law, and in violation of the constitution of the United States. This view of the case seems evident from the concluding paragraph of the opinion. Mr. Justice Blatchford said:

"In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review."

The question could not be open for review if there was an antecedent defect in the creation of the commission which rendered any exertion of duties invalid because the statute creating it had not provided for notice to the railroads affected by such exertion of duties. But Mr. Justice Miller, in his concurring opinion, is very direct and clear. He said:

"I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary (which, I think, it is not) for the legis-

lature to have given such notice if it had established such rates by legislative enactment. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice, and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the supreme court of Minnesota to receive evidence on this subject, I think the case ought to be reversed, on the ground that this is a denial of due process of law in a proceeding which takes the property of the company; and, if this be a just construction of the statute of Minnesota, it is for that reason void."

These views seem to satisfy all the purposes of the state, and all the rights of the railroads. The commission undoubtedly exercises a function which the legislature would otherwise exercise. It should be as full with the commission as with the legislature, and, in both, subject to the same judicial investigation, as we have already seen it is, and thereby giving to the railroads that protection to their rights and property which the constitution guaranties.

The third ground urged, to wit, that the constitution is discriminative as to railroads, as they are owned or not owned by corporations or companies, is answered by the interpretation of the provisions by the supreme court of the state in *Moran v. Ross*, 79 Cal. 163, 21 Pac. 549, in which the court said:

"In our judgment, the control of the railroad commission, as provided for, is not confined to corporations. It extends, by its terms, to railroad corporations and 'transportation companies.' This should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint-stock companies, partnerships, or individuals, and so it has been construed by legislative enactment."

The legislative enactment referred to is the act of April 15, 1880, which was passed under an enabling clause in the constitution. Section 14 of the act, after providing what should be meant and included by the term "transportation companies," further defined the word "company" "to mean and include corporations, associations, partnerships, trustees, agents, assignees, and individuals." This construction is binding upon this court. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, supra.

As part of the argument against the validity of the state constitution, it is said that it provides "for the fixing of conclusive rates, and rates of that character only; that the word 'reasonable' is not written in the law; that it does not appear there either expressly or by implication." Regarding this objection as not included in those already replied to, it is only necessary to say that the direction to the commissioners to establish rates must be understood as a direction to establish just and reasonable ones. Making the rates conclusive as evidence is a different thing from making them or directing or intending them to be made unreasonable; and the former is held void, not because the rates to which it gives conclusiveness will be unreasonable, but because they may be so, and a judicial investigation is attempted to be prevented.

The other contentions, based on the interest of *La Rue*, as a shipper of grain, and on the pledges of Stanton before election, are of no especial consequence,—the former because the grain rate resolu-

tion was adopted by an unanimous vote, and the latter because, after all, the final inquiry must be, were the reductions resolved upon reasonable? and we are aided little in that inquiry or into the conditions and circumstances involved in it by a consideration of Mr. Stanton's prejudice or nonprejudice.

This brings us to the other contentions of respondents, and to the merits of the controversy. They are: (1) That (to quote the attorney general) "the term 'unreasonable,' as applied to rates of charges fixed by the legislature, or a body intrusted by a state constitution with that branch of legislation, means nothing more or less than confiscation." In other words, if such rates produce any revenue, much or little, they are reasonable. (2) That they (respondents) are entitled to have the grain rates considered separate from the 25 per cent. resolution; that there must be a showing as to each, not as to both indistinguishably. (3) Even if joined, the showing not sufficient.

1. This is claimed to be established by authority. I do not think so. It seems to have been decided in the Dey Case, 35 Fed. 866. But the same learned judge who expressed that view in the Dey Case retracted it in the Ames Case, 64 Fed. 165, and it has received no judicial sanction since. This was inevitable when it came to be seen that the regulation of rates could not be an absolute legislative prerogative. When the power of judicial review was asserted and entertained, the fourteenth amendment of the constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative. Certainly not the judicial prerogative. That must apply justice as it is understood of men, and, in its clear light, it was inevitable that it would come to be seen that the fourteenth amendment of the constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value,—if its guaranties of the law's equal protection to all persons would be satisfied as to railroads by leaving them a microscopical profit. If so, the pool of Tantalus would lose its force to illustrate excited and disappointed expectation when compared with the organic law of this great land. We should keep in mind that the regulation of a railroad affects, in reality, the natural persons who own it, not the insensible legal artificiality and abstraction called a "corporation." For the natural persons the protection of the constitution is intended, and would any one say that justice is done them if their investment be allowed only an infinitesimal fraction of 1 per cent., while all other investments are expected to return, at least, legal interest, with freedom, besides, of unlimited advantage.

One of the counsel for respondents, at the oral argument, frankly admitted that, if injustice was threatened, all who were in would hurry out of the ownership of railroad property. Of not a dissimilar alternative, Mr. Justice Brewer said, with strong metaphor, that the apples of Sodom were fruits of joy in comparison. That the power of regulating rates was intended to be exerted to that

effect no one will contend for; that it may not be so exerted, safeguards are needed. It is against, not only what may be done, but what can be done, that preventive laws are directed; and, if it be said that justice may be exercised by a legislature or a commission, a sufficient answer is that it is a rule of our polity that the ultimate exercise of that is best committed to the courts. This may offer restraints sometimes, even to good purposes, but would we not be as children, thoughtless and insensible, if we felt the restraints more than the evil they may prevent.

2. The respondents are entitled to have the grain rates considered separately from the 25 per cent. reduction on other freights, but the showing may be good for either, and hence need not distinguish. Mr. Hayne, for the respondents, puts this objection in another form. He says, granting a deficiency of revenues, it does not necessarily appear that this is the result of grain rates; they may be too high; that a determination of the effect of the reduction of them involves an examination of the validity of every other rate. "You do not get any light," the counsel says, "by taking general results, because it is quite consistent with the general result that the grain rates are nine or ten times too high, and that the others may be too low. It may be that the difficulty is in some other rate. If so, the applicant for relief ought to show it." It would seem, also, if this were so, that the respondents might show, and should show it, against the statement of the complainant, that the rates are not discriminative; but another answer is that such a showing would be too extensive for a preliminary inquiry, and absolutely intractable by affidavit. Still another answer is that the action of the board negatives the fact upon which it is based. It does not seem conceivable, if that fact be true, that the board of railroad commissioners would have passed a resolution which, by its horizontal application, preserved, and, may be, intensified whatever discrimination existed between the grain rates and other rates.

3. The attorney general says that he can demonstrate, beyond the possibility of a plausible explanation, that complainant has failed to make such a showing as would entitle it to the relief prayed for, even if the 8 per cent. and 25 per cent. reductions could, under any circumstances, be considered jointly. On the other hand, Mr. Herrin says that complainant is not asking for a single dollar of dividend, because existing rates and business are not sufficient to earn dividends. It only seeks revenue enough to pay interest on bonds, to pay operating expenses, and to pay taxes. Present rates, under the experience of 1894, were insufficient for such payment. The elements of the controversy will be stated as we proceed. It may, however, be premised here that Mr. Justice Brewer said in the Dey Case: "Compensation implies three things,—payment of the cost of service, interest on bonds, and then some dividend;" "adequate dividend," subsequent cases say. These, then, are the factors of compensation to be applied.

Complainant's bill, after a somewhat detailed statement of the amounts payable by complainant under the leases to it, gives a

summary of the receipts and expenditures, which shows a deficiency on the Pacific System for the year of 1894 of \$276,262.70; for 1895, \$1,476,176.39. In the amendment to the bill there is an exhibit of the receipts and expenditures of the California roads of the system, showing a surplus for 1894 of \$434,497.05; for 1895 (ending June 30), a deficit of \$863,691.29. The attorney general claims that this showing is incorrect, for three reasons: (1) Because there is included a deficit of the Oregon & California road, in the sum of \$541,355.71; (2) because there are included in expenditures on the various roads, for improvements and betterments, the sum of \$654,826.81; (3) because there is included in expenditures, as operating expenses, the rent paid to the California Pacific road, in the sum of \$600,000. If the last (third) be good, it is conceded that the deficit on the Pacific System, including the other objected items, will amount to \$24,131.20. If not good, the deficit will amount to \$54,905.65. For the time being, I will assume this objection to be good, and will consider the other objections.

Is the deficit of the Oregon & California road a proper expenditure of complainant, which resulted from the insufficiency of the income to pay the interest on the bonded debt? This, of course, depends upon the terms of the lease from the Oregon & California Company. It provides that the Southern Pacific Company shall pay to the Oregon & California Company, on account of the road, from the income received from it, as follows: The cost of operating such road and incidental expenses connected therewith, and "shall apply the residue of the amount of net income and earnings of said railroads to such extent as shall be required for the purpose, to the payment of the interest, * * * upon the now existing bonded indebtedness." The lease also provided that "on the 1st of May of each year the Southern Pacific Company shall pay to its lessor such balance, if any, of the net income for the year ended the 1st of December preceding, as shall remain in its hands after all the payments for interest * * * agreed to be made or paid." It is, however, further provided that, if the net income be insufficient to pay in full such current interest for the year, it shall be optional with the Southern Pacific Company to advance or pay for account of the Oregon & California Company such deficiency. If, however, it do so, it shall be entitled to interest thereon, at 6 per cent. per annum, until reimbursed, and shall be entitled to pay itself out of subsequent earnings or income of the demised premises, and have a lien thereon, and on such income.

It is objected that the payment of the deficit was optional, and, again, because the amount paid is secured upon future revenues and on the demised premises. In other words, it was not a "payment," in any proper sense, by the Southern Pacific Company for which it could charge. Interest on bonded debt is held by all authorities to be a proper charge upon income, and hence, if the Oregon & California Company had operated its road, such interest could be claimed by it,—deficiency of income to pay such interest would be a loss to the company. But that is not the test. We have already seen (and important consequences follow from it) that the board of rail-

road commissioners dealt with the Pacific System,—dealt with the Southern Pacific Company, as operating that system,—not any individual road, but all the roads; and hence the regulation of the board must be tested by the revenues of all the roads, not by the revenue of one. It is not what the Oregon & California Company might show, or what the Southern Pacific Company might show, for the operation of that road alone, but what it may show as to the system. This being so, the conclusion is obvious. Was the payment of the interest a loss to the Southern Pacific Company? Clearly not. It is secured to it, and is to be reimbursed to it, and is charged in the report as a "Balance deficit payable by Oregon & California Railroad Company." Clearly, again, if it had not been paid, it could not be claimed as a loss. If paid, and to be reimbursed and secured, it cannot be claimed as a loss, if the debtor or the security be good. I cannot assume now that the debtor or the security will not be good. It may be, of course, that it will not be good, but I can only deal with present conditions, or, at any rate, with those likely to occur within a reasonable period of time. That, under the lease, the payment of the deficit is not a charge on the Southern Pacific Company, is not only evident from its terms, but evident from the allegations of the bill.

The second ground of objection, that is, that to improvements and betterments, there will have to be considered—First, the abstract legality of such a charge; and, second, the competency of it under the leases. The abstract legality of such charge is established by the Reagan Case. The same contention was made there, and a deduction of the sum of \$302,085.77 was claimed to have been charged to operating expenses, whereas it was expended for "Cost of road, equipment, and permanent improvements." Mr. Justice Brewer, commenting on the claim, said:

"Again, the sum of \$302,085.77 appears in that table, under the description 'Cost of road, equipment, and permanent improvements, admitted to have been included in operating expenses,' and is added to the income as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of \$302,085.77 is one of \$113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails except as included within this amount. Now, it goes without saying that, in the operation of every road, there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of 'Renewals of rails and ties,' is stated the number of tons of 'New rails laid' on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company."

Substantially to the same effect is *Union Pac. Ry. Co. v. U. S.*, 99 U. S. 402. In the latter case the court was called upon to interpret that clause of the act of 1862 in aid of the construction of the Union

Pacific Railroad, which provided that "after said road is completed, and until said bond and interest are paid, at least 5 per cent. of the net earnings of said roads shall also be applied to the payment thereof." It may be said that there were several elements in that case which are not in the case at bar, but, nevertheless, the remarks Mr. Justice Bradley makes are substantially applicable. Speaking of when a railroad is completed, he said:

"In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail or iron bar, laid on wooden stringpieces, resulting in what was known in former times as 'snake heads'; the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail, and, finally, the H rail, which itself passed through many successive improvements. Finally, steel rails, in the place of iron rails, have been adopted as the most perfect, durable, safe, and economical rails on extensive lines of road. Bridges were first made of wood, then of stone, then of stone and iron. Grades originally crossed, and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over or under intersecting roads. A single track is all that is deemed necessary to begin with; but now no railroad of any pretensions is considered perfect until it has, at least, a double track. Depots and station houses are, at first, mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first-class railroad."

And, declaring what are proper expenditures, he further said:

"Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earnings in order to arrive at the 'net earnings,' as this expression is to be understood within the meaning of the act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent im-

provements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed. * * * We are disposed to agree, therefore, with the judge who delivered the concurring opinion in the court below, that the twenty-seventh item of expenditure, as stated in the table of expenses in the eighteenth finding, entitled 'Expenditures for station buildings, shops,' etc., is a charge that may properly be made against earnings; since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account."

The same idea is variously illustrated in the following cases: U. S. v. Kansas Pac. R. Co., 99 U. S. 455; St. John v. Railway Co., 22 Wall. 136; Railroad Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789; Mobile & O. R. Co. v. State of Tennessee, 153 U. S. 495, 14 Sup. Ct. 968; Barnard v. Railroad Co., 7 Allen, 512; Minot v. Paine, 99 Mass. 106, 107; Railway Co. v. Elkins, 37 N. J. Eq. 273; Dent v. London Tramways Co. 16 Ch. Div. 344.

The character of the improvements, as shown by the report, and charged as operating expenses for 1894, is the same as those described in the Reagan Case, and also in Union Pac. Ry. Co. v. U. S. The character of those claimed for 1895 is not so explicitly described, but they may fairly be presumed to be the same.

The competency of the charge under the leases depends, of course, upon their provisions, and a consideration of them will necessarily be somewhat detailed. It is provided in the lease from the Oregon & California Railroad Company that the complainant shall pay out of the earnings and income "the expenses of repairing, maintaining, improving, adding to, and keeping up the said leased railroads, with their appurtenances." Construing this provision by the light of the Reagan Case, and other cases *supra*, the expenditures made are properly chargeable against the income; nor do I think the subsequent provisions of the lease make those expenditures a lien on future income or on the demised premises, because they only give a lien "for advances to or for the party of the first part for additions or improvement of the demised premises, or any part thereof, * * * *not paid by the party of the second part under the lease.*" The italics are mine, and the provision indicated by them removes the expenditures under the lease from the objection made against them.

The lease of the Central Pacific Company gives more latitude to construction. It is dated the 7th day of December, 1893. But it is the final modification of a lease made on the 17th of February, 1888, and a construction of it is helped by a consideration of the latter. In this it is recited that it is for the mutual advantage of the contracting parties; that neither (to quote its words) is to be

benefited at the expense of the other. This is put as one of the conditions of the letting, and, when it ceases to be that, a modification may be requested. The letting was for the period of 99 years, and under it the Southern Pacific Company incurred many obligations. Among them was one to pay a rental of \$1,200,000, to be increased if justified by the income; and that it would "keep and maintain the property hereby leased in good order, condition, and repair; operating, maintaining, and adding to and bettering the same at its own expense." This provision made the improvements and betterments an expense to be borne by the Southern Pacific Company, and hence one to be allowed to it in estimating its gains or losses. But the lease was modified in 1893. It was also modified in 1888, but not in any of the provisions we are now concerned with. In the modification of 1893 it was recited as a reason for it that the Central Pacific Company "has been and is being benefited at the expense of the Southern Pacific Company, and the necessity has therefore arisen for a revision and change of such lease, so that neither party thereto shall be benefited at the expense of the other." The modification then made was radical. Instead of the numerous obligations of the other lease, its large rental, and the larger one of the modification of 1888, and the obligation to add to and better the road at its expense, the Southern Pacific Company only contracted to pay a rental of \$10,000, in installments, which was required to be applied by the Central Pacific Company to the expense of maintaining and keeping up its corporate organization. And then it is provided that on the 1st day of April in each year the Southern Pacific Company shall pay to the Central Pacific Company such balance, if any, of the net earnings or income received by it for the year ending the 31st of December then next preceding, as shall remain in its hands after all the payments thereinbefore provided for or agreed or directed to be made. It is further provided that if advances be made by the Southern Pacific Company for the various purposes mentioned in the lease, "to or for or upon the request of" the Central Pacific Company, "other than such as fall within the payments before provided to be made by the lessee out of the earnings or income," the Southern Pacific Company may be entitled to pay to itself with interest. And it is further provided that after the payments are made which are stipulated for, if the balance of the net income exceed 6 per cent. of the par value of the capital stock of the Central Pacific Company, one-half of such excess shall belong to the Southern Pacific Company. The payments and advances made by the Southern Pacific Company are to bear interest at 6 per cent. per annum, and be a lien on the demised premises, and the income thereof, unless there be an agreement in writing to the contrary. It is stipulated that the leases of February, 1885, and January, 1888, be canceled, except as they relate to the operation of the demised premises prior to January 1, 1894, and also that the lease may be at any time modified or canceled. There was another modification which changed paragraph 4, by making the interest on advances lawful interest, instead of 6 per cent., and by omitting the lien on

the demised premises, and by providing for arbitration if the parties could not agree upon the terms of modification.

The difference between the lease as it was first made, and as it became as modified, makes clear the interpretation of the latter. Under the former the Southern Pacific Company was to pay to the Central Pacific Company a rental of \$1,200,000, subject to be increased if the revenue justified to a sum not exceeding \$2,400,000. Under the latter a rental of \$10,000 was to be paid, which was to be applied to a special purpose. Under the former the Southern Pacific Company was to keep, maintain, repair, add to, and better the same at its own expense, pay taxes and all other charges (nearly), and the income of the road was to be its. Under the latter the Southern Pacific Company is to operate the railroad branches and leased lines, and apply the earnings and income derived therefrom to paying all operating expenses thereof, and the incidental expenses connected therewith, including the sums payable for rentals of leased lines, and, according to their lawful priorities, to the payment of the current interest and sinking-fund contributions, or other payments from time to time becoming due and payable from said Central Pacific Railroad Company, whether to the United States of America, or to bondholders or others, during the existence of this lease, and pay the balance of the income to the Central Pacific Company.

It is clear, therefore, that, if the railroad was added to or bettered, it was to be out of the income which the Central Pacific Company was entitled, and which would, if not so expended, be paid to it. It is true that the lease provides for the contingency of the payment of such expense by the Southern Pacific Company, but it also provides for its repayment, so that it is not, in any case, a deduction from its revenue. If it be said that the Reagan Case makes such expenses proper as operating expenses, the answer is, it was competent for the parties to stipulate otherwise; and now to hold it a charge on the Southern Pacific Company would be to restore the liability of the lease as it stood in 1888, and which was altered as far as omissions and explicit enumeration could alter it. Hence it follows that the item of \$111,786.71, for betterments and additions to the Central Pacific Company, should not be allowed as an expenditure of the Southern Pacific Company.

Under the lease of the California Pacific road, the Southern Pacific Company is required to "better the same at its own expense." The expenditure, therefore, was by it made, and in its report it was charged to itself. The effect is not altered by the fact that at the end of 50 years the company is to receive the then cash value of the additions and betterments made during the term of those which the report shows were made, and it would be hard guessing to say what traces of them would be left in fifty years.

The lease of the Northern Railway Company provides that additions and betterments are "a charge to the said lessor, and the settlement therefore shall be made annually." They, therefore, should not be allowed to the Southern Pacific Company.

The lease of the Northern California Railroad provides that the

Southern Pacific Company shall "add to and better the same during the term." This expenditure, therefore, is a proper charge of the Southern Pacific Company.

The lease of the Southern Pacific Coast Railroad Company is too long to quote. It is said by counsel for the respondents that it "is a virtual conveyance of the property for the term [55 years], without any recompense to the lessor other than the payment of its annual liabilities, and the guaranty of its bonded indebtedness." Granting this is so, it yet devolves upon the Southern Pacific Company to maintain the road, and the making of such improvements, as have already been described, were a proper expenditure by it, hence a proper item of charge to be made by it.

In the "Omnibus Lease," so called, in which the Southern Pacific Company (of California, Arizona, and New Mexico, respectively) lease to complainant, there is this provision:

"Third. The betterments and additions to said leased properties shall be made by the said Southern Pacific Company, and settlement thereof made annually at the same time that payment is made for the net profits, as herein provided; and each of said railroad companies shall be charged, respectively, with the amount of payments made for betterments and additions to the property owned by it."

This makes the betterments and improvements an expenditure of the several companies, not of the Southern Pacific Company, and therefore not to be allowed to it.

The remaining objection is that made to the rental of \$600,000, to be paid to the California Pacific road. There was a somewhat confusing concession made as to this item. Including that item, it was said that the net deficit on that road was \$54,905.65, shown by the report. But it was said that, to put the system on a basis of receipts and expenditures, it was improper to include the whole of it, but only the difference between the amount and certain fixed charges, amounting to \$347,868.50; that is, \$252,131.50. But it is not very clear why the fixed charges should be charged, and the rent not charged, or why the former should be deducted from the latter. As we have seen, and shall see, it is the expenditures of the Southern Pacific Company which we can only consider. Was the rent or were the fixed charges such an expenditure? By the terms of the lease, there was to be paid by the Southern Pacific Company to the California Pacific Company a rental of \$600,000 per annum, and it is provided that "it will, during said term, keep and maintain said property in good order, condition, and repair, and operate, add to, and better the same at its own expense, and will pay all taxes legally assessed against or levied thereon." The rent, therefore, is as much an annual expenditure as the taxes and betterments are, and why, then, should it not be allowed, or why should something be allowed out of it, or instead of it, which is not an expenditure to the Southern Pacific Company? The objection to allowing the rental is stated by one of the counsel to be that any rent could be charged or successive lettings be made with successive rentals, and all with the same propriety and legality be charged. Whether this would be done is improbable. That it could be

done legally would depend upon good faith, and the relation and proportion of the rent to the property. I see, therefore, no objection to this charge of \$600,000 rental. It is an annual expenditure of the Southern Pacific Company, to be annually reimbursed to it from the income of the road with other expenditures. The deficit on that road, therefore, can be regarded, if the other charges are correct, to be \$54,905.65.

The total amount to be deducted from the expenditures of the Southern Pacific Company, on account of betterments and improvements, is as follows:

Central Pacific Company.....	\$ 111,786 71
Northern Railway Company.....	21,727 35
Southern Pacific of California.....	228,756 68
Southern Pacific of Arizona.....	27,571 59
Southern Pacific of New Mexico.....	178,766 32

\$ 568,608 65

Adding to this the deficit on the Oregon & California road, to wit... 541,355 71

Makes a total of.....\$1,109,964 36

Deducting from this.....54,905 65

It leaves as a surplus to the system for 1894.....\$1,055,058 71

As to the year 1895, the bill alleges as follows:

"That for the first six months of the current year, to wit, from the 1st day of January to the 13th day of June thereof, which is the latest time to which your orator is able to bring down its statistics, the total receipts and expenditures of your orator in the operation of said Pacific System of railroads were as follows, viz.:

Receipts.

Gross earning from operations.....	\$14,727,319 96
Interest and other net income.....	64,166 87
Rentals from terminals and other property.....	44,638 94

\$14,836,125 77

Expenditures.

Operating expenses, renewal and improvements to equipment and roadways	\$10,738,982 95
Taxes	497,040 00
Rentals for railroads, terminals, bridges, and other property.....	453,141 41
Interest on bonds.....	4,209,804 47
Sinking-fund payments on mortgages of Central Pacific Railroad Company	113,333 33
Payments to United States for Central Pacific Railroad Company	300,000 00

\$16,312,302 16

—"Thereby leaving a deficiency between the receipts and expenditures of your orator, for said period, of \$1,476,176.39."

It is objected by respondents that, by this showing, 1895 cannot be judged, because the difference between receipts and expenditures for operating expenses is greater in the last six months of the year. The percentage of increase in each is given by the attorney general, and admitted by counsel for complainant to be 11 per cent. for receipts, and 3 per cent. for operating expenses. Assuming this increase, the first and last half of 1895 would compare as follows,

including the operating expenses, improvements, and betterments, and excluding fixed charges, such as interest, taxes, and the like:

Receipts from operations for the first half, as per bill.....	\$14,727,319	96
Operating expenses	10,738,982	95
Eleven per cent. increase of receipts from operations, second half of year	1,620,005	20
Three per cent. increase of expenses.....	322,169	49

These amounts, added to those of the bill, give us receipts and expenses for the last half of the year as follows:

Receipts	\$16,347,325	16
Expenses	11,061,152	44
The total receipts for the year from operations, then, would be....	31,074,645	12
Operating expenses	21,801,135	89

To earnings from operations must be added receipts from other sources. These are stated in the bill to be, for the first half of the year, as follows:

Interest and other net income.....	\$ 64,166	87
Rentals from terminals and other property.....	44,638	94

Total	\$108,805	81
Assuming that the same amounts would be received from the same sources, we would have, as the amount to be added to earnings....	\$217,611	62

To expenses must be added the expenditures for other purposes than operation. These are stated in the bill to be as follows:

Taxes	\$ 497,040	00
Rentals for railroads, terminals, bridges, and other property.....	453,141	41
Interest on bonds.....	4,209,804	47
Sinking-fund payments on mortgages of Central Pacific Railroad Company	113,333	33
Payments to United States for Central Pacific Railroad Company..	300,000	00

Total	\$5,573,319	21
Assuming that there must be a like expenditure for like purposes for the second half of the year, and the total expenditures would be	\$11,146,638	40

Making these additions, respectively, to earnings from operation and expense of operation, and the receipts and expenditures for 1895 would be as follows:

Receipts	\$31,294,256	74
Expenses	32,949,774	31

Making a deficit of \$ 1,655,517 57

In this computation there is allowed, as an expenditure, the improvements and betterments, and also, it may be assumed, a payment of interest on the bonded debt of the Oregon & California road. If these may be assumed to be the same as in 1894 (the betterments were probably less; the deficit, on account of the payment of interest, was probably more), the following deduction from expenditure should be made:

For improvements and betterments.....	\$ 568,608	65
Oregon & California deficit.....	541,355	71

Total	\$1,109,964	36
This would make the true deficit for 1895 on the Pacific System....	\$545,553	21

On the argument complainant's counsel claimed to be shown by the report, as per the following table:

	S. P. of Cal.	C. P. R. R.	Nor. Ry.
Land Dept. Ex.....	\$ 44,716 38		
Corporation Ex	29,523 34	\$ 43,263 83	
Taxes on land.....	13,186 57	17,510 98	
Back taxes	218,384 20	220,612 29	\$20,205 32
Totals	\$305,810 46	\$281,387 10	\$20,205 32
Less Mis. Receipts, etc. (p. 117).....		64,069 90	
(This is for whole road)		\$217,317 20	

Summary.

S. P. of Cal.....	\$305,810 46
C. P. R. R.....	217,317 20
Nor. Ry.....	20,205 32
Total	\$543,332 98

For 1895 they claimed back taxes payable under a late decision of the supreme court, as follows:

Central Pacific Railroad.....	\$198,161 18
Southern Pacific of California.....	166,904 81
	\$365,065 99

It is seriously disputable whether land office expenses or taxes on lands are a proper expenditure. If so, land department revenues should be a proper receipt; and, if they be appropriated to a particular purpose, it should only be the net revenues after the expenses of sale. Taxes on any year are, undoubtedly, a proper charge against that year, but it is very doubtful if the accumulation of many years can be charged against a particular one. However, it is not necessary now to decisively pass upon these points.

The bill alleges:

"That the earnings and expenses of said railroads entirely within the state of California, received and paid by complainant during the six months ending June 30, 1895, were as follows, to wit:

Receipts.

Gross earnings from operations.....	\$9,785,539 99
Interest and other net income.....	102,432 89
Rentals from terminals and other property.....	44,638 94
	\$9,932,611 82

Expenditures.

Operating expenses, renewals, and improvements to equipment and roadway	\$ 7,137,853 49
Taxes	334,572 68
Rentals for railroads, terminals, bridges, and other property.....	398,447 39
Interest on bonds.....	2,742,929 55
Sinking-fund payments on mortgage of C. P. R. R. Co.....	92,500 00
Payments to United States for C. P. R. R. Co.....	90,000 00
	\$10,796,303 11

—"Thereby leaving a deficiency between the receipts and expenditures of your orator, upon said lines, for said period of six months, ending June 30, 1895, of \$863,691.29."

If we make the same percentage of increase to ascertain the receipts and expenses of the last half of the year, as we did for the Pacific System, the result will be as follows:

Receipts.

Earnings from operations first half of year.....	\$ 9,785,539 99
Second half	10,861,409 39
From other sources.....	294,143 66
Total	\$20,941,093 04

Expenditures.

Operating expenses, renewals, and improvements to equipment and roadbed, first half of year.....	\$ 7,137,853 49
For second half of year.....	7,351,989 09
Other expenses	7,316,899 24
Total	\$21,806,741 82
Making a deficit of.....	\$865,648 78

From this, improvements and betterments must be deducted; and assuming these to be the same as on the California roads in 1894, but which are probably less, they amount as follows, omitting those on the Central Pacific Railway Company:

The S. P. R. R. Co. of California.....	\$228,756 68
Northern Railway Company.....	21,727 35
Total	\$250,484 03

The expenditure for betterments and improvements on the Central Pacific Railroad Company was \$111,786.71; but all of this cannot be assigned to California. The road is 1,359.05 miles long, of which 757.09 miles are in California; so, disregarding fractions of miles, the amount of the expenditure to be assigned to California is \$62,268.24, making the total amount to be deducted for betterments and improvements \$312,752.27, which makes the deficit for 1895, from the operation of the roads entirely in California, \$552,896.51. In this computation are not included land department expenses, taxes on land, back taxes, or taxes on franchises held legal by the supreme court.

From this showing it is perfectly evident that there should be no reduction of rates of the Southern Pacific Company, either regarding the Pacific System or the California roads, unless its business increase. Is there a prospect of that so near that the court will be justified in dissolving or withholding its injunction against the new rates? It is alleged in the bill that, when the rates in California were established by complainant, they "were no more than sufficient to enable your orator to operate said railroads as aforesaid, and so remained down to the commencement of the year 1894; that in said year an unusual depression in business occurred, and the freight and passengers offered to your orator for transportation over said railroads were so reduced in quantity and number that your orator was unable, from the income derived therefrom, at the rates aforesaid, to pay the charges, costs, and expenses necessary for the conduct of its business, and the security of its property, as here-

inbefore set forth; that said business depression has continued to the present time, and there is no indication that it will be relieved, or the volume of freight and passenger traffic be increased, during the present or the next ensuing year; and your orator is informed and believes, and therefore avers, that said business depression will not be relieved, or such freight and passenger traffic be increased, during the present or the next ensuing year." These allegations of the depression of business, and the possibilities of its continuance, were attempted to be supported or denied by the respective parties by affidavits, necessarily more or less speculative and conjectural; and the power of the court to take judicial notice of it, and make special applications of it, was asserted or denied. But there need be no conjecture, nor need the court resort to any but the ordinary methods of proof. The business of the complainant has certainly decreased, as is apparent from the evidence. How 1894 compared with 1893 I do not know. How 1894 compared with 1895 has been shown, and the difference is easily understood and accounted for. It could have no other cause but a depression in business, affecting the market and transportation of all articles.

The depression existed when the bill in this case was filed, to wit, October 14, 1895, and there has been nothing offered to show a change. I may not assume one, even from the sources of judicial notice, so definite as to time or amount as to determine a judicial view or action. But this is not seriously important. The regulation of the rates on classes of freight, other than grain, does not now embarrass our consideration. Before final action shall be determined or taken on them by the board of commissioners, before they shall be expressed in a schedule, this case can be tried. Before any considerable movement in grain it can be tried, and the conclusions from this preliminary showing be confirmed or refuted, and a final injunction be granted or denied. I cannot refrain from saying to that opportunity and time the parties to this suit should eagerly look and eagerly prepare. Great problems are awaiting solution, which will receive their solution, or commence to receive their solution, then, and by it. Then, and by it, will be shown whether that allegation of the complainant be true:

"That the rates now in force upon the several railroads operated by it, as aforesaid, have been fixed according to circumstances and conditions surrounding the traffic, and with a careful regard for the financial, commercial, and competitive conditions which enter into, affect, or control the making and relative adjustment of rates and classifications and commodities in the territory traversed by said railroads, and are equitable and fair to the patrons of said railroads, and in many cases are now fixed at the actual cost of transportation, by reason of competition with other carriers, by railroad and water." Or that other averment of respondents be true, that "affiant is informed and believes, and the history of the complainant corporation in this state, with which he is familiar, confirms him in such belief, and he therefore avers, that in many cases the rate of transportation is fixed at about the actual cost of such transportation, at points where it is the interest and object of complainant to crush out opposition, and destroy the property of competing common carriers; and that large expenditures of money have been made, which were unwarranted and uncalled for by the commercial conditions existing at the present time or in the near future; but that such expenditures were made, and large properties created, for the purpose of destroying competition, and destroying the property interests of

others who enter into competition as common carriers, and the discriminating rates are made in favor of persons and places which approximate the cost of transportation, with the view to serve the ends and objects of this complainant in the creation of a monopoly, and the losses entailed by such reduction of rates, and discrimination and creation of property are unjustly and unreasonably fixed upon charges of freights and rates in other portions of the state, that the revenue of this complainant corporation may be maintained without regard to the true interests of commerce, and the rights of the public, or the justness or reasonableness of the rates of charges for the transportation of freight within the state of California."

The view I have taken of the showing made by the complainant makes it unnecessary to consider that made by the United States. In the latter there are elements which are not in the former, and to give them proper attention would delay the decision too long. Besides, the right of the government to intervene was again challenged by respondents, and with such strength of objection (although supported with ability) as to justify a review of its allowance, but which I think is better postponed to a later stage of the case.

The order of the court; therefore, is that that part of the order staying the execution of the resolution of the board of railroad commissioners, reducing rates on grain 8 per cent., be continued until the further order of the court; that the balance of the restraining order be dissolved.

DEXTER, HORTON & CO. v. SAYWARD.

(Circuit Court, D. Washington, N. D. January 7, 1897.)

1. EXECUTION SALES—CONFIRMATION—VESSEL SOLD IN ADMIRALTY.

Upon objections to confirmation of a marshal's sale of real and personal property under execution, the defendant opposed confirmation of the sale of a vessel, on the ground that it had already been sold under admiralty process, and the court had no jurisdiction to issue process for its sale in the present suit, while the plaintiff denied that any confirmation of the sale of personal property was necessary, or that the court had jurisdiction to make it. The purchaser at the sale in admiralty was not a party to the proceedings. *Held*, that the court would make no order in respect to the sale of the vessel, but would leave the purchasers to defend such rights as they might have acquired.

2. UNITED STATES MARSHALS—FEES AND PERCENTAGES—EXECUTION SALES.

In the state of Washington, pursuant to section 3017 of the Code of the state, adopted by Rev. St. § 829, as interpreted by the state courts, a marshal who has sold property under execution to the plaintiff in the case is entitled, in addition to the fees for making the levy, etc., to percentages upon all moneys actually paid into his hands, and returned into court, but not on the full amount of the bid unless so paid, and, by the provision of the appropriation bill and Rev. St. § 837, to double fees and percentages.

Argued and submitted upon objections to confirmation of sale of personal property under execution, and upon a motion to retax the marshal's fees and costs, upon final process.

E. F. Blaine, for plaintiff.

S. M. Shipley, for defendant.

Richard Saxe Jones, for marshal.

HANFORD, District Judge. Upon an execution issued to satisfy the judgment in favor of Dexter, Horton & Co., a banking corpo-

ration, property of the defendant, both real and personal, previously held under writs of attachment, was sold by the marshal, for sums aggregating \$38,757.56, a large part of which was sold to the plaintiff, there being no other bidder. In due time, after the marshal's return, the defendant filed objections to confirmation of the sales, on several grounds; but upon the argument all objections were expressly waived, save one specific objection, to confirmation of the sale of the steam tug Favorite, which objection is upon the ground that said steamer was not at the time of the sale the property of the defendant, nor in the custody of the marshal, nor subject to sale under the writ. The facts are that previous to the removal of this cause into this court from the superior court of the state of Washington, in which it was commenced, the sheriff of Kitsap county, by virtue of a writ of attachment in this case, made a levy upon the steamer Favorite and other property; and, before the property held under attachment had been transferred to the custody of the marshal, a libel in rem against said steamer was filed in the United States district court for this district, and, by virtue of the process issued therein, the marshal took said steamer into his custody, and she was afterwards released upon stipulation, according to the practice in admiralty, of which proceedings the parties to this action and the sheriff had full knowledge. Thereafter other proceedings in rem were commenced, and prosecuted in the district court, against the steamer, and she was finally sold under a venditioni exponas, by which sale it is contended the purchaser obtained a clear title to the vessel, clear of all liens.

It is manifestly the purpose of the party making the objection to litigate in summary fashion the questions of title, although the purchaser at the sale under the ven. ex. has not been made a party to this action, nor come within the jurisdiction of this court, so as to be concluded by the judgment of this court, if it shall be adverse to him. The plaintiff, in answer to the objections, says that the vessel was sold as personal property, and immediately delivered into the possession of the purchaser, and that there is no law or rule of practice requiring or authorizing action by the court to confirm a sale of personal property by the marshal under final process. So, I have before me the defendant, on one hand, denying the jurisdiction of the court to issue process for the sale of this vessel; and, on the other hand, the plaintiff, denying the jurisdiction of the court to confirm or refuse confirmation of the sale which the marshal has made. Under these circumstances, it seems clear to me that the court is not called upon to express any opinion as to the validity of either one of the sales of the steamer made by the marshal, as no order made in this proceeding can be effective to settle the disputed questions, or prevent future litigation involving the same questions. Therefore, an order will be entered confirming the marshal's sale of real estate, and the purchasers will be left to defend such rights as they may have acquired to the personal property, without an order of confirmation.

Upon the motion to retax the marshal's fees and costs, the question is raised whether the marshal is entitled to a percentage upon

the whole amount of plaintiff's bid for the property, or only a percentage upon the amount of cash actually paid into his hands by purchasers at the sale, or whether the marshal is entitled to any percentage in cases where property is sold under final process to the judgment creditor. Section 829, Rev. St., allows to the marshal, besides mileage, on any final process,—for making the service, levying on property, advertising and disposing of the same by sale, set-off, or otherwise, according to law, receiving and paying over the money,—the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the states, respectively, in which the service is rendered. This, in effect, adopts the law of this state as the rule on the subject of compensation, to an officer executing final process upon a judgment in an action at law; so that the questions submitted must be decided in accordance with the laws of this state, except as changed or modified by other laws enacted by congress. Section 3017, 1 Hill's Ann. Code, allows the sheriff "percentage on all moneys actually made and paid to the sheriff on execution or order of sale, under \$1,000, 2 per centum. Percentage on all sums over \$1,000, 1 per centum."

In the case of *State v. Prince*, 9 Wash. 107, 37 Pac. 291, the supreme court of this state has definitely decided that under section 3017 a sheriff is not entitled to a commission upon the sale where the property is bid in by the plaintiff for the amount of his debt, and no money actually passes through the sheriff's hands. And in that case it was contended that, if percentage as above provided could not be charged, under section 3017, it could be by virtue of section 3027, provides that "each and every officer who shall be called on or required to perform services for which no fees or compensation are provided for in this chapter shall be allowed fees similar and equal to those allowed him for services of the same kind for which allowance is made herein"; and upon this point the opinion of the court is as follows:

"It is contended that it was intended to pay for 'crying the sale'; but, if such were the purpose, it is likely the legislature would have provided a specific sum, for that service is the same whether the property sells for one dollar or sixty thousand dollars. On the other hand, if it is to pay for the responsibility incurred in receiving and returning the money, it is an apt provision, requiring payment in proportion to the risk imposed. If it was so intended, section 3027 would not be applicable, for, the money not having been actually made and paid, no service was rendered to which it could apply. In any event, this section was only intended to operate where there is no provision relating to the subject, and fees are expressly provided for serving executions."

The above decision, declaring the law of this state, must be accepted without question in this court. It is in harmony with that decision, however, to hold that the marshal is entitled to a percentage on the amount of money which he received on account of the sale, and which he has returned into court, in addition to the other fees for making the levy, posting notices, etc., allowed by the Code. Under the provisions of the appropriation bill for the year in which the sale was made, the marshal for this district is allowed the same fees and compensation as the marshal for the districts of Oregon and Idaho; and by section 837, Rev. St., the marshal for

the district of Oregon is allowed to receive double the fees provided by section 829. The intent of this law is to fix the fees and compensation of the marshal at double what would otherwise be coming to him, according to section 829. He is therefore entitled to receive, for executing the final process in this case, mileage at the rate of 12 cents per mile; for making the levy, for copies of the notices, process, etc., necessary to complete service, double the fees allowed by the Code; and percentage on the amount of \$1,000 paid to him on account of the sale, and returned into court, at the rate of 4 per cent., and 2 per cent. on the money so paid in over and above the first \$1,000; and the allowance for keeper, as heretofore ordered.

LOZANO et al. v. PALATINE INS. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 478.

FIRE INSURANCE—STOCK OF GOODS—WARRANTIES AS TO KEEPING BOOKS, ETC.

Policies of insurance on a stock of goods consisted of a printed sheet containing the formal printed parts, and, attached thereto, a paper containing a description of the insured property, together with a "covenant and warranty" by the assured to keep, in a fireproof safe, or in some place not exposed to a fire which would destroy the building containing the goods, an inventory and account books containing a complete record of all business transacted. *Held*, that the covenant as to the keeping and method of preserving the inventory and books was a part of the policy, and constituted a warranty, the breach whereof prevented any recovery.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action at law by Lozano and others, constituting the firm of Lozano, Pendas & Co., against the Palatine Insurance Company, Limited, of Manchester, England, to recover upon two policies of fire insurance. The case was heard below upon demurrer to a plea in bar, and under a stipulation for final judgment on the decision thereof. The court overruled the demurrer, and entered judgment for defendant pursuant to the stipulation. Plaintiffs thereupon sued out this writ of error.

E. R. Gunby, S. M. Sparkman, M. G. Gibbons, and G. M. Sparkman, for plaintiffs in error.

A. W. Cockrell, A. W. Cockrell, Jr., and R. S. Cockrell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. This is a suit to recover on two fire insurance policies, copies of which were filed with the declaration. The defendant insurance company filed a plea as follows:

"Now comes the defendant, by its attorneys, and for plea to the declaration herein says: The only contracts or agreements between the plaintiffs and defendant are evidenced by the two instruments in writing called policies, filed with

the declaration. In and by said contracts under which the plaintiffs claim as aforesaid the plaintiff agreed that said contracts should become null and void in the event the plaintiffs should fail to comply with a certain warranty set forth therein, and that such failure should constitute a perpetual bar to any recovery by the plaintiffs thereunder, the same being in each policy in the words and figures as follows: 'The following covenant and warranty is hereby made a part of this policy: (1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days from such date, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and for credit, from date of inventory, as provided for in first section in this clause, and during the continuance of this policy. (3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night and at all times when the building mentioned in this policy is not actually opened for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.' And the plaintiffs, therein called the assured, did fail to comply with said warranty in the several particulars hereinafter set forth; that is to say, that such books and inventories as were kept by the plaintiffs were not kept as aforesaid, in this: that at night, about 4 o'clock a. m., when said building was not open for business, and when said building was destroyed by fire, said books were in said building, and not in any safe, and were destroyed by fire; and that the said plaintiffs wholly failed to produce any books for the inspection of this company, the defendant aforesaid. And this the defendant is ready to verify."

To this plea the plaintiffs demurred on the following ground:

"That the alleged warranty or covenant of warranty set up in the pleas of the defendant, as the same appears in the policies of insurance made a part of the pleadings in this cause, and referred to in the defendant's pleas, does not constitute a warranty, and the failure of the plaintiffs to comply with the said alleged warranty does not constitute a bar to recover on said policies."

After filing the demurrer, the parties stipulated as follows:

"It is stipulated and agreed by and between the parties hereto, by their respective attorneys of record hereunto fully authorized, for the purpose of expediting this cause, and having a final determination of the real point at issue, that this cause shall be submitted finally upon the simple question whether or not the alleged breach of the so-called 'iron-safe clause' as it appears in the original policy filed with the declaration in this cause, and which policy is by agreement made a part of the pleadings, and as set up in the pleas demurred to, prevents a recovery by the plaintiffs; that upon the determination of this issue by the circuit court final judgment be entered accordingly; that thereupon the losing side may take the cause by usual appellate process to the United States circuit court of appeals, where said issue as aforesaid, and not otherwise, shall be submitted for final determination by said appellate court, and the judgment entered there upon the said issue, and thereupon the losing side shall have reasonable opportunity in due course of practice to have said issue determined by the United States supreme court; that, in the event of reversal and throughout the history of this cause, this issue shall be and remain the issue, and its final determination shall finally settle this cause. In the event of final determination and settlement in favor of the plaintiffs, the judgment shall be for the plaintiffs in the sum total stated in the estimates contained in the so-called 'proofs of loss' submitted by the plaintiffs to the defendant, without interest at the rate of 8 per cent. per annum from the sixtieth day next after the same were submitted, together with their taxed costs. And in the event such final determination shall be for the defendant, the

judgment shall be, it go hence without delay, and recover of the plaintiffs its taxed costs."

The case having been submitted to the court below on the demurrer and the above stipulation, the court overruled the demurrer, and thereupon entered judgment in favor of the defendant.

The only error assigned in this court is that the court erred in overruling the plaintiffs' demurrer to the defendant's plea. The argument in this court has taken a very wide range, the principal points discussed being that the stipulation providing for the keeping and production of books was no part of the policy of insurance proper, and as attached to the policy it was not intended as a warranty. The original policies were produced for the court to see that the part containing the description of the property and the covenants with regard to keeping books was attached to the main sheet upon which the formal parts of the policy were printed. The policies sued upon and produced in court, although respectively made up on two pieces of paper attached together, really contained in each but one contract of insurance, all the parts of which were agreed upon and delivered at one time. Without the so-called "appended paper" containing the description of the property and the covenants as to keeping books, there would be, in fact, no policy of insurance on which a recovery could be had in a court of law.

There is no contention that the conditions with regard to keeping books and providing for their safety were complied with in any respect whatever, and the case-made shows the contrary. In *Dwight v. Insurance Co.*, 103 N. Y. 341, 346, 8 N. E. 654, 655, it is said:

"Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon, or which they may consider necessary and proper to protect their interests, and which, when made, must be construed and enforced like all other contracts according to the expressed understanding and intent of the parties making them. If an insurance policy, in plain and unambiguous language, makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it, or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties."

In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 14 Sup. Ct. 379, 381, Mr. Justice Jackson, for the court, says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other; and, when called upon to pay, in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the insured must show himself within those terms; and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured had violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms con-

ditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The judgment of the circuit court is affirmed.

KAISER et al. v. FIRST NAT. BANK OF BRANDON.

(Circuit Court of Appeals, Fifth Circuit. December 8, 1896.)

No. 509.

1. NEGOTIABLE NOTES—BONA FIDE HOLDERS—NOTICE.

The fact that a purchaser, for valuable consideration, of negotiable notes, from a member of the payee firm, who claims to be the owner thereof, knows that the latter is the president of a bank whose indorsement in blank appears on the notes, after the indorsement of the firm, is not sufficient to put the purchaser on inquiry, or charge him with notice that the notes belong to the bank.

2. SAME.

One who was president both of the A. Bank and the B. Bank received from the president of a third bank two notes, which the latter claimed to own individually, as collateral both for balances due from his bank to the A. Bank, and for debts due by him individually to the B. Bank. The notes were kept by the A. Bank until dishonored, and until its own balances were discharged, and were then sent to the B. Bank. *Held*, that the fact that the B. Bank received physical possession of the notes after dishonor was no evidence that it was not a bona fide holder for value.

In Error to the United States Circuit Court for the Southern District of Georgia, Eastern Division.

This suit was brought by the First National Bank of Brandon, Vt., against Kaiser & Bro., to recover the amount of two promissory notes, as follows:

"\$2,000.00.

Brunswick, Ga., May 11th, 1893.

"Ninety days after date, we promise to pay to the order of Lloyd & Adams two thousand dollars, at Brunswick State Bank, Brunswick, Ga. Value received.

"No. 4,397.

A. Kaiser & Bro.

"Due Aug. 12."

Indorsed on back:

"Lloyd & Adams.

"Brunswick State Bank, Brunswick, Ga.

"F. E. Cunningham, Cashier."

Indorsed across face:

"Noted and protested for nonpayment, Aug. 12th, 1893.

"M. P. King, Notary Public, Glynn Co., Ga."

"\$3,000.00.

Brunswick, Ga., May 11th, 1893.

"Four months after date, we promise to pay to the order of Lloyd & Adams three thousand dollars, at Brunswick State Bank, Brunswick, Ga. Value received.

"No. 4,396.

A. Kaiser & Bro.

"Due Sept. 14."

Indorsed on back:

"Lloyd & Adams.

"Brunswick State Bank, Brunswick, Ga.

"F. E. Cunningham, Cashier."

Indorsed across face:

"Noted and protested for nonpayment, Sept. 14th, 1893.

"W. B. Cook, Notary Public, Glynn County, Ga."

The defense interposed was that the notes were without consideration, being accommodation paper given by Kaiser & Bro. on behalf of the Brunswick State Bank on the fraudulent representations of the president of said bank, and denying that the First National Bank of Brandon obtained possession of the notes in the regular course of business, or was a bona fide holder of the same, for value, asserting that the said bank obtained the same after maturity, and after said notes were dishonored, and fully charged with notice that the said notes were fraudulently obtained.

On the trial, the uncontroverted evidence was as follows: On May 11, 1893, Charles B. Lloyd, the president of the Brunswick State Bank, by representations, subsequently ascertained to be false and fraudulent, as to the solvency of the Brunswick State Bank and of the firm of Lloyd & Adams, induced A. Kaiser & Bro. to make the notes sued on for the accommodation of the Brunswick State Bank. At that time, Kaiser & Bro. owed nothing to the Brunswick State Bank, nor did they owe Lloyd & Adams, the nominal payees of the note. Among other representations, Lloyd stated that the Brunswick State Bank and the firm of Lloyd & Adams were solvent, when, in fact, the said bank and the said firm were both insolvent. Having obtained the note from Kaiser & Bro., Lloyd indorsed the name of Lloyd & Adams thereon, and had the cashier of the Brunswick State Bank stamp the indorsement of said bank on said notes, and sign his name as cashier to attest the bank's indorsement, and then, in the latter part of May or early in June, 1893, took the notes to the Sprague National Bank of Brooklyn, N. Y., of which N. T. Sprague was president; the said Sprague being also at the time president of the First National Bank of Brandon, Vt. Mr. Sprague, president of the two banks aforesaid, testified, without contradiction, as to the negotiations then completed, as follows: "Mr. Lloyd, the president of the bank in Brunswick, brought them to the bank to get accommodations on the notes in return for favors from the Sprague Bank. * * * Mr. Lloyd said the bank was needing funds. I said: 'Mr. Lloyd, you are owing the First National Bank of Brandon, and I do not want to advance any more to you unless you give security.' His wife was present at the time, and he offered to secure me by two notes which he had, and said he owned, and that they were perfectly good. I looked it up, and found they were satisfactory. I said then: 'Mr. Lloyd, you know I am interested in one bank as much as the other,—president of the Sprague Bank, and president of the other; and I am going to have both debts secured, and whatever security you have must go, after the debts made here, to secure those of the bank there, and vice versa.' He agreed to it very readily and courteously. We agreed to it, and I rapped, and called the cashier: 'Mr. Brown, take from Mr. Lloyd those notes for the bank, and you may do so and so with them for his account until that is settled, and then they are for the Brandon Bank of Vermont, as collateral.' He said: 'Yes, sir.'" At the time of these negotiations in the parlor of the Sprague National Bank in Brooklyn, the Brunswick State Bank was then indebted to the Sprague National Bank, but owed the First National Bank of Brandon nothing. Lloyd owed the Sprague National Bank nothing, but was indebted about the sum of \$8,500 to the First National Bank of Brandon.

On June 2, 1893, Kaiser & Bro. sent a telegraphic dispatch to the Sprague National Bank, as follows:

"Do you hold our two notes, two and three thousand dollars, favor of Lloyd & Adams, as collateral only Brunswick Terminal Company; Liverpool exchange it is accommodation paper. Answer.

"[Signed]

A. Kaiser & Brother."

To that dispatch the Sprague National Bank, by its cashier, sent the following reply:

"Brooklyn, June 2, 1893.

"A. Kaiser & Brother, Brunswick, Ga.: Telegram received. We hold notes named collateral to any indebtedness to us of said bank.

"Sprague National Bank."

The two notes in the suit were held by the Sprague National Bank from the time they were received from Lloyd until they were forwarded for collection. After protest they were returned to the Sprague National Bank, and by its cashier handed over to Sprague, president of the First National Bank of Brandon.

On June 1, 1893, the Brunswick State Bank owed the Sprague National Bank \$7,744.81. On that day the accounts were balanced. Thereafter balances were struck on the following days, showing the following indebtedness: June 26, 1893, \$9,512.34. Subsequently, on the same day, a new balance was struck, and it then appeared that on pending account there was due them a credit of \$7,483.57. The last balance was made September 25, 1893, and on that balancing of accounts between the Brunswick State Bank and the Sprague National Bank there appeared to be due a credit to the Brunswick State Bank of \$184.10. Whatever indebtedness the Brunswick State Bank owed the Sprague National Bank arose through the payment of drafts of the Brunswick State Bank, drawn on the Sprague National Bank, and the charging back to that account the unpaid discounts and expenses. Charles B. Lloyd, president of the Brunswick State Bank, died June 26, 1893. It was admitted on the trial on the part of the plaintiff that Mr. P. M. Adams, of the late firm of Lloyd & Adams, is hopelessly insolvent, and wholly incapable of responding to any judgments which may be rendered on said notes; and the following is the testimony of F. E. Cunningham, cashier of the Brunswick State Bank, whose indorsement is on the notes sued on, to wit: That the Brunswick State Bank owed the First National Bank of Brandon nothing, and had no account with it; and that the Brunswick State Bank did not discount the notes sued on for Lloyd & Adams at all, but that Mr. Lloyd just carried them there, and had him put the Brunswick State Bank's indorsement on them, to be used for the Brunswick State Bank. It was also admitted by plaintiff that the Brunswick State Bank, on the day that these notes were made, was insolvent, and had been hopelessly insolvent 60 days before that time; and that Charles B. Lloyd had absolute control of the bank, acted as board of directors, president, cashier; and that he negotiated and transacted the entire business of the Brunswick State Bank; and that these notes sued on were handed to Mr. Sprague by Mr. Lloyd, in the parlor of the Sprague Bank, in Brooklyn, N. Y. The defendants admitted on the trial that Kaiser & Bro. knew that Charles B. Lloyd was president of the Brunswick State Bank, and also knew that he owned a majority of the stock of the Brunswick State Bank.

T. P. Ravenel, for plaintiffs in error.

Samuel B. Adams and A. J. Crovatt, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). Upon the foregoing facts, established by the evidence, the trial judge directed a verdict for the First National Bank of Brandon, upon which Kaiser & Bro. sued on this writ of error. Although there are numerous argumentative assignments of error, the contention is made in this court that the court erred in directing a verdict for the plaintiff below—First, because the evidence involved the right of the holders of notes which had been procured from the makers by fraud to recover against the makers, there being a conflict in the testimony as to the bona fides of the plaintiff's title, and this question should have been submitted to the jury; second, because there was proof not rebutted by the plaintiff that the notes were procured from the defendants by fraud, and there was strong proof that the plaintiff received them after dishonor.

The evidence was uncontradicted to the effect that the First National Bank of Brandon acquired an interest as pledgee in the notes in controversy from the holder, Charles B. Lloyd, who represented himself as the owner, before maturity, for a valuable consideration, and without notice, except such notice as was given by the fact that the notes presented bore an indorsement in blank by the

Brunswick State Bank, coupled with the knowledge that Lloyd, who presented the notes of which he claimed to be the owner, was the president of the Brunswick State Bank. Counsel admits the law to be that nothing short of willful ignorance, tantamount to fraud in procurement, will defeat the rights of a bona fide holder of negotiable instruments taken before dishonor, and without notice of the defect of title in the party pledging, but contends in this case that because the paper had been indorsed by the Brunswick State Bank, and was originally offered to the Sprague National Bank for the purpose of increasing its balance there, it was willful ignorance on the part of the president of the First National Bank of Brandon not to know that the notes did not belong to Charles B. Lloyd individually, but to the Brunswick State Bank.

In *Bank of Edgefield v. Farmers' Co-operative Manuf'g Co.*, 2 U. S. App. 282, 295, 2 C. C. A. 637, 646, and 52 Fed. 98, 103, it was held by this court:

"It has been settled in the courts of the United States since the leading case of *Goodman v. Simonds*, 20 How. 343, that one who acquires mercantile paper before maturity from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though, by ordinary diligence, he could have ascertained those facts. *Swift v. Smith*, 102 U. S. 442; *King v. Doane*, 139 U. S. 166, 173, 11 Sup. Ct. 465."

Taking the law to be as thus declared and admitted by plaintiffs in error, it is clear that the evidence, given its fullest force, does not show a case where the First National Bank of Brandon was charged with any such notice of outstanding rights and equities as put it upon further inquiry, under penalty of being charged with willful ignorance of such outstanding rights and equities.

The plaintiffs in error further contend that there was strong proof that the plaintiff, the First National Bank of Brandon, received the notes after dishonor. The evidence in this respect is that after the notes were delivered to the Sprague National Bank, which bank was the redeeming agent of the First National Bank of Brandon, they remained in the physical custody of the Sprague Bank until near maturity, when they were forwarded to other agents for collection. After the notes were protested, they were turned over to the First National Bank of Brandon. The case shows that the First National Bank of Brandon acquired conjointly with the Sprague National Bank the right and title to these notes as collateral, and that, in the pledge resulting, the Sprague National Bank was the depository. The mere fact that the physical possession of the notes remained in the hands of the Sprague National Bank until after the indebtedness of the Brunswick State Bank and the Sprague Bank was settled, and even after, would raise no presumption inimical to the rights of the First National Bank of Brandon as pledgee, if its original title as such pledgee was good. As we understand the undisputed evidence in the case, while it may not be denied that there were some circumstances attending the pledge of the notes in suit, which, if more fully explained, would have re-

lieved the case of all doubt, yet we are of opinion that the case as made permitted only one verdict responsive to and in accordance with the evidence as submitted, and that verdict was the one directed by the court, in favor of the First National Bank of Brandon. Necessarily, the judgment of the circuit court is affirmed.

TRAVELERS' INS. CO. v. SELDEN.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 179.

ACCIDENT INSURANCE—"BODILY INFIRMITIES"—APOPLEXY.

The T. Ins. Co. issued an accident policy to one S., insuring him against death resulting through external, violent, and accidental means, but not covering death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary overexertion. S., a man 53 years of age, while engaged in work which required stooping, and shortly after running rapidly up a hillside, to get an article needed in his work, was attacked with pains in his head, and shortly after died. On the trial of an action on the policy, two physicians, called by the plaintiff, testified that S. died of apoplexy, which is a bodily infirmity or disease, and that there was nothing in the circumstances to have caused death if there had been no bodily infirmity or predisposition to apoplexy. *Held*, that it was error to refuse to direct a verdict for the defendant.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

J. Alston Cabell and Patrick H. C. Cabell, for plaintiff in error.
Barton H. Wise and John S. Wise, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. The policy of insurance on which this action is based is on its face called an "accident policy," and contains the covenant of the Travelers' Insurance Company to pay a stipulated indemnity to Richard C. Selden for loss of time "resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business." It also contained a covenant to pay \$5,000 to his wife or legal representative if death results from such injuries alone, with a proviso that the company should not be liable in case of accident or death resulting, wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary overexertion, nor for injuries of which there was no visible mark on the body. The policy was issued on the 22d of March, 1895. The insured died on the 23d of April, 1895, and this is an action of assumpsit on the policy, resulting in a verdict for the plaintiff for \$5,000, with interest, and the case is before us on a writ of error.

Various exceptions were taken to the charge of the presiding judge, and to his refusals to charge as requested, but the conclusion reached by us renders it unnecessary to consider them in detail.

The testimony shows that, on the morning of April 19th, the deceased, a farmer, residing on his plantation, went to his barnyard for the purpose of castrating a colt; that he was apparently in his usual health, which is described as that of a vigorous, hardy man, somewhat fleshy, about 53 years of age, and accustomed to lead an active life; that upon his arrival at the barn the colt was seized by some of the men employed on the farm, and thrown down; that Selden thereupon tied him, and proceeded to castrate him; and that, after removing one of the seeds, it was found that the iron used in burning the part was too cold for the purpose, whereupon Selden got up from his stooping posture, ran rapidly up a little hillside, to a fire, where he heated the iron, and ran back to where the colt was lying, when he stooped over, burned the place, and applied the grease, and proceeded to remove the other seed. Before the operation was entirely finished, he showed signs of distress, threw his hand up over his eye, and exclaimed, "I have a fearful pain over my eye," and, as he was about falling over on the colt, he was caught by the attendants, and carried to the barn steps, having lost the use of one of his legs and becoming very sick. After reaching the barn, he put his hand to his head, and said to one of the men, "John, this is the last of me." He was soon removed to his house in a buggy, put to bed, and a physician was summoned. Two physicians attended him until death, on the 23d, and the certificates of both state that he died of apoplexy. The testimony shows that, in going from the colt to the fire, deceased passed over a rough, rocky piece of ground, on which corncocks were scattered in places; but there is no proof that he stumbled or fell, either going or returning. One of the attending physicians was examined at the trial, and testified that the deceased died from a well-defined case of apoplexy, which he defined to be the rupture of a blood vessel on the brain, and that the same was regarded by medical writers and the profession as a bodily infirmity or disease. He further gave it as his opinion, after hearing the witnesses detail the occurrences on the 19th of April, that there was not enough in those circumstances to have caused death, had there not been some bodily infirmity, or the existence of disease, or predisposition to apoplexy. The certificate of the other attending physician, who was the family physician of the deceased, was also offered in evidence by the plaintiff. It is to the effect that he was called in on the 19th of April, and found Mr. Selden critically ill; that he called another physician in to consultation (the same as was examined at the trial); that he was with him day and night until his death; that he died of apoplexy; that there was no history of injury, and no signs of any; and that no post mortem was held. The defendant company offered no testimony, and upon the conclusion of the plaintiff's case duly moved the court to direct a verdict. This motion, which is in the nature of a demurrer to the evidence, is in

accordance with the practice in this jurisdiction, and it is now to be considered whether, under the circumstances of this case, it should have been granted.

"It is the settled law of this court," says Mr. Justice Gray, in *Randall v. Railroad Co.*, 109 U. S. 482, 3 Sup. Ct. 324, "that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." Other cases of equally high authority declare that it is not only the right, but the duty, of the court, if the evidence is such as not to warrant a verdict for a party, to direct the jury accordingly, and that in every case, before the evidence is left to the jury, there is a preliminary question to be decided by the judge whether there is any evidence produced by the party upon whom the onus of proof is imposed on which the jury can properly proceed to find a verdict for the party introducing it. The legal sufficiency of the evidence to support the verdict presents a question of law, the decision of which is not a matter of discretion, but of duty, and is as much the subject of exception and review as any other ruling of the court in the course of the trial. In all cases where there is conflict of testimony, or question as to the credibility of witnesses and preponderance of proof, and in actions of negligence, where the line which separates questions of law from questions of fact is so close that it cannot be accurately delimited, and minds equally intelligent and equally impartial might draw different conclusions, the judgment of 12 impartial men, of the average of the community, applying their separate experiences of life to the solution of such doubts as may arise, is more likely to be wise and safe than the conclusion of any single judge, and the practice is not to be encouraged which would substitute the conclusions of one mind for that average judgment which it is the object of our system of jurisprudence to obtain in all proper cases. But where there is a simple question of contract or its breach, and the facts are undisputed, it must be ruled as a question of law; for the rights of parties in such cases must be decided according to the law of the land as expounded by the courts, and cannot be left to the arbitrary determination of a jury, which may adopt theories without proof, substitute possibilities for facts, and conjectures for evidence. Judges are no more free from the weaknesses of human nature than are jurors, but where responsibility is diffused the obligation of duty seems to rest more lightly upon the individual than where it is concentrated, and the pleadings of sympathy or the promptings of prejudice or passion are oftentimes likely to produce that result on a jury which it is the special and highest duty of the judge to prevent.

The case under consideration was simply one of contract. Had the policy of insurance been an ordinary life policy, the right to recovery was plain; but it is the duty of courts to enforce contracts as made, and not to make, or allow to be made, new contracts between the parties. The contract was what is known as, and what

on its face and in its terms it purported to be, an "accident policy," and the defendant corporation covenanted to pay the sum of money named if death resulted from bodily injuries through "external, violent, and accidental means alone, independently of all other causes," and it was expressly stipulated that it should "not cover injuries of which there is no visible mark, nor death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity," or from "voluntary overexertion." In an etymological sense anything that happens may be said to be an "accident," but, in the sense in which the word is used in this policy, as shown by the context, and as expounded in similar cases, it is to be taken as meaning "an event which proceeds from an unknown cause, or as an unusual effect of a known cause, and therefore unexpected,"—something casual and fortuitous. To entitle the plaintiff below to recover, the burden of proof was upon her, not only to show that the deceased came to his death through "external, violent, and accidental means alone," but also to show that the death was not due, in whole or in part, directly or indirectly, to disease or bodily infirmity. There was not only no proof of any accident, but conclusive evidence, from the only medical witnesses examined, that death was due to disease. If, during the operation upon the colt, while running to the fire for the hot iron, the deceased had stumbled or fell, that might have been considered an accident; but there was nothing of the kind. At most, it might be contended that the exertions and activities of that morning tended to bring into activity a then existing but dormant disorder; but "voluntary overexertion," and disease and bodily infirmity, are in express words not insured against.

There was not only no evidence that the death was caused by external, violent, and accidental means, but conclusive evidence to the contrary. The only medical testimony as to the cause of death was that of Dr. Michaux, who swore that the deceased died of apoplexy, and that there was nothing in the circumstances detailed sufficient to cause death without a previously existing disease. He was a witness put upon the stand by the plaintiff, and there was no evidence to contradict him. Where the weight of credible testimony proves the existence of a fact, it must be accepted as a fact. Where an event occurs which can be readily explained as an operation of nature, working through natural, usual, and ordinary laws, that cannot be called an accident; nor can conjectures be allowed to displace proofs. Most modern writers apply the term "apoplexy" to cerebral hemorrhages. It is a well-defined disease,—as well understood as pneumonia. It is a disease to which men of the age of the deceased are most peculiarly subject. Hippocrates states that it is of most frequent occurrence between the ages of 40 and 60, and all medical experience confirms the truth of this observation, and the reason is obvious, for the blood vessels of the brain are liable to undergo degenerative changes after middle life. The texture becoming fragile, their function in carrying on the healthy nutrition of the brain is impaired, and, being liable to give way, the blood escapes into the brain. If the hemorrhage is slight in amount, and in that part of the brain where its presence

gives rise to little disturbance, the effused blood undergoes gradual absorption, and a certain measure of recovery takes place, while, if a large vessel is ruptured, and blood extravasated in or around the important structures at the base of the brain, death is likely to follow within a short period. Severe exertion of mind or body, much stooping, anything, in fact, which tends, directly or indirectly, to increase the tension within the cerebral blood vessels, may bring on an attack. When a man with delicate lungs exposes his breast unprotected to the wintry blast, you could as well attribute the pneumonia and death which may ensue to accident, as you could the stroke of apoplexy which follows when a man over 50 years of age engages in an operation which demands violent exertion and much stooping. In either case a man in the full vigor of youth and manhood might pass the ordeal unscathed; in both, death is due, directly or indirectly, to bodily infirmity.

Not only is there an entire absence of proof of any accident likely or sufficient to cause death in this case, but positive proof that death was due to disease, and no conflicting testimony whatever. What question, therefore, was there which could properly go to the jury? In *Barry's Case*, 131 U. S. 100, 9 Sup. Ct. 755, relied upon by the defendant in error, there was proof that the deceased jumped from a platform four or five feet high, alighting so heavily as to attract the attention of his companions, and was hurt; that he became ill on his way home, and much conflicting testimony as to the cause of his death, as to whether it resulted from duodenitis, or a stricture of the duodenum, caused by the jump. There being a conflict of testimony as to the cause of death, such a question was properly submitted to the jury. In *Burrough's Case*, 69 Pa. St. 51, there was conflicting testimony as to whether deceased received a blow upon the abdomen from a pitchfork, causing internal injuries, or whether death was due to a strain. The court held that an accidental strain, resulting in death, was an accidental injury, within the meaning of the policy; that being an unexpected event, happening by chance, and not occurring according to the usual course of things. In *Martin's Case*, 1 Fost. & F. 505, it was held that an injury to the spine, caused by the lifting of a heavy burden, was within the meaning of the policy, which was against any bodily injury occasioned by any external or material cause operating on the person of the insured.

It is unnecessary to cite the numerous and familiar cases which declare it to be the duty of the court to direct a verdict when the evidence is undisputed, or is of such conclusive character that the court would, in the exercise of a sound judicial discretion, be compelled to set aside a verdict rendered in opposition to it. In *Improvement Co. v. Munson*, 14 Wall. 448, Mr. Justice Clifford says:

"Formerly it was held that if there was what is called a 'scintilla' of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon which the onus of proof is imposed."

in "Such is the constant practice," says Mr. Justice Swayne, in *Bowditch v. Boston*, 101 U. S. 16, because "it gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." The court cannot allow the jury to assume the truth of any material fact without some evidence legally sufficient to establish it, and the jury cannot legally infer the existence of a material fact unless there is some proof of it. "The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings." *Railroad Co. v. Woodson*, 134 U. S. 622, 10 Sup. Ct. 630. It therefore follows that, when the facts and circumstances are admitted and undisputed, it becomes a question of law for the court to decide whether they support the averments of the pleadings, and it is error to leave a question of law to the arbitrary determination of a jury, for everybody knows that a case of this kind can have but one result if left to a jury, moved, as it must be, by the natural and creditable instincts of human nature, to sympathize with the afflicted. No case can be conceived which more strongly invokes the obligation to duty imposed upon the courts as set forth in the oft-quoted language of Mr. Justice Miller, in *Pleasants v. Fant*, 22 Wall. 116:

"It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial."

That the contract between the parties in this case, if decided by the rules of law, and not determined by the sympathies of the jury, would have had another result, finds apt illustration in the case cited in the brief, *Mary M. Selden v. American etc., Insurance Co.*, where Mr. Commissioner Guy, in a carefully considered report, which was confirmed by the circuit court of the city of Richmond, reaches the conclusion that there was no liability upon a similar policy.

The judgment of the court below is reversed.

UNITED STATES v. HARRIS et al.

(District Court, E. D. Pennsylvania. January 29, 1897.)

CARRIERS—TRANSPORTATION OF LIVE STOCK—RAILROAD RECEIVERS.

Rev. St. § 4388, imposing a penalty for violation of the statute relating to the transportation of live stock upon "any company, owner, or custodian of such animals," does not apply to receivers of a railroad appointed by a court to control and manage the road.

This was an action by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company, to recover a penalty

for the alleged violation of Rev. St. § 4388, relating to the transportation of live stock. The case was heard on a rule for judgment on a point reserved.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.

John G. Lamb, for defendants.

BUTLER, District Judge. The defendants are sued under section 4388 of the Revised Statutes, charged with willful disregard of the law relating to the transportation of live stock. The section provides that "any company, owner or custodian of such animals who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars." The construction of the statute, and the proceeding under it are governed by the rules of the criminal law, as fully as if the proceeding was by indictment. The exclusive purpose of the section is to inflict punishment. Those named as liable to such punishment are the railroad company and the owners and custodians of the animals. The defendants here sued are neither. What reason therefore is there for supposing that the suit can be maintained? The language must receive a strict construction, confined to its obvious import. *U. S. v. Hartwell*, 6 Wall. 395; *U. S. v. Wiltberger*, 5 Wheat. 76; *Grooms v. Hannon*, 59 Ala. 510; *Com. v. Wells*, 110 Pa. St. 463 [1 Atl. 310]. No straining, however desperate, would be adequate to make the terms embrace the defendants. They are simply the court's officers, appointed to execute its orders. The property is in custody of the court and is controlled and managed by it, through these officers. It would be immaterial to say that in this view no one can be punished under the section during such custody, if it were true. It would not be true, however, for the owners, as well as those in direct charge of the stock, may be so punished during such custody. If others also should be punished congress should provide for it. The instances cited by the prosecution in which courts have enforced the interstate commerce law, and other statutory provisions relating to the management of railroads and their property, generally, while in custody of the law, are equally immaterial. Such cases bear no relation to this. Of course courts will enforce observance of these provisions in their management of the property and business, when attention is called to the subject. The question whether a criminal proceeding may be prosecuted to punish their officers under the section in question, is a totally different one. If it be said the intention is not to punish these officers, then who is intended to be punished? Certainly not the company and stockholders, from whose control the road was taken, and who are not sued in consequence. Surely it is not intended to punish creditors, who had no possible connection with the matter complained of. The courts permit suits to be brought against such officers for debts, or other liabilities incurred, as a means merely of ascertaining the amount due; but

judgments recovered even in such cases can only be enforced by consent and direction of the court.

The defendants' rule for judgment notwithstanding the verdict is made absolute.

HARRISBURG TRUST CO. v. SHUFELDT.

(Circuit Court, D. Washington, N. D. January 23, 1897.)

ACTION ON NOTE—DEMAND OF PAYMENT.

The commencement of an action on a note payable on demand is itself a demand of payment, and it is unnecessary to allege a request for payment before the commencement of the action.

Strudwick & Peters, for plaintiff.

Hastings & Steadman, for defendant.

HANFORD, District Judge. This is an action to recover a balance due after deducting partial payments upon a negotiable promissory note, made payable on demand. The defendant has demurred to the complaint, his contention being that the same is insufficient, for failure to allege a demand prior to the commencement of the action. There is a rule of long standing, and supported by the weight of authority in this country, that the commencement of an action is itself a demand, and that failure to request payment, prior to the commencement of the action, affords no ground of defense. *Bank v. Fox*, Fed. Cas. No. 2,683; 5 Am. & Eng. Enc. Law, 528z⁴⁰. It is insisted, however, that the courts and the text-books in this country have fallen into error by following early decisions, which were controlled by peculiar facts, and which are insufficient of themselves to establish a general rule upon the subject. It is unwise to depart from business customs and practices which have been sanctioned by repeated decisions of courts, and acquiesced in for a considerable time, and which may fairly be supposed to have been contemplated by the parties at the time of making their contract. This contract must be construed as one having been made subject to the rule above stated, and the maker of the note is, by the terms of his contract, liable without any demand, prior to the commencement of an action. Demurrer overruled.

CITY OF JACKSONVILLE v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 529.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—PERSONAL INJURIES.

A municipal corporation is liable in damages to parties injured through its negligence in failing to keep its streets in proper repair, though no special statute authorizes an action for such cause.

In Error to the Circuit Court of the United States for the Southern District of Florida.

Suit by Kate Smith, defendant in error, against the city of Jacksonville, plaintiff in error, to recover damages for personal injuries, arising from nonobservance of duty on the part of the city in reference to keeping one of its streets in proper repair and safe condition. The cause of action is set forth in the declaration as follows: "For that whereas defendant, before and on the 17th day of May, A. D. 1894, was possessed and had control of a certain public street, called 'Main Street,' in the said city, in the county aforesaid, and ought to have kept same in good and safe repair and condition, yet the defendant, well knowing the matters hereinafter mentioned, and not regarding its duty in that behalf, while it was so possessed, and had control of the said street, to wit, on the 17th day of May, A. D. 1894, aforesaid, then knowingly, wrongfully, and negligently suffered the same to be and remain in bad and unsafe repair and condition; knowingly, wrongfully, and negligently suffered divers planks and pieces of plank to be and remain broken and loose upon the crossing of the said Main street, the defendant having full notice and knowledge thereof, by means whereof the plaintiff, who was then and there crossing the said street, then and there, necessarily, unavoidably, and without fault or negligence of hers, tripped and stumbled upon and against one of the said planks or pieces of plank lying upon the said street, and was thereby thrown, and fell to the ground; and the plaintiff was then and there rendered unconscious by the said fall, and received serious internal injuries, and she became sick, lame, and disordered, and so remained for a long time, to wit, from thence hitherto, and still so remains, during all which time she suffered, and now suffers, great pain, and was and is hindered from transacting her business affairs, and also, by means of the premises, was obliged to, and did, lay out divers sums of money, amounting to \$200, in and about endeavoring to be healed of the said wounds, sickness, and disorder, to the damage of the plaintiff of \$10,000, and therefore she brings this suit." To the declaration the plaintiff in error interposed a plea of not guilty, and filed a motion, accompanied by an affidavit, to dismiss the suit for want of jurisdiction, on the ground that the plaintiff and defendant were citizens of the same state. The motion to dismiss was overruled by the court. Several special instructions were asked by counsel for the city, which, in effect, requested the court to direct a verdict for the defendant, on the ground that, in the absence of statutory provisions authorizing suit, an action for damages will not lie in favor of an individual against a municipal corporation for injuries caused by the negligence of the corporation in permitting its streets to remain in a defective and unsafe condition. These instructions were refused, and the following statement appears in the record, as part of a bill of exceptions, in reference to the general charge of the court: "And the said judge, the said parties having concluded and submitted their testimony and said several matters aforesaid, and after his said refusal to charge as above shown, did then and there give his opinion, and deliver his charge to the jury, touching the legal duty of the said defendant to keep the streets and sidewalks of said city in proper repair and condition, and free from obstructions in respect of the rights of the public in passing over the same, and also as touching the doctrine of contributory negligence, and each and every of all the matters involved in the issues in said case, instructing the jury in the law therein satisfactorily to the parties to said cause, to which said charge, given orally, there was no objection or exception." Upon the issues joined, the cause was submitted to a jury; and, a verdict being returned in favor of the plaintiff below, judgment was duly entered thereon.

The charter of plaintiff in error, among other powers not necessary to enumerate, confers upon the city the following: Section 2, art. 1: "Said corporation shall have perpetual succession, shall sue and be sued, plead and be impleaded, may purchase, lease, receive and hold property, real and personal, within said city; and may sell, lease or otherwise dispose of the same for the benefit of the city; and may purchase, lease, receive and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead; for the erection of water works; for the establishment of poor houses, pest houses, houses of detention and correction; for public parks and promenades, and for any other public purpose that the mayor and city council may deem necessary or proper; and may sell, lease or otherwise dispose of such property for the benefit of the city to the same extent as natural persons may. Said city shall have and use a common seal, and change it at pleasure." Section 4, art. 3: "The mayor and city council shall, within the limitations of this act, have power by ordinance to levy

and collect taxes upon all property and privileges taxable by law for state purposes; to appropriate money and provide for the payment of the debts and expenses of the city, and also for the debts of the municipal corporation of which said city is the successor; * * * to make appropriation to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean and keep in repair streets, alleys and sidewalks, and to erect, establish and keep in repair bridges, culverts, sewers and gutters; and to make appropriations for lighting the streets and public buildings, and for the erection of all buildings necessary for the use of the city; * * * to fix from time to time the number and boundaries of the city wards; to pass all ordinances necessary for the health, convenience and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation; to impose penalties upon the owners, occupants or agents of any house, walk or sidewalk or other structure, which may be considered dangerous or detrimental to the citizens, unless, after due notice to be fixed by ordinance, the same be removed or repaired; * * * regulate, provide for and compel the construction and repair of sidewalks and foot pavements; * * * to regulate, require and provide for the construction or repair of streets and paving the same; * * * to grant the right of way through the streets, avenues and squares of said city for the purpose of street, or other railroads; to take and appropriate grounds for widening streets or parts thereof, or for laying out new streets, avenues, squares, parks or promenades, when the public convenience may require it." Laws 1887, c. 3775.

Geo. U. Walker and Porcher L'Engle, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

Error is prosecuted in this case to reverse the judgment rendered by the circuit court adjudging the liability of the city of Jacksonville to respond in damages to the defendant in error. The three specifications of error relied upon by plaintiff in error, in the brief of counsel, are the following: The court erred in refusing to give in charge to the jury the special instructions requested; in refusing to vacate the verdict because the evidence proved contributory negligence on the part of the defendant in error; and in refusing to set aside the verdict because excessive.

Under the first specification, counsel for plaintiff in error states, in the following language, the real question for consideration.

"The fundamental proposition of the defense is that upon an admission of all the facts, and confessing that every allegation in the declaration was true, and proved to the court and jury, yet the city of Jacksonville, being a municipal corporation, vested by statute with functions of a public nature, to be exercised for the public benefit, is not liable in an action of tort for damages at the hands of an individual, unless such private action is expressly authorized by statute."

In view of the statement thus made of the question for decision, it is unnecessary to go into a recapitulation of the testimony developed on the trial. It is sufficient to say the evidence discloses that the defendant in error was injured from the effects of a fall she received in attempting to cross one of the streets of the city of Jacksonville, and, further, that, at the time of the injury, the street was, and had been for some days previous, in a defective condition. One of the witnesses thus refers to the condition of the street and the occurrence of the accident:

"My recollection is it was in a pretty bad condition. The street railway had been raised to the grade of the street, and was some four or five inches above the level of the street. There were several boards lying longitudinally with the railway. I think they were there from the block pavement being taken up. Some of them were turned up, and the street was in a very bad condition. I frequently noticed people had difficulty in crossing at that place, and on this occasion, when I saw the lady fall, I naturally thought she had tripped up on one of the boards, although I didn't see her trip. She struck the rail."

The question of law raised by the assignment has had the consideration of the supreme court of Florida, and in an elaborate and carefully prepared opinion, in a case in which the plaintiff in error was a party, Mr. Justice Van Valkenburgh, speaking for a unanimous court, observes:

"We think the true doctrine is that a municipal corporation is liable in damages to parties receiving special injuries by reason of its nonobservance of duty in keeping its streets, alleys, etc., in good repair, although the work of such repairs is let out by contract to another person." *City of Jacksonville v. Drew*, 19 Fla. 116.

The *Drew Case* reiterates the principle announced by the court in the earlier case of *City of Tallahassee v. Fortune*, 3 Fla. 19. The essential facts of the two cases above referred to are substantially similar to those in the case at bar, and the same legal principle applies here as was enforced by the supreme court in those cases. See, also, the more recent case of *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368.

The rule established by the supreme court of Florida is in accord with the doctrine announced by the supreme court of the United States in *Barnes v. District of Columbia*, 91 U. S. 540, and *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012.

In the case of *Barnes*, 91 U. S., at page 551, Mr. Justice Hunt, referring to a decision of the supreme court of Michigan, says:

"The authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them."

In *Barnes v. District of Columbia*, and *City of Galveston v. Posnainsky*, 62 Tex. 129, 130, appears a long list of authorities sustaining the rule held by the supreme court of Florida.

Counsel for plaintiff in error, however, refers to the case of *Forbes v. Board of Health*, 28 Fla. 26, 9 South. 862, as maintaining a contrary doctrine. The *Forbes Case* is clearly distinguishable from this case and those previously decided by the supreme court of Florida. The dissimilarity was evidently thought to be so apparent that no reference is made by Mr. Justice Mabry, in his opinion, to the earlier cases. "We take it to be a sound principle," says the supreme court, "that no proposition of law can be said to be overruled by a court which was not in the mind of the court when the decision was rendered." *Woodruff v. Parham*, 8 Wall. 138.

The remaining assignments relate to the action of the circuit court in refusing to grant a new trial. Whether the court erred in overruling the motion for a new trial is a question which will not be inquired into here, as it was a matter in the discretion of the court below, and is not subject to review in this court. *Railway Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270; *Zimpelman v. Hipwell*,

4 C. C. A. 609, 54 Fed. 848; Mining Co. v. Fullerton, 7 C. C. A. 340, 58 Fed. 521; Alexander v. U. S., 6 C. C. A. 602, 57 Fed. 828.

There being no error in the judgment of the circuit court, it is accordingly affirmed.

In re FORSYTH.

(District Court, N. D. California. January 13, 1897.)

No. 11,302.

1. MANDAMUS — JURISDICTION OF FEDERAL COURTS — CONTROL OF CLERK — FUND IN COURT.

The United States district court entered a decree, upon a libel in admiralty, directing the clerk of that court to pay to a receiver of the property of the claimant of the libeled vessel, appointed by a court of another state, the surplus proceeds of the sale of the vessel, then in the registry of the district court, after payment of all costs, etc. Pursuant to such decree, the judge and clerk of the court drew a check for such surplus proceeds to the order of the receiver, but while said check was in the hands of the clerk, before it had been mailed, an execution, issued from a court of the state in which the district court sat, upon a judgment against the claimant, was served by the sheriff upon the clerk of the district court, with a notice that all debts, credits, and personal property of the claimant in the hands of the clerk were attached. Thereafter the state court appointed a receiver of the property of the claimant in supplementary proceedings taken upon said judgment, and such receiver applied to the district court for a writ of mandamus directing the clerk to deliver to him the check for the surplus proceeds of the vessel. *Held*, that the proceeding was an original one, and the district court had no power to issue a writ of mandamus, but by virtue of its inherent power to control its own officers it might direct the action of the clerk.

2. FUND IN COURT—CUSTODY OF CLERK—ATTACHMENT AND GARNISHMENT.

Held, further, that the clerk was holding the check, not as an individual, but in his capacity as clerk, the fund being in the custody of the court itself until actually delivered to the receiver, to whom the decree had ordered it paid, and the check and the fund on which it was drawn were not subject to attachment or garnishment under process of another court.

3. SAME—PROCEEDS IN ADMIRALTY—JUDGMENT OF STATE COURT.

Held, further, that the judgment of the state court constituted no claim upon the proceeds of the sale of the vessel. *Chandler v. The Willamette Valley*, 76 Fed. 838, reaffirmed.

Application for a writ of mandamus to command and direct the clerk of the court to deliver to A. C. Forsyth, receiver of the Oregon Pacific Railroad Company, appointed by one of the courts of this state, a check drawn upon a fund in the registry of this court, being the surplus proceeds remaining from the sale of the steamship Willamette Valley, the property of the Oregon Pacific Railroad Company, after satisfying certain maritime liens pending in this court against her. Application denied.

Wal. J. Tuska and Walter G. Holmes, for petitioner, A. C. Forsyth.
Page, McCutchen & Eells, for the receiver of the Oregon Pac. R. Co.

MORROW, District Judge. In the case of *Chandler v. The Willamette Valley* (No. 10,862), a decree was entered in this court on June 9, 1896 (76 Fed. 838), directing the clerk, Southard Hoffman, to

pay to Charles Clark, receiver of the Oregon Pacific Railroad Company, claimant of the steamship Willamette Valley, and the surplus proceeds derived from its sale, or to his proctors, after payment of all costs incurred in the case, the remnant of proceeds in the registry of this court, amounting to the sum of \$23,524.45. After the entry of this decree, the court, upon application, granted stays of proceeding from time to time until September 27, 1896, and, on September 28, 1896, pursuant to the decree and in accordance with the rules and practice of the court in that behalf, the clerk and judge of the court signed two checks, drawn on the assistant treasurer of the United States at San Francisco, in said case,—one payable to Charles Clark, receiver of the Oregon Pacific Railroad Company, for the sum of \$19,918.29; and the other in favor of Messrs. Page & Eells, proctors, for the sum of \$3,606.16. The check in favor of Charles Clark, receiver, was inclosed by the clerk in an envelope addressed to Charles Clark at Cornvallis, Or., but before it was deposited in the mail the sheriff of the city and county of San Francisco left with the clerk of this court a copy of a writ of execution issued out of the superior court of the city and county of San Francisco in an action pending in that court, wherein one W. A. Swinerton was plaintiff and the Oregon Pacific Railroad Company was defendant, and wherein a judgment had been rendered in favor of the plaintiff and against the Oregon Pacific Railroad Company for the sum of \$15,363.78 and \$1,115.75 costs. With the copy of the writ of execution, the sheriff served a notice on the clerk that the debts owing by him to the said Oregon Pacific Railroad Company and the credits and other personal property in his possession and under his control belonging to the said Oregon Pacific Railroad Company were attached in pursuance of such writ. On September 29, 1896, a like service of a copy of the writ of execution and notice was made upon Charles Page of the law firm of Page & Eells. On September 28, 1896, Hon. J. M. Seawell, one of the judges of the superior court of the city and county of San Francisco, made an order in the case of Swinerton v. Oregon Pac. R. Co. in proceedings supplementary to execution, requiring Southard Hoffman, the clerk of this court, and Charles Page, to be and appear before him on the 29th of September, 1896, and answer concerning property of the said Oregon Pacific Railroad Company in their hands, custody, or control, and concerning moneys owing by them to the said Oregon Pacific Railroad Company in an amount exceeding the sum of \$50. The examination was continued until October 2, 1896, when such proceedings were had that on October 14, 1896, Judge Seawell rendered his decision in the matter, and made the following order:

"In the Superior Court of the City and County of San Francisco, State of California.

"W. A. Swinerton vs. Oregon Pacific Railroad Company.

"In the foregoing entitled action an order having been duly made by the Hon. J. M. Seawell, a judge of the superior court of the city and county of San Francisco, state of California, on the 28th day of September, 1896, in proceedings supplementary to the execution issued upon the judgment theretofore on the 4th day of June, 1894, duly recovered in the said action in favor of the plaintiff above named and against the defendant, directing Southard Hoffman and Charles Page,

of the firm of Page & Eells, to be and appear before the said judge to answer concerning property of the defendant in their hands or custody or under their control, and enjoining them from transferring or disposing of such property, and the said Southard Hoffman and Charles Page having duly appeared before the said judge, and having been examined on oath concerning property of the defendant in their hands or under their control, and it appearing from such examination that there is now in the possession and under the control of the said Southard Hoffman the following personal property, to wit: One check, dated San Francisco, September 28, 1896, for the sum of \$19,918.²⁹/₁₀₀ drawn on the subtreasury of the United States of America at the city and county of San Francisco in favor of one Charles Clark, as receiver of the Oregon Pacific Railroad Company, the defendant, and signed by Wm. W. Morrow, judge of the district court of the United States for the Northern district of California, and by Southard Hoffman, clerk of the district court of the United States for the Northern district of California; that the said sum of money mentioned in the said check is the surplus proceeds of the sale in admiralty of the steamship Willamette Valley, her tackle, etc., belonging to the defendant, decreed to be sold by the district court of the United States for the Northern district of California in the libel suit pending therein entitled 'R. D. Chandler against Steamship Willamette Valley'; that the check was so prepared, drawn, and signed in pursuance of a decree of the said district court of the United States for the Northern district of California in the said libel suit of R. D. Chandler against Steamship Willamette Valley, her tackle, etc., made and dated and entered in the said court on the 9th day of June, 1896, directing the clerk of the said court to pay said surplus moneys to Charles Clark, as such receiver, or to Charles Page, his proctor; and it further appearing that the said Charles Clark was appointed such receiver by a court of foreign jurisdiction, to wit, by the circuit court of Oregon, and that the said surplus proceeds arose from the sale of defendant's property, steamship Willamette Valley, while in the state of California, to wit, in the city and county of San Francisco: Now, therefore, on motion of Henry E. Monroe, attorney for plaintiff, it is ordered that Alexander C. Forsyth, Esq., be, and he is hereby, appointed receiver of all the property, real and personal, of the defendant, and of the said check above described, and all other chattels, choses in action, and evidences of debt, with full power and authority to realize thereon, collect all moneys due by suit or otherwise, demand or sue for the same, and to demand and receive from each and every person or persons having in his or their possession or custody or under their control any money, checks, drafts, notes, bills, choses in action, evidences of debt, or other personal or real property belonging to the defendant, or to which the said defendant was or may have been entitled on the 28th day of September, 1896, the date of making the said order of examination by the judge of this court and its service on Southard Hoffman, or on the 29th day of September, 1896, the day upon which the said order of examination was served upon Charles Page. And it is further ordered that the said Alexander C. Forsyth execute an undertaking to the defendant herein in the sum of \$100 to faithfully perform his duties as such receiver, and take the oath required by law.

"Dated this 14th day of October, 1896.

"[Signed]

J. M. Seawell, Judge."

This order was modified by another order on October 23, 1896, and again modified and corrected on October 30, 1896, the final order being as follows:

"It appearing to the court that the order made and entered in the above-entitled action on the 23d day of October, 1896, modifying the order made by this court on the 14th day of October, 1896, appointing a receiver herein, contains words and expressions which do not accurately express the intention of the court, and that the order intended to be made on the said 23d day of October, 1896, should be in the words and figures hereinafter contained: It is now therefore ordered that the order made by this court in the above-entitled action be modified and corrected, and the same is hereby modified and corrected, so as to read as follows: It appearing to the court that on the 14th day of October, 1896, the judge of this court made and entered an order in said cause, reciting certain facts, and thereupon appointing one A. C. Forsyth, as receiver of said defendant corpora-

tion's property, and with authority to sue for the same, and particularly for a certain check signed by the judge and clerk of the district court of the United States for the Northern district of California, which check was payable to one Charles Clark, receiver of the Oregon Pacific Railroad Company, and as it appeared was in the possession of Southard Hoffman, clerk of the said district court; and it further appearing that the said check was made, drawn, and so signed in pursuance of and under the terms of a certain decree made by the district court of the United States for the Northern district of California in the cause entitled 'R. D. Chandler, Libellant, against S. S. Willamette Valley, etc.:' pending in the said district court, wherein the said Charles Clark, receiver of the Oregon Pacific Railroad Company, applied for the remnant of proceeds referred to in such decree, and wherein it is ordered, adjudged, and decreed that the petition of Charles Clark, receiver of the Oregon Pacific Railroad Company, against the remnant of proceeds now in the registry of this court and arising from the sale of the steamship Willamette Valley be, and the same is hereby, granted, and that the clerk pay to the said Charles Clark, receiver as aforesaid, or to his proctor, after payment of all costs incurred in the matter of said intervention and said several petitions, the remnant of proceeds now lying in the registry of this court, amounting to the sum of twenty-three thousand five hundred and twenty-four $\frac{45}{100}$ dollars; and that the amount of the said check is \$19,918. $\frac{29}{100}$, and formed part of the remnant; and it further appearing that the said Southard Hoffman claimed to hold the said check in his possession as clerk of the said United States district court, and declined to deliver up the same under the advice and instructions of the district judge of the said United States district court; and it further appearing that the said A. C. Forsyth, as such receiver, under appointment aforesaid, has brought suit in the superior court to compel the surrender to him by said Hoffman of said check, and enjoining him from sending it out of this jurisdiction; and whereas, it was not the intention of the judge of this court to authorize the said receiver to take proceedings by suit or otherwise which might be an infringement upon the jurisdiction of the said district court, if the said check was in fact in its custody for the satisfaction of its own decree, but simply to authorize the said receiver to make such showing as he might be advised before the said district court for the delivery of the said check to him; and it appearing that the order as signed by the judge of this court was inadvertently made, and that the same should be modified: It is now ordered that the said order made on the 14th day of October, 1896, be, and the same is hereby, modified, by setting aside all provisions thereof except the order appointing A. C. Forsyth a receiver of the property of the defendant corporation, and that in this respect the said order be confirmed. It is further ordered that the authority of the said receiver to sue for and take other proceedings for the recovery of the check hereinbefore described be limited to an authority to take such proceedings as he may be advised in the district court of the United States for the Northern district of California, and not elsewhere, unless in a court of the United States of superior jurisdiction to that of the said district court, and that the receiver institute such proceedings within ten days from the date of this order. And it is further ordered that the said receiver, within ten days after the date of this order, dismiss the action heretofore commenced by him in the superior court entitled 'A. C. Forsyth, Receiver, etc., vs. Southard Hoffman et al.,' and numbered 56,932. And it is further ordered that this order stand for and take the place of the order heretofore made and signed by this court, and entered on the 23d day of October, 1896.

"Dated October 30th, 1896.

"J. M. Seawell, Judge of the Superior Court."

In connection with the order of October 23, 1896, Judge Seawell rendered the following opinion, which is equally applicable to the final corrected order of October 30, 1896:

"In the Superior Court of the City and County of San Francisco, State of California.

"W. A. Swinerton vs. Oregon Pacific Railroad Company.

"It was not my intention, when making the order of October 14, 1896, to authorize the receiver to bring any action in a state court for the recovery of the check in the possession of Col. Hoffman. I stated orally that a receiver would be

appointed, so that an application might be made by him to the United States district court. It is true, as claimed by the plaintiff's counsel, that a receiver appointed by this court cannot, as a matter of right, maintain an action or other proceeding in the federal court; but that court would undoubtedly, in a proper case, as a matter of comity, entertain favorably the application of a receiver appointed by this court, and grant such relief as might be proper, provided it did not interfere with the rights of other parties as established by some judgment or decree of that court. Beach, Rec. § 682; High, Rec. § 241. The plaintiff claims that by virtue of the garnishment served upon Col. Hoffman a valid attachment has been made of the check in his hands. As he claims to hold the check in his official capacity as clerk of the United States court, and it appears that he has been ordered by the judge of that court not to produce it in this court, but to apply it as directed by the decree of that court, I consider it equally improper to direct a suit to be brought in the state court against Col. Hoffman, or to order him to deliver the check to the receiver. If there was in fact a valid attachment of the check levied, there does not appear to be any good reason to doubt that the judge of the district court would, upon a proper application by petition, direct the delivery of the check to the receiver. If he should refuse it, it would be because he was of the opinion that the check was not subject to garnishment in the hands of the clerk of his court. The United States court is the only tribunal which can determine that question. I did not, in my former order, intend to inaugurate a conflict between this court and the United States district court. Had such been my intention, I should have ordered Col. Hoffman at once to produce the check, and deliver it to the receiver; for he claimed no interest in it himself. As the litigation begun by the receiver against Col. Hoffman must inevitably end in a conflict between the state and federal courts, I deem it my duty to arrest all further proceedings against the clerk of the United States district court, and to restrict the receiver to such remedies as that court may, as a matter of comity, grant. If I should err in this the plaintiff can have the error corrected by the appellate court. An order will be made vacating so much of the order of October 14th as authorizes the receiver to maintain actions in any other tribunals than the United States courts, and directing him to dismiss the action commenced by him against Col. Hoffman in this court."

Pursuant to the order of October 30, 1896, Forsyth qualified as receiver, and demanded of the clerk of this court and Charles Page that they, and each of them, should deliver to him the check in favor of Charles Clark, hereinbefore described, and, this demand not having been complied with, the said A. C. Forsyth has presented his petition to this court for a writ of mandamus to be directed to Southard Hoffman, the clerk of this court, directing and commanding him to deliver to the petitioner, as receiver of the Oregon Pacific Railroad Company, the said check, alleging that he has no speedy or adequate remedy in the ordinary course of law to obtain or recover the said check or the said moneys on deposit against which it is drawn, or to apply it or its proceeds or the said moneys to the satisfaction of the judgment made and given against the Oregon Pacific Railroad Company in favor of W. A. Swinerton by the superior court of the city and county of San Francisco.

That a conflict of jurisdiction has been avoided in this case by the wisdom of the superior court in dealing with the questions presented to it is what was to have been expected from the high character of that court, but it is not to be overlooked that a certain degree of comity has also been observed by that court which calls for an acknowledgment by this court in the careful consideration it should give to the claim of the petitioner, as the receiver appointed by the superior court, to secure possession of the check in con-

troversy. The fact, therefore, that the judgment here represented was before this court upon an intervention against the proceeds in the registry of the court, and was dismissed without prejudice to any proceedings that might be taken in any other court, will not prevent a full review of the claim of the petition upon its merits.

Section 716 of the Revised Statutes provides:

"The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and the principles of law."

It has been held, under this statute, that the circuit courts of the United States may issue writs of mandamus when necessary to the exercise of their jurisdiction, but they have no authority to issue it as an original writ in any case. *McIntire v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat. 598; *Bath Co. v. Amy*, 13 Wall. 244; *Graham v. Norton*, 15 Wall. 427; *Greene Co. v. Daniel*, 102 U. S. 187; *Davenport v. Dodge Co.*, 105 U. S. 237; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633. The same limitation would apply to the power of the district courts. Treating this petition as an original proceeding, it is clear the court would have no jurisdiction to entertain it; but it has been said that it may be considered as ancillary to the jurisdiction which the court has already acquired in the case of *Chandler v. The Willamette Valley*. If this were an application to issue the writ for the purpose of carrying into effect that judgment, this view of the law would undoubtedly be correct, but it must be apparent from the character of the proceedings prosecuted in the state court that such is not the purpose of this petition. It is, on the contrary, an effort to secure the process of this court to satisfy a judgment obtained in the state court, and, perhaps, in a proper case in the distribution of proceeds in the registry of the court such an application would be entertained, and the power of the court exercised summarily in securing the rights of the petitioner according to law and justice, as provided in general admiralty rule No. 43; but where the action of the clerk of the court is to be controlled or directed, a writ of mandamus would not be necessary, and there are reasons why it would not be proper. "There is inherent in every court a power to supervise the conduct of its officers and the execution of its judgments and process. Without this power, courts would be wholly impotent and useless." *Griffin v. Thompson*, 2 How. 244, 257. This power can be, and is, effectively exercised by the established rules of procedure and by the usual orders and processes of the court. In this case, therefore, the form of the proceeding may be treated as immaterial. The question is, has the petitioner presented such a state of facts as calls for the interposition of the power of the court in his behalf? It is claimed on his behalf that the check in question is held by Southard Hoffman as an individual, and not as the clerk of the court, and that, so holding this evidence of a credit in favor of the Oregon Pacific Railroad Company, of which the petitioner is receiver for the purpose of satisfying the com-

mon-law judgment recovered in the superior court of this state, it was subject to the levy of execution made by the sheriff. This contention is clearly erroneous, and founded upon mistaken premises. The clerk of this court is not, in any sense, holding the check in an individual or private capacity. He is holding it by virtue of being the legally appointed and qualified clerk of this court, and for the purpose of carrying out the lawful order and decree of this court made in the case of *Chandler v. The Willamette Valley*. But, even though he holds the check in his capacity as clerk of the court, the fund upon which the check is drawn is not in his hands as clerk, nor under his control. It is in the custody and under the absolute and exclusive control of the court. As was well said in *The Lottawanna*, 20 Wall. 201, where an attempt was made to garnish some surplus proceeds in the registry of the court:

"The proceeds in such a case are not by law in the hands of the clerk nor of the judge, nor is the fund subject to the control of the clerk. Moneys in the registry of the federal courts are required by the act of congress to be deposited with the treasurer of the United States, or an assistant treasurer or designated depository, in the name or to the credit of such court; and the provision is that no money deposited as aforesaid shall be withdrawn except by the order of the judge or judges of said courts respectively, in term time or vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk. 17 Stat. 1. Regulations substantially to the same effect have existed in the acts of congress for more than half a century, and within that period it is presumed that no proceeding to attach such a fund by a creditor of the owner has ever been sustained. 3 Stat. 395."

In other words, the possession of the clerk is the possession of the court. In *Jones v. Bank*, 76 Fed. 683, 684, which involved an attempt to attach money in the Merchants' National Bank of Boston, the designated place of deposit of all moneys paid into the registry of the circuit court of the United States for the district of Massachusetts, the circuit court of appeals, through Putnam, Circuit Judge, said:

"There can be no doubt that the deposit made in that bank, and in controversy in two of these appeals, must be regarded as made under the direction of the circuit court, pursuant to the requirements of the statute, and that it must be treated as the fund of the court, as fully as though it were in the personal possession of the clerk, and therefore subject in all respects to its summary control and disposition, and entitled to protection in all particulars, in order that it may be free at all times for such disposition. Any interference with it, or with the bank where it is deposited, or attempt thereto, which would embarrass in any degree such control or disposition, or harass the bank, or put it to expense, by reason of its possessing the fund, unless the consent of the circuit court was first obtained, would amount, on plain principles of law, to an implied contempt, and, if persisted in understandingly, to an actual one."

The surplus proceeds, upon which this check is drawn is in custodia legis, and is subject to the orders and processes of this court. It is not subject to attachment either by the process of foreign attachment or of garnishment. In the language of the supreme court in *The Lottawanna*, supra:

"The fund, from its very nature, is not subject to attachment, either by the process of foreign attachment or of garnishment, as it is held in trust by the court, to be delivered to whom it may belong, after hearing and adjudication by the court," citing *The Albert Crosby*, 1 Lush. 101; *The Wild Ranger*, Brown. & L. 84; 1 Chit. Archb. (11th Ed.) 702.

In *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, it was distinctly held that the possession of property, by a marshal of a court of the United States, by virtue of a levy under a writ of execution issued upon a judgment recovered in a circuit court of the United States, is a complete defense to an action, in a state court, of replevin of the property seized, without regard to its rightful ownership; and also that the principle that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, applies both to a taking under a writ of attachment or mesne process and a taking under a writ of execution. But it is unnecessary to elaborate further on this well-settled feature of the law. The proposition was fully discussed and considered in the case of *Chandler v. The Willamette Valley*, 76 Fed. 838, where W. A. Swinerton, by a petition of intervention against the surplus proceeds, sought to obtain the amount of the common-law judgment recovered by him in the state court, and which A. C. Forsyth, as the receiver appointed by that court, now seeks, by this application for a writ of mandamus, to compel the clerk of this court to deliver to him the check drawn upon this fund to satisfy said judgment. This court then held that the common-law judgment constituted no claim upon the surplus proceeds which could be recognized in admiralty as against the superior right of Charles Clark, receiver of the Oregon Pacific Railroad Company, appointed by the state court of Oregon, where the foreclosure proceedings against the corporation and its property, including the steamship *Willamette Valley*, were instituted and litigated, and are still pending, so far as these surplus proceeds derived from the sale of the said steamship in this court are concerned. The reasons for the decision of the court in that case were fully stated in the opinion just referred to, and need not be repeated here. See opinion, 76 Fed., at pages 850-855. Nothing that counsel for petitioner, Forsyth, have urged on this application has led the court to alter or modify its views in the slightest degree. The conclusion which the court arrived at in the case of *Chandler v. The Willamette Valley*, *supra*, as to the proper disposition of the surplus proceeds, is thus stated in the opinion:

"The entire surplus, less all costs, will be paid over to the receiver, Charles Clark, or to his proctors, to be paid by them to the circuit court of the state of Oregon in and for Benton county, where the foreclosure proceedings against the former owners of the vessel, so far as this surplus is concerned, are still pending."

The decree reads, so far as it is material to the present inquiry, as follows:

"That the petition of Charles Clark, receiver of the Oregon Pacific Railroad Company, against the remnant of proceeds now in the registry of this court, and arising from the sale of the steamship *Willamette Valley*, be, and the same is hereby, granted, and that the clerk pay to the said Charles Clark, receiver as aforesaid, or to his proctor, after payment of all costs incurred in the matter of said intervention and said several petitions, the remnant of proceeds now lying in the registry of this court, and amounting to the sum of twenty-three thousand five hundred and twenty-four $\frac{45}{100}$ dollars."

Upon this sum, as stated, a check was drawn by the clerk, and signed by the judge of this court, in favor of Messrs. Page & Eells, proctors for the receiver, Charles Clark, for the sum of \$3,606.16. No question is made with reference to this payment. It is as to the balance of \$19,918.29 that the controversy lies. If anything is plain with reference to the proceedings in *Chandler v. The Willamette Valley*, upon the petitions against the surplus proceeds, as deduced from the opinion of the court rendered in that case, it is that the court intended and directed that the surplus proceeds be paid either to Charles Clark, receiver, or to his proctors, for him, to be by them transmitted or paid into the registry of the circuit court of the state of Oregon in and for Benton county, where the foreclosure proceedings were pending. The fund was to be delivered to Charles Clark, receiver, or to his proctors on his behalf, not absolutely, but merely in trust, to be by them, in obedience to the order and decree of this court, delivered to the receiver's court in the state of Oregon. The receiver and his proctors were practically constituted officers of the court for this purpose, and were accountable to this court for any failure of duty, breach of good faith, or dereliction on their part. Nor can it be said that their duty in this respect is ended until the fund is delivered into the registry of the receiver's court in Oregon. The court will certainly see to it that its determination is carried out, so long as it has jurisdiction of the fund, or of the custodians thereof. Its jurisdiction and power are not exhausted or satisfied until its judgment and decree is carried out. As was said by Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised."

As further illustrating the absolute right of the court over funds in its possession, and its inherent power to see to it that its judgment and decree in relation thereto is enforced, the language of the supreme court in *Osborn v. U. S.*, 91 U. S. 474, is in point:

"The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they long since ceased to be such officers. If the moneys were illegally taken, they must be restored; and, until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court."

This court decided, in *Chandler v. The Willamette Valley*, supra, that as all the maritime liens against the steamship *Willamette Valley* had been satisfied, the surplus proceeds should be delivered to the receiver's court in Oregon, as that court was better adapted to do justice as between the rival claimants of the surplus proceeds derived from the sale of the steamship in the registry of this court. Its power to do this is undoubted. As said in *The Lottawanna*, 21 Wall. 558, 583:

"If a case should be so complicated as to require the interposition of a court of equity, the district court could refuse to act, and refer the parties to a more competent tribunal."

See, also, *The E. V. Mundy*, 22 Fed. 173.

It follows that, if the court has the power "to refer the parties to a more competent tribunal," it necessarily has the inherent authority to transmit the fund or surplus proceeds which form the subject of the litigation. And until this fund is so delivered into the registry of the receiver's court in Oregon, pursuant to the final order of distribution of the court, it is, to all intents and purposes, in the custody of the court, and cannot be interfered with by foreign attachments or garnishments from the state tribunals. In this view of the power and authority of the court, the fund can no more be interfered with, under the judgment of the court in *Chandler v. The Willamette Valley*, while it is being transmitted to the receiver's court in Oregon, than it could have been while resting in the registry of the court in the city of San Francisco, pending the determinations of the claims or petitions presented against it. In all these transactions, and in the performance of the clerical duties connected therewith, the clerk of this court was and is but its ministerial officer. If the court itself cannot be interfered with, it is difficult to understand upon what theory its officers can be. The case of *Jones v. Bank*, 76 Fed. 683, previously referred to, is, in several of its features, analogous to the case at bar, and the principles therein enunciated are applicable to the case at bar. It is true that the methods of procedure to obtain the fund in the registry of the court were different. In the case referred to it was sought to accomplish this by bills in equity filed in the circuit court, where the money was deposited, claiming title to the fund, and praying that the same be paid to the complainants. Three separate bills were filed. In the case at bar it is sought to accomplish the same purpose by a petition to the court that it grant a writ of mandamus, commanding and directing its clerk to deliver to the petitioner, A. C. Forsyth, as receiver for the state court, the check drawn upon the fund in the registry of the court. But this difference in the remedy is immaterial, so far as the principles involved are concerned. A decree was rendered in favor of the defendants in each case; that is to say, the court refused to permit the fund to be interfered with. The cases were appealed to the circuit court of appeals, and the judgments of the lower court were affirmed. Putnam, Circuit Judge, in the course of the opinion of the appellate court, said:

"Our attention has been called to the want of parties, but we prefer to put our decision on such grounds as will protect the depositaries of the federal courts in this circuit from all such attempts to harass them. We doubt not these bills were filed entirely in consequence of a zealous desire to seek a remedy for a supposed right, and with no purpose beyond that. Yet the occasion requires us not to state at large why proceedings of this character are not tolerated by the law, but only to declare the rule, so that no one can hereafter excuse himself for not regarding it. The futility of all such bills is sufficient to defeat them, because, notwithstanding the pendency of one of them, the court having control of a fund may order the entire disposition of it summarily, thus leaving nothing for the bill to

act on. A bill which can reach no result except by staying the ordinary and rightful exercise of the essential functions of the court is, by its character, so futile that it ought to be dismissed for that reason alone; but it is enough to say that the rule that bills of this sort will not be tolerated is so fundamental, and so necessary to the full exercise of judicial functions, that the reasons on which it rests need not be further stated."

The reasoning in the case just quoted from is directly applicable to this petition for a writ of mandamus. The purpose of the petition is to attach funds in the registry of this court, which the court has already decided belong to another person; and it is sought to do this in favor of one holding a claim which was presented to the court in the case of *Chandler v. The Willamette Valley*, and was there fully discussed and considered, and denied. No appeal was taken. It is now attempted, by these supplementary proceedings, to induce the court to reverse itself with respect to this claim, and for no stronger reason than that it is contended that the clerk of the court, who now holds, ready for delivery to Charles Clark, the receiver, the check drawn upon the fund which this court has, after full discussion and consideration, ordered to be transmitted into the registry of the receiver's court in Oregon, is holding such check in his personal, and not official, capacity. The contention is without foundation, and to grant it would be to frustrate the determination of this court in *Chandler v. The Willamette Valley*, *supra*. The position which the clerk of this court occupies with reference to the check in question, and his primary duty to obey and carry out the orders and judgments of this court, are nowhere stated more felicitously than in the case of *Senior v. Pierce*, 31 Fed. 625, 629. Love, J., said:

"Since, then, property in the hands of an officer of a court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without the order of the court, to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must inevitably either prove futile, or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him, and without any power whatever to give him protection against the orders of his own court? Would it not be his duty to resist by force the attempt of an officer of a different jurisdiction to take the property from his custody? Can the officer in possession be required to determine for himself, in advance of the judgment of his own court, and of the court from which the writ of replevin issues, the right of the plaintiff suing out a replevin from an alien jurisdiction to the property in dispute, and the authority of the officer serving the writ of replevin to seize and take the property? And can an officer be adjudged to be in contempt, and punished for his disobedience, to the process of an alien jurisdiction, while acting in obedience to the command of his own court in refusing to deliver up property which he holds as the mere custodian of that court?"

The reason for this is that, "while state and national tribunals are independent and separate, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments or decrees." *Adams v. Trust Co.*, 15 C. C. A. 1, 66 Fed. 620. It is clear, therefore, that under the principles of law referred to as applied to the circumstances and facts of the case at bar, the petition should be dismissed, and it is so ordered; the costs of this proceeding to be paid by the petitioner.

LOUISVILLE TRUST CO. v. CINCINNATI INCLINED PLANE RY. CO.
(CITY OF CINCINNATI, Intervener).

(Circuit Court, S. D. Ohio, W. D. January 4, 1897.)

1. STREET RAILROADS — UNAUTHORIZED USE OF STREETS — RECEIVERS — REMOVAL OF TRACKS.

The I. P. Co. operated a street railway in several streets in the city of C. The city brought suit against it, in a state court, to enjoin the operation of the railway in certain streets, and obtained a decree enjoining such operation on the ground that the I. P. Co. had no legal right in such streets; the operation of such decree being, however, stayed for six months. This decree was affirmed on appeal. Before anything was done under it, the L. Trust Co., trustee of a second mortgage on the I. P. Co.'s property, filed a bill in the United States circuit court against the city, alleging that it was about to oust the I. P. Co. from certain streets necessary to the operation of the mortgaged road, and seeking to enjoin it from doing so. Pending this suit the L. Trust Co. also commenced a suit against the I. P. Co. for the foreclosure of the mortgage, in which suit a receiver was appointed, who took possession of the road and operated it. In the L. Trust Co.'s suit against the city, the circuit court reached the same decision as the state court as to the rights of the I. P. Co. in the streets, and it dismissed the bill. The decision of the circuit court as to the rights of the I. P. Co. was affirmed by the circuit court of appeals. The city then filed an intervening petition in the foreclosure suit, asking that the receiver be directed to cease operating the road in the streets in which the I. P. Co. had no legal right, and to restore full possession of such streets to the city. To this petition the L. Trust Co. filed an answer, averring that the I. P. Co. had applied to the proper authorities of the city for a renewal of its right to operate its road in the streets in question, which application was pending, and that it had also obtained from the state court a further stay of that court's injunction, for six months, to enable it to arrange with the city for a renewal of its right. *Held*, that an order directing the receiver to restore possession of the streets to the city, which would amount to a mandatory injunction requiring him to remove the railroad structure from the streets, involving great injury to the I. P. Co. and the mortgagee, would not be granted.

2. SAME—RIGHTS OF CITY.

Held, further, that the circuit court should not, by holding possession, through its receiver, of the lines of railroad which both state and federal courts had decided the I. P. Co. had no right to maintain, prevent the city from taking any means which it might have a right to employ to get possession of the streets, by proceedings to abate a nuisance or otherwise, notwithstanding the operation of its injunction had been stayed by the state court, and its right to resort to any other proceedings might be doubtful.

3. SAME—RIGHT OF CONDEMNATION.

Held, further, that a possible right of the I. P. Co. to condemn the right of way in the streets in question afforded no reason for continuing the possession of the receiver until such proceedings could be taken; the right not being clear, and the right of way to be condemned not being a mere link, but the major portion of the whole line.

4. SAME—RECEIVER'S POSSESSION.

Held, further, that, as the same department of the city government to which the I. P. Co.'s application for a renewal of its right had been submitted must decide whether proceedings should be instituted to remove the railroad from the streets, the court might properly continue the receiver in possession until that department notified him that it desired to take possession of the streets, but that upon such notice the receiver should surrender to the I. P. Co. the possession of the railroad in the streets in question.

This is an intervening petition by the city of Cincinnati praying the court to direct its receiver to deliver over to the city, for occupation

by the Cincinnati Street Railway Company, portions of the route in the streets of Cincinnati occupied by the tracks of the Cincinnati Inclined Plane Railway Company, now in possession of the receiver of this court appointed in the above-entitled cause, and which are being used by him in the operation of the railway of the said inclined plane railway company. In order that the questions which are presented by these intervening petitions should be fully understood, it is necessary to state in a summary way the history of the litigation between the inclined plane railway company and the city, and between the Louisville Trust Company, the second mortgagee of the inclined plane railway company, and the city of Cincinnati:

The Cincinnati Inclined Plane Railway Company was organized in April, 1871, under the provisions of the general corporation act of Ohio of May, 1852, providing for the incorporation of steam railway companies for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and village of Avondale, Hamilton county, Ohio. In 1889 the Avondale terminus was duly extended to Glendale, in the same county. Under the act of 1852, and one of 1877, and certain grants by the city council, some directly from the city to the inclined plane company, and one derived by mesne assignments from other grantees of the city, the inclined plane company has maintained to the present day an inclined plane reaching from the head of Main street, at its intersection with Mulberry street, as its base, to Locust street, on Mt. Auburn, as its top, and has maintained a street railway from the bottom of the incline down Main street to Court, west on Court to Walnut, south on Walnut to Fifth, east on Fifth to Main, north on Main to the foot of the inclined plane, and from the top of the inclined plane north on Locust street to Mason, east on Mason to Auburn avenue to Vine street, north on Vine street to the Zoölogical Garden, and thence beyond the city limits to Carthage; returning from the Zoölogical Garden on Vine street to Auburn avenue, south on Auburn avenue to Mason, west on Mason to Locust, south on Locust to the top of the inclined plane. On December 12, 1890, the city of Cincinnati filed an action in the superior court of that city against the Cincinnati Inclined Plane Railway Company to recover car licenses and percentage of gross earnings, and to enjoin the railway company from maintaining and operating its cars upon more than one track on Auburn street from Mason to Vine streets, and from maintaining its tracks or operating its cars upon any of its tracks on Main, Court, Walnut, or Fifth streets. The cause was heard by reservation in the general term of the superior court, and on October 12, 1893, a judgment was entered which, among other things, found that the company was illegally and without right maintaining its tracks, poles, wires, and other appliances in Main street, Court street, Walnut street, and Fifth street, and that it had no legal right to maintain and operate a railway on more than one track on Auburn avenue from Mason to Vine streets. In accordance with the finding, the court enjoined perpetually the inclined plane company from continuing to maintain and operate a street railway over those portions occupied by it without right. The order of injunction contained the following limitation: "It is further ordered that the operation of this decree be, and the same is hereby, stayed for the period of six months, with liberty on the part of the defendant to apply for an extension of time. To which order staying the operation of this decree the plaintiff excepts." The case was taken to the supreme court of Ohio, and affirmed October 30, 1894. 44 N. E. 327. Nothing had been done under the decree when, on the 6th day of March, 1895, a bill of complaint was filed by the Louisville Trust Company, in this court, against the city of Cincinnati, averring that it was the trustee under a mortgage made by the Cincinnati Inclined Plane Railway Company January 1, 1889, conveying to it all the property of said inclined plane railway company to secure bonds to the amount of \$500,000 issued by that company, \$375,000 of which had been issued, and had gone into the hands of bona fide purchasers; that this mortgage was subject to the priority of a first mortgage on the same property issued to secure bonds amounting to \$125,000, made to William A. Goodman, trustee. The bill averred that the city of Cincinnati was proposing to oust the company from possession of certain streets necessary to the operation of the road mortgaged, and

to install therein another railway company, without right, and in violation of the lawful interests acquired by said complainant trustee through said mortgage in and to the property of the street railway company. Pending the submission of the cause made by the bill of the Louisville Trust Company against the city of Cincinnati, the same complainant filed the bill in this cause against the Cincinnati Inclined Plane Railway Company, averring that the interest on the bonds secured by the mortgage to it had not been paid, that the railway company was insolvent, and praying a foreclosure of the mortgage, and that all the property of the company covered by the mortgage might be sold, subject to the first mortgage, to pay complainant's debt. The bill prayed for the appointment of a receiver to take charge of the company's property, to operate the road, and to turn the net earnings into court for distribution in accordance with the terms of its mortgage. The prayer was granted, and on the ——— day of October, 1895, Brent Arnold was appointed receiver of the road, and directed to take possession of all its property, and to operate the same under the orders of the court. Subsequent to this appointment, this court decided, in the action brought by the Louisville Trust Company against the city of Cincinnati, already referred to, that the equities of the case were with the city, and dismissed the bill, on April 7, 1896. 73 Fed. 716. From this decree the Louisville Trust Company took an appeal to the circuit court of appeals, and pending the appeal in the suit against the city the receiver continued to operate the entire line of the inclined plane railway company. The conclusion of the circuit court was in accordance with the decision of the state court. Upon the issues made in that court, it held, moreover, that the right of the Cincinnati Inclined Plane Railway Company to operate its inclined plane over Miami, Dorsey, and Baltimore streets had expired. The circuit court of appeals for this circuit decided that, under the circumstances of the case, it was not bound by the decision of the state court, and that it must exercise an independent judgment thereon. Proceeding to do so, the court found that the right of the inclined plane company to occupy Main street from Liberty south to Court, over Court west to Walnut, down Walnut, south to Fifth, east on Fifth to Main, and north on Main to Liberty, had expired, and that its present occupation of those streets was in violation of the rights of the city. It further held that the inclined plane was operated over Miami, Dorsey, and Baltimore streets without any legal authority from the city, or any right therefor. It further held that the inclined plane company was entitled to occupy only one track on Auburn avenue from Mason street to Vine street. It held, however, that, under the acts of the legislature and the grants from the city, it still had a right to occupy Main street from Liberty to the foot of the inclined plane, where Main street intersects with Mulberry, differing in this respect from the state courts. 22 C. C. A. 334, 76 Fed. 296. The decision of the court of appeals was that the complainant below was entitled to an injunction against the city from undertaking to dispossess the mortgagor from that part of its line occupied under valid and unexpired grants; as laid down in the opinion, and that the complainant below might have leave to file an amended and supplemental bill setting up the pendency of the foreclosure suit, the action therein in the appointment of the receiver with leave to bring in the city of Cincinnati as a party claiming rights in the mortgaged property, and for such other orders and decrees as were not inconsistent with the views expressed in the opinion. A mandate has come down from the circuit court of appeals, and an entry has been made in accordance with the opinion of the court of appeals, setting aside the decree dismissing the bill, and giving complainant leave to amend his bill of complaint as he may be advised.

On the 8th of December, 1896, the city of Cincinnati filed an intervening petition in this cause, in which it sets out substantially all the facts heretofore reviewed, and avers that it has, by its board of administration, in accordance with law, extended route No. 5, route No. 9, and route No. 18, now owned and operated by the Cincinnati Street Railway Company, in such a manner as to require the laying of tracks by that company on a large part of the streets in which the tracks of the inclined plane company are now being operated by the receiver of this court, though, by the decisions of the supreme court of Ohio and of the circuit court of appeals of the circuit, the grants for the same to the inclined plane company have expired; that such extensions have been accepted by the Cincinnati Street Railway Company; and that it has partially laid its track in the streets upon which the extension is granted, other than the streets occupied by the

receiver. The petition further avers that, for the purpose of carrying out the contracts of extension between the city and the Cincinnati Street Railway Company, "it is necessary that the possession of the said streets for the maintenance and operation of the street railway should no longer be held and maintained by the receiver herein, and the petitioner therefore says that by reason of said interest, as well as by reason of the fact that the receiver is occupying and using said streets unlawfully, without any warrant of law, this petitioner is entitled to have the tracks in such streets, and the poles and wires therein, placed by the Cincinnati Inclined Plane Railway Company, and now used and maintained by the receiver, removed therefrom, and full control of said streets surrendered and restored to the city of Cincinnati. This petitioner therefore moves and prays the court that an order be made herein directing the receiver to cease from holding possession of the streets,—of Main street from Liberty to Fifth, Court street, Walnut street, Fifth street, and that part of Auburn avenue from Mason to Vine street now occupied by the track of the Cincinnati Inclined Plane Railway Company, laid therein as a part of said route No. 8,—and from using said streets, or any part thereof, and from maintaining or operating thereon said railway, and from maintaining their poles and electric wires, and that the said receiver be made to restore full possession of said streets to the city of Cincinnati, and, further, that an order be made prohibiting the said receiver from crossing with the inclined plane structure, or with cars thereon, the said streets mentioned in the said resolution of June 16, 1871, to wit, Miami, Baltimore, Dorsey, and Locust streets between Dorsey and Saunders streets, and Mount street, and that the said receiver be directed to restore to the city of Cincinnati full possession of the said streets, and that, notwithstanding the said order entered by this court, appointing the receiver herein, the city of Cincinnati be permitted to resume full and entire possession and control of its said streets crossed or occupied by said inclined plane, and of its said streets included in said route No. 8, and to take such means to regain such possession and control, and to remove the poles, wires, and tracks in and on said streets, as it might lawfully take if said receiver had not been appointed by this court."

This cause came on upon the intervening petition of the city on Saturday December 12, 1896, and was partially heard. The court adjourned the hearing until December 19, 1896, to give the Louisville Trust Company an opportunity to file an answer. On that day the answer was filed. The answer, after referring to the suit in the superior court of Cincinnati, says: "That by instituting the said suit the city of Cincinnati, in regard to the occupancy of its streets by the inclined plane company, submitted itself to the jurisdiction of that court, and is bound to conduct itself with reference to the respective rights of the city and of the inclined plane company as the said court may from time to time order and decree. Complainant further states that it was advised by counsel learned in the law that it had the right to procure from the city of Cincinnati the renewal of its franchises on the streets embraced in route No. 8, and Locust street, so far as occupied by its inclined plane, and the right of crossing the other streets with its inclined plane, and it was further advised by such counsel that the proper authority of the city of Cincinnati, to whom such application should be made, was the board of legislation; that, being so advised, it did, on Monday, December 14, 1896, in good faith, make application to said board of legislation for a renewal of its grants and rights, and offered to submit itself to such fair and just terms of renewal as the city may be advised it should so submit itself; that said board of legislation received its said application, and caused the same to be referred to the joint committees on steam railroads and street railroads, and that the same is now pending in such board of legislation in this way, and that the said inclined plane company intends to prosecute its application with vigor and dispatch, and in good faith, and is determined to submit itself to such terms as said city may require of it. The complainant says that this was done under a resolution of the board of directors of the said inclined plane company on December 11, 1896, a copy of which is set out in the complainant's amended and supplemental bill of complaint, and which is now referred to. The complainant further states that on December 18, 1896, said inclined plane company caused an application to be made by its counsel, before the superior court of Cincinnati, in the case above referred to, for a suspension of the decree therein entered, enjoining it from the occupancy of the streets mentioned in the said decree, and that evidence was heard

upon its part, and upon the part of the city of Cincinnati, in the said application, on that day, and that on December 19, 1896, the said court entered a decree suspending said injunction for six months, with leave to further apply. A copy of the decree of said court entered upon said application, and of the opinion of the judge granting the same, is now referred to, and is made a part hereof. The complainant further states that it is advised by counsel that such application as to the city of Cincinnati was properly made, and is further advised by counsel that its making the same has been approved by the court holding the matter in consideration, as between the city of Cincinnati and the said inclined plane company. The complainant further states that it is advised that if the receiver was to be discharged herein, or directed to cease operation of the said lines, that it is the purpose of the Cincinnati Street Railway Company, directly or indirectly, to forthwith cause the tracks of the inclined plane company to be torn up along all that part of route No. 8 which is coincident with any of the grants of the intervening petition as having been made to the Cincinnati Street Railway Company, with a view to so crippling the inclined plane company as to render it financially unable to comply with such terms and conditions as the city may hereafter exact; and the complainant is advised that, under the laws and ordinances governing the city of Cincinnati, that the Cincinnati Street Railway Company cannot lawfully build upon any of the streets of said city any new lines of railway between November 1st and March 31st, the breaking and opening of the streets for the construction of street railroad, between these dates, being prohibited by law, and so it will be that the railroad in the hands of the receiver cannot be operated, nor can there be any railroad laid down, within that time, and the public will suffer great loss, inconvenience, and damage. The complainant, therefore, in view of the decree of the said superior court of Cincinnati, and in view of the facts and circumstances in this case, says that it would be inequitable and unjust to comply with the prayer of the intervening petition of the city of Cincinnati herein; that there has been expended in building, maintenance, and operation of said inclined plane and adjoining properties a large sum of money, to wit, \$750,000, most of which would be lost if the said order prayed for by the city of Cincinnati should be granted by this court. * * *

Prior to the filing of this answer, on December 12, 1896, the Louisville Trust Company tendered its supplemental and amended bill of complaint in its action against the city. In this it avers "that a single track line of railway upon Auburn avenue, between Mason and Vine streets, cannot be successfully or conveniently operated without good and sufficient switches or turnouts for the passage of cars, and that, in case the said city of Cincinnati shall not agree with the said receiver in regard thereto, then the court herein should ascertain and adjudge what switches and single tracks should be maintained and operated upon the said street." The bill then further proceeds to ask that the receiver shall, for and in behalf of the defendant, the Cincinnati Inclined Plane Company, for the benefit of all persons concerned, be authorized and directed to appropriate so much of said streets and alleys as may be necessary for the use and operation of said inclined plane, of the streets over and along which the cars of the said receiver are now being operated, in accordance with the laws of Ohio for condemnation by a steam railway company of the streets and alleys of a municipal corporation necessary for its maintenance, under section 3283 of the Revised Statutes of Ohio.

Evidence was introduced in support of the averments of the city's intervening petition, and of the answer of the Louisville Trust Company. It was shown that the board of administration had directed the corporation counsel to proceed with this intervening petition, and to procure the removal of the tracks of the inclined plane company from those streets in which it had been adjudicated to have no rights, and that the receiver should be requested to discontinue the inclined plane railway over such streets, and that a copy of such request had been served upon the receiver.

E. A. Ferguson, St. John Boyle, and Alex. P. Humphrey, for Louisville T. Co.

Thornton M. Hinkle, for Cincinnati Inclined Plane Ry. Co.

Fred Hertenstein and J. D. Brannon, for city of Cincinnati.

Miller Outcalt, for W. A. Goodman.

TAFT, Circuit Judge (after stating the facts). The city asks the court to direct its receiver to surrender to it possession of certain streets in which he is now operating a railway. This would require him to remove the tracks, poles, and wires of the company from those streets, and also to tear down and remove the bridges of the inclined plane over Miami, Dorsey, and Baltimore streets, as well as those parts of the inclined plane trestle and engine house which lie in Locust street. Such an order would be, in effect, a mandatory injunction against the inclined plane company and the complainant, the Louisville Trust Company. The court always exercises a sound legal discretion in the granting of even a prohibitory injunction, and often declines to make the order, or delays its operation, in view of the balance of conveniency and hardship between the parties. A fortiori is this true in the granting of a mandatory injunction. Such an order in this case would work great injury to the interests of the inclined plane company and the trust company. Negotiations have been opened by the inclined plane company with the board of legislation of the city, looking to the renewal of former grants. The superior court, which in 1893 granted a perpetual injunction against the use by the inclined plane company of the invalid part of its line as a street railway, has suspended the operation of its injunction for six months from December 11, 1896, to permit such a negotiation. The vigor of Judge Smith's language in granting the suspension leaves no room to doubt that in his judgment the situation of the parties justifies him in withholding his hand, as chancellor, in the enforcement of the decree, until a full opportunity is given to the inclined plane company to obtain, if possible, new concessions from the city. I concur with Judge Smith in this view, and do not think that the time allowed is unreasonable, when one considers the somewhat slow movements of a municipal legislature. It is urged upon the court that such an affirmative order of the kind here prayed for was made upon a receiver in the case of *Felton v. Ackerman*, 22 U. S. App. 154, 9 C. C. A. 457, and 61 Fed. 225. The circumstances of that case were very different. There the receiver, while operating a railroad, erected a fence across a public highway, under a void order of a road commissioner. He was required by the court to undo the wrong he had unwittingly done. It was no sacrifice of the property in his charge. The fence reduced the number of railway crossings by one, and to that extent lessened the danger of crossing accidents; but its removal caused but a slight change in the receiver's situation, or that of the railway company's line which he was operating. So far as the petition of the city asks for affirmative relief against the inclined plane company and the trust company in the form of an order for the removal of tracks, poles, wires, bridges, and buildings, it is denied.

But this conclusion by no means disposes of the whole case made by the city's petition. The court is in possession, by its receiver, of the whole line, valid and invalid. The city can pursue no remedy for the enforcement of its rights in the line except by application to this court. Therefore this court has ancillary jurisdiction to entertain the petition, although the city and the inclined plane company are both citi-

zens of Ohio. *Compton v. Jesup*, 31 U. S. App. 486-524, 15 C. C. A. 397, and 68 Fed. 263. When a court thus takes possession of property by its receiver, it necessarily assumes an obligation to every one interested in it, or affected by its use, either to afford by its own orders every remedy which such person might have to assert his rights had no receiver been appointed, or else to give him leave to pursue such remedy against the receiver as if the receiver were a private person. *Compton v. Jesup*, 31 U. S. App. 486-534, 15 C. C. A. 397, and 68 Fed. 263 et seq. Will this obligation be discharged by the court, if, after denying the city the affirmative relief it prays, it shall maintain the status quo, and continue to operate the railway line, valid and invalid, during the period fixed for negotiation by the superior court? The order directing the receiver to operate the road is, in effect, an injunction against the city's interference with his use of the invalid portion of the line. It constitutes affirmative and positive protection to the inclined plane company in its occupation of the streets. But it is said that the operation by the receiver of the road does not deprive the city of any remedy to possess itself of the streets in controversy, because its sole remedy is by enforcement of the decree of the superior court, and that is suspended for six months, and so this court may properly remain in possession till the injunction of the superior court becomes effective again. It is contended that the bringing of the suit by the city, in the superior court, against the inclined plane company, and the procurement of the injunction, constitute such an election of remedies by the city that it can pursue no other to obtain possession of the streets, and that the order suspending the operation of the injunction really enjoins the city from seeking possession of the streets while it is in force. Again, it is urged that the inclined plane company, under the law of Ohio, has the right, if it cannot agree with the city as to terms upon which it shall have a new grant, to condemn the right to occupy the streets necessary to restore its former route. It is also contended, and cases are cited which are said to sustain the proposition, that equity would enjoin the city from ousting the inclined plane railway company by physical force from the use of streets, though it has been declared to be unlawful, and thus compel the city to confine its efforts to action in the courts. It is further said that the city could not take any steps to remove the tracks and other property of the inclined plane company now, or until April 1st next, because of a general ordinance which forbids the tearing up of the streets to lay or remove railway tracks from November 1st until April 1st.

Coming now to consider the points thus made on behalf of the inclined plane company in this order, it may first be said that counsel have not been able to find and cite a case supporting the view that an order temporarily suspending the order of injunction in effect enjoins the complainant from obtaining his rights in any other lawful way pending the suspension. To say the least of it, the claim is of doubtful validity. See *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545, 560.

2. Nor do I think that the other proposition that the city may not

oust the inclined plane railway from the enjoyment of its admittedly illegal occupation of the streets, by using only so much force as is necessary, has been so clearly established as to admit of no doubt. The cases cited by the counsel for the trust company and the inclined plane company are *Easton, S. E. & W. E. P. Ry. Co. v. City of Easton*, 133 Pa. St. 505, 19 Atl. 486, and *Asheville St. Ry. Co. v. City of Asheville*, 109 N. C. 688, 14 S. E. 316. In the first of these cases a street-railway company had an admitted right to occupy a street with its tracks. In a change of grade made by the city, the company had to take up and relay its tracks for a short distance. The city claimed the right to require it to lay a particular kind of rail. The company laid another. The city tore it up, and stopped the operation of the road. The company relaid it, and then procured an injunction against the city's further interference. The supreme court of Pennsylvania held that an injunction would properly issue against the city, whatever the merits of the controversy over the different kinds of rails, because the city could not, before submitting the question to the courts, take the law into its own hands, decide a doubtful question of law, and, upon the assumption that its decision was right, inflict great loss upon the railway company's business, especially when the convenience of the public might be seriously affected thereby. The North Carolina case was similar in principle. In both cases the companies were rightfully in the streets, in neither case had the rights of the parties been adjudicated at all in a court, and in each the contention of the city authorities, out of which the action grew, was combated by the railway company. In the case at bar it has been decided finally, and it is not now denied by either the trust company or the inclined plane company, that the grants to the latter to occupy the streets in question have all expired. This would seem to make a broad distinction between the case at bar and those cited. By the common law, a tenant at will, who is notified by his landlord to leave the premises, may be forcibly ejected, without giving the tenant any cause of action, if no more force than is necessary to remove the tenant and his goods is used. *Low v. Elwell*, 121 Mass. 309. If a man build his house upon a common, a commoner may, after notice, tear down the house, though the man be in it, and this without incurring liability to the ejected person. *Davies v. Williams*, 16 Q. B. 546. More than this, it has been generally held that an injunction will not issue against threatened trespasses where the complainant cannot allege that he has good title to the property about to be entered upon. *Hart v. Mayor, etc.*, 9 Wend. 571; *Schoonover v. Bright*, 24 W. Va. 698; *Cox v. Douglass*, 20 W. Va. 175; *Tate v. Vance*, 27 Grat. 571. Whether these cases, which nearly all concern the occupation of private property, would apply to the case at bar, may admit of question, but they certainly suggest forcible analogies to it.

3. With respect to the contention that the court ought to maintain its receiver in possession of the invalid portions of the line until an appropriation of the same by condemnation proceedings can be had, it is quite sufficient to say that the right of the inclined plane company to condemn is very doubtful. Again, the condemnation pro-

ceedings would have to include about three-quarters of the route of the inclined plane company within the city. There are cases where a court has enjoined the owner of land taken as part of the right of way of a railway built and running, from ousting the company until the latter could institute condemnation proceedings, but they are where the right to condemn is undisputed, and where the land in question is so small a part of the railway line that the delay in payment for the land is an injury very slight, as compared with the loss entailed by cutting the road in two and stopping its business.

4. The effect of the ordinance of 1876, as to the tearing up of the streets in the winter season, would seem to have little bearing on this case, because, even if it has the full effect claimed for it, there is nothing in it to forbid the city authorities from stopping the operation of the cars of the inclined plane company, and nothing to prevent the taking down of the poles and wires. It admits of serious doubt, too, whether section 5 and section 7 of the general street railway ordinance of 1879 do not modify the scope of the ordinance of 1876.

As will be seen, I am not deciding definitely any of the issues of law raised by the counsel for the inclined plane company. I am only stating what appears to be sufficient to show that the claims made by them are at least of doubtful validity. This court does not decide that Judge Smith's order may not operate as an injunction, or that the city has the right to abate the wrongful occupation of the streets by the inclined plane company. All that is held is that, if the obstacle of the receivership is removed from the course of the city, it could urge reasonable arguments to sustain both propositions in defense of action taken by it on the faith of their validity. In such a case this court ought not, by the possession of its receiver, to prevent the city from taking such course with respect to a remedy as it may be advised. The whole risk of any course taken must be upon the city. If it does an act in contempt of the superior court, its agents must answer there. This court assumes no responsibility for any action the city may take, but it is the court's duty to remove the insuperable obstacle to the city's exercising a choice of remedies interposed by the receiver's possession of the invalid portion of the line.

In *Lane v. Capsey* [1891] 3 Ch. 411, which was a mortgage foreclosure, a receiver had been appointed to take possession of the property, including five houses. In a prior action against the mortgagor, brought to enjoin him from erecting any more houses on the right of way of the complainant, and to compel him to tear down parts of those erected, the complainant's right to a passageway was declared, and the injunction against further building was allowed, but the mandatory injunction was denied, without costs. After the receiver was appointed, the complainant applied to the court in the foreclosure proceeding for leave to abate the violation of his rights. It was contended that the refusal of the mandatory injunction forbade remedy by abatement, and so that no leave should be given. Mr. Justice Chitty said that, if it was clear that there could be no remedy by

abatement, it would be his duty to deny the leave, but that, if there was doubt about it, then he ought to remove the impediment caused by the receiver's possession to any lawful proceeding. He thought that the question of the right to an abatement was not necessarily foreclosed by the failure to obtain a mandatory injunction, and that it was sufficiently doubtful to require him to remove the impediment of the receiver's possession. He did this by giving the complainant the right to pursue any lawful remedy he might be advised against the receiver, without being in contempt, including forcible abatement, if lawful.

Under the circumstances of this case, I should not care to expose an officer of this court to a possible contest of force with the city authorities. Some other means must be devised for removing the obstacle of the receiver's possession to the pursuit by the city of any lawful remedy it may be found to have. By section 2640 of the Revised Statutes of Ohio, it is provided that the council shall have the care, supervision, and control of all public highways, streets, avenues, etc., within the corporation, and shall cause the same to be kept open and in repair, and free from nuisances. By subsequent legislation this power, in Cincinnati, is vested in a board of legislation. It is conceded by counsel for the city that before any proceedings could be taken by agents of the city for removal of the inclined plane company's tracks from the invalid portion of its line by way of abatement as a nuisance, the board of legislation must take action declaring the occupation to be a nuisance, and directing its abatement. This is the same board with whom negotiations are in progress for a renewal of the grants of the inclined plane company, and it may be inferred that, as long as there is any hope of an agreement between the board and the company, the former will not attempt to resort to radical measures by passing such a resolution. In view of the necessity for action by the board of legislation before any remedy by abatement can be tried, I think I may properly allow the receiver to continue the present operation of the lines until the board of legislation indicates its purpose to resort to abatement, by passing such a resolution as that indicated above. The question whether the public would or should be inconvenienced by practically destroying this line is one the responsibility of deciding which may justly be put upon this chief municipal body, and ought to be avoided, so far as possible, by this court. Counsel for the city have argued, from other statutes, that the court ought to hearken to a resolution of this kind from the board of administration, and act upon that; but the powers of that board relied upon relate to remedies by suit, and not to those by abatement of nuisances.

And now what must be the court's order if the board of legislation should pass a resolution declaring the receiver's operation of the invalid parts of the line a nuisance, and notify the receiver thereof? After that the court could not operate the invalid part of the line. The receiver was appointed to conserve the mortgage interests of the Louisville Trust Company. No suitor in equity can ask the court to do an unlawful act through its receiver. Scru-

pulous care in this regard is enjoined by statute upon federal courts in the operation of railroads by their receivers under state laws and franchises. In *Felton v. Ackerman*, 22 U. S. App. 154, 9 C. C. A. 457, and 61 Fed. 225, already referred to, the circuit court of appeals of this circuit said:

"It is of the greatest importance that receivers of the federal courts shall not be violators of the state laws; and wherever a court is made to know, in any proper way, that its receiver is violating the law of the state in which is the property of which he has charge, the court must, *sua sponte*, direct him to cease further violation."

This passage has been pressed upon the court as a reason why the court should immediately, without awaiting action by the board of legislation, order the receiver to cease the operation of the invalid part of the road, because it has been made to know that the company's grants have expired, and the city is trying, through the courts, to oust it from occupation of the streets. But I cannot regard the company as other than a tenant at will in the streets, until the board of legislation shall indicate its intention to treat the occupation as a nuisance. It is true that the city, by the corporation counsel, under direction of the board of administration, has filed petitions indicating its intention to procure the removal of the tracks, etc., from the streets; but pending the litigation, and the remedial process of the courts, it was understood tacitly that the company should continue the operation of the road as formerly. I think the court may assume such tenancy at will to exist, either until process issues from a court, or until the board charged with control of the streets shall indicate its purpose not to await judicial action. Had Judge Smith not suspended the order of injunction, I should have enjoined the receiver from operating the invalid portion of the line at once, because the board of administration having control of the litigation had notified the receiver of its desire to enforce its rights under the injunction. As it is, the attitude of the city is to be determined by the action or nonaction of the board of legislation. The case is a different one from a real obstruction of public travel, like that in the case of *Felton v. Ackerman*. Here the road is affording means of transportation to the public, and is not, in any practical sense, obstructing the streets; and until the city board charged with the duty of declaring nuisances and authorizing their abatement shall take formal action, and assume the responsibility of destroying this instrument of public convenience before judicial process shall issue, this court may treat the occupancy of the streets by the receiver as temporarily acquiesced in by the city, and not unlawful, in an indictable sense, pending negotiations for a renewal of the grants. When the board of legislation shall act, however, it is not a matter of doubt what the duty of the court will be. Its receiver must cease the operation of the invalid portion of the line. In considering the duty of the court in this case, the circuit court of appeals, speaking by Judge Lurton, said:

"If the occupation of any of the streets of Cincinnati is no longer lawful, the court should be quick in directing its receiver to respect the rights of the city, and to desist from the operation of such parts of the road as are upon streets

where the easement has expired, unless the consent of the city for such further operation is first obtained. The federal court must not suffer itself to be used as a means of obstructing the just and legal rights of the city, or less prompt in courteous regard for the judgment of the state court than the absolute necessities of the case demand, in order to prevent injustice to this complainant."

The language is mandatory upon this court, and I have certainly gone as far as it permits in leniency towards the inclined plane company, in treating the nonaction of the board of legislation as a tacit consent by the city to the company's temporary occupation of the streets. But suppose the board of legislation passes a resolution declaring the use of the streets by the inclined plane company unlawful; what course should the receiver take? He need not take up the tracks, and deliver possession of the streets to the city. To order that would be, as already said, a mandatory injunction, and a remedy the court is not inclined to grant. The only other course is to redeliver possession of the tracks and other property now in situ on the streets occupied without right to the inclined plane company. The receiver took possession for the benefit of the mortgagee. I assume that the mortgagee, with the alternative of a removal of the tracks, would prefer a restoration to its mortgagor of so much of the property mortgaged as is in place in the streets in which the grants have expired. But it will be practically impossible to run part of the line without the rest, especially when we consider that included in the property which the receiver must deliver to the company are the bridges over Miami, Dorsey, and Baltimore streets, and the engine house at the top of the inclined plane. Therefore the trust company would probably prefer that the entire property shall be restored to the inclined plane company, if the latter will consent to turn over to the receiver the net earnings from the operation of so much of the road as it shall be able to operate.

The order of the court upon the petition of the city will therefore be as follows: That from and after the receipt by the receiver of a notice from the board of legislation that his operation of the inclined plane railway in any of the streets in which by the decree of the circuit court of appeals the grants owned by said inclined company have expired, is unlawful and forbidden, the receiver is enjoined from operating the railway in such streets, and he is directed to surrender possession of the property of the inclined plane company in place in such streets to said inclined plane company; and it is further ordered that, upon written application filed herein by the Louisville Trust Company, the receiver shall deliver possession of all the remainder of the property of the inclined plane company now in his custody to said company, on the condition, consented and agreed to in writing, and filed herein by said company, that it will turn over to the receiver herein the monthly net earnings from the operation of its property, after payment of the running expenses thereof, including salaries, wages, and supplies. And the receiver is ordered, within two weeks hereof, to file a full and complete account of the receipts and disbursements for the entire period of his receivership. Each party will pay its own costs in this proceeding.

What has been said disposes of the pending questions. I only wish

to add, in order that my language may not be misunderstood, that I have not intended, in the slightest degree, to advise a resort by the city to violence to enforce its rights in the streets. On the contrary, I think it would be deplorable if the city authorities, not accepting the weighty suggestion of the superior court in its order of suspension, and not abiding the expiration of that order, should foreclose reasonable negotiation, and disgrace the city's fair name by a course probably leading to a breach of the peace. If the city disregards the suggestion contained in the superior court's order of suspension, it does so at its own risk, and cannot rely on any approval of such a course by this court. All that this court decides is that, when the city demands the right to pursue remedies to enforce rights in the streets adjudged to belong to it by two courts of last resort, this court will not protect a party which is violating those rights by throwing the shield of its receivership over such violation. It will discharge the receiver, and let the inclined plane company, on the one hand, take the risk of operating the invalid portions of the road, if it chooses, and the city, on the other, that of any course it may see fit to pursue. The relation of this court to the controversy is merely incidental and ancillary, and imposes no duty upon it of distinctly deciding as to the lawful remedies of the parties, if it can free itself from that relation, as it can and will by the order above set out.

UNITED STATES v. PINE RIVER LOGGING & IMPROVEMENT CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1897.)

No. 780.

TROVER AND CONVERSION—TIMBER CUT FROM PUBLIC LANDS—AGREEMENT WITH GOVERNMENT.

The United States government, through an agent of the land office, seized certain logs which were in the possession of defendants, claiming that they had been unlawfully cut on an Indian reservation. Thereupon a contract was entered into between the government and defendants, by which it was agreed, in order to preserve the logs free of cost to the United States, that they might be removed to a boom in the Mississippi river at Minneapolis, with the distinct understanding that the government's possession of the logs should not be questioned or impaired on account of such removal, and that nothing in the contract should impair any right of either party in the logs. The logs were removed to Minneapolis, and, it being found desirable to manufacture them into lumber, defendants gave bonds to the government, reciting the previous proceedings, and the purpose to have the logs manufactured into lumber to preserve the property for the interest of all concerned, and conditioned for the payment of any judgment that might be recovered by the government against the defendants, in any form of action, on account of the premises. The defendants, after the logs were sawed, sold the lumber, and took the proceeds. *Held*, that the government did not, by accepting the bonds, agree to relinquish its rights in the logs, or consent that the lumber made from them might be sold by the defendants for their own benefit, and, upon proving that the logs were wrongfully cut, it would be entitled to recover from the defendants for a conversion thereof, and not merely for a trespass on the Indian reservation.

In Error to the Circuit Court of the United States for the District of Minnesota.

John E. Stryker, for plaintiff in error.

Eugene G. Hay and **J. B. Atwater**, for defendants in error.

Before **CALDWELL**, **SANBORN**, and **THAYER**, Circuit Judges.

THAYER, Circuit Judge. This suit was brought by the United States against the Pine River Logging & Improvement Company, a corporation, and Joel B. Bassett and William L. Bassett, co-partners as J. B. Bassett & Co., who are the defendants in error, and against John S. Pillsbury and Charles A. Smith, co-partners as C. A. Smith & Co., for the wrongful conversion of 22,005,921 feet of pine lumber, which was alleged in the complaint to have been taken from the Mississippi Indian reservation in the state of Minnesota. The complaint, which contained nine counts, charged, in substance, that nine different parties had wrongfully felled certain pine trees standing on said Indian reservation, and had cut the same into logs, and had removed the logs from the reservation; that the trespasses in question were committed at the special instance and request of the defendants; that the logs, when thus cut, had been delivered to the defendants; that the defendants had thereupon caused the logs to be floated down the Mississippi river to the city of Minneapolis, and to be there manufactured into lumber; and that they had sold the lumber, and had appropriated the proceeds thereof to their own use.

The answers which were filed by the defendants to the aforesaid complaint alleged, in substance, the following facts: That the logs referred to were cut under and by virtue of contracts which had been entered into with certain Chippewa Indians for the cutting of dead and down timber found on said reservation; that said contracts had been executed in pursuance of the provisions of an act of congress approved February 16, 1889, in relation to the cutting of dead and fallen timber on Indian lands (25 Stat. 673, c. 172); that payment for the logs so cut and removed had been made in full to the United States and to the proper Indian agent in accordance with the provisions of said contracts; that said logs were so cut by said Indians, and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under said contracts, from dead and down timber, and that the defendants were entitled to the same, and became the owners thereof upon delivery of the logs, and upon the making of the aforesaid payments; that, after the said logs had been delivered to the defendants, and before they were floated down the river to Minneapolis, the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber, and not from dead or down timber; that thereafter, for the purpose of preserving said logs, and realizing the full value of the same for the party who should ultimately be determined to be owner thereof, a contract was entered into between the United States and the defendants, which was as follows:

"This agreement, made and entered into this 27th day of May, 1892, by and between the government of the United States, * * * party of the first part, and the Pine River Logging & Improvement Company, * * * and J. B. Bassett & Company, * * * witnesseth: That whereas, the United States, by and through

a special agent of the general land office, has seized and is now in the undisputed possession of certain pine saw logs heretofore cut on the Winnebigoishish and Leech Lake Indian reservations, in the state of Minnesota, said logs being now in the waters of the Winnebigoishish Lake, Leech Lake, Leech river, Mississippi river, and Ball Club Lake, state of Minnesota, and within the limits of the Indian reservations aforesaid; and whereas, it is apprehended by both parties that said logs will suffer deterioration in quality by being suffered to remain where they now are until the season of 1893; and whereas, the parties of the second part desire, for the preservation of whatsoever property interest they may have in said logs, to remove, or cause the same to be removed, to a boom in the Mississippi river near the city of Minneapolis, and are willing to so remove said logs without questioning or attempting to disturb the possession thereof in the United States: Therefore, it is mutually agreed and understood that the parties of the second part may, without charge or cost to the United States, and under the supervision of the special agent of the general land office, cause said logs to be driven from their present position, through the waters of the Mississippi river, to such a boom in the Mississippi river at or near the city of Minneapolis as the Mississippi & Rum River Boom Company may designate: provided, that said logs shall be separated from all other logs and detained at Minneapolis in the boom to be designated by the boom company aforesaid, subject to the order of the commissioner of the general land office. In consideration of the covenant and agreement aforesaid, and with the distinct understanding that the possession of the United States shall in no sense be questioned or impaired on account of the location of the logs, the United States does hereby agree, through the commissioner of the general land office, that said logs may be driven in the manner and subject to the conditions hereinbefore stated: provided, that nothing in this contract contained shall be held in any proceeding, legal or otherwise, hereinafter to be had, to impair any right, title, property, or interest that the said parties of the second part, or either of them, or the United States, may have in or to the said logs, or any of them; the object of this contract being to recognize and continue possession in the United States, and to allow said logs to be driven without in any way affecting the question of right, title, property, or interest in the logs, and to leave such questions for future determination."

The answers further showed that thereafter, on March 10, 1893, after the logs had been driven to the city of Minneapolis in compliance with the provisions of the aforesaid contract, two bonds were accepted by the United States, one of them being executed by the Pine River Logging & Improvement Company as principal, and the other by the members of the firm of J. B. Bassett & Co. as principals. The bond executed by the Pine River Logging & Improvement Company contained the following recitals and condition, and the bond executed by the firm of J. B. Bassett & Co. was of like tenor and effect:

"Whereas, the above-named Pine River Logging & Improvement Company, principal, did in the year 1891 enter into divers contracts with sundry Indians of the Chippewa Nation, which contracts were duly approved by the department of the interior, whereby each of the said several Indians so contracted with were to cut, haul, and deliver during the season of 1891-92 onto certain waters of the Mississippi river a certain quantity of pine saw logs to be cut on a certain Chippewa Indian reservation in Minnesota, from dead and down timber, and when so cut to deliver said logs to the above-named principals; and whereas, each of said Indians did proceed, in pursuance of said contract, to cut a certain quantity of pine saw logs, and did deliver them in certain waters of the Mississippi river to the above-named principal; and whereas, a controversy afterward arose between said principal and the United States as to whether the said logs so cut were cut from dead and down timber, or as to whether the same were in great part cut from green timber; and whereas, in consequence of such a controversy, said logs, while in the possession of said principal, were seized at or about their place of delivery to the said waters, by the United States, acting through the officers and employes of the department of the interior; and whereas, the United States, and on May

27, 1892, entered into a written agreement in duplicate that the said logs so seized shall remain in the possession of the United States, but shall be driven at its expense by the said principal from said point of seizure to within the limits of the Mississippi & Rum River Boom Company; and whereas, the said logs have been so driven by the said principal; and whereas, the department of the interior has not yet completed its investigation into the facts of said case, and it is considered important by both parties that the said logs be further driven to the mill and manufactured for the preservation of the property, for the interest of all concerned, pending said investigation and a suit to be instituted by the United States, if it shall elect to do so, to determine the questions at issue between the parties: Now, therefore, the condition of this obligation is such that, if the said parties of the first part shall well and truly pay or cause to be paid, or satisfy or cause to be satisfied, to the United States of America, any judgment that may be rendered against the above-named principal in any form of action or suit which may be brought by the United States against said above-named principal on account of the premises hereinbefore recited, not to exceed the penalty of this bond, then this obligation to be void; otherwise to be of full force and effect."

Replying to the aforesaid answers, the United States admitted, in substance, that the defendants the Pine River Logging & Improvement Company and J. B. Bassett & Co. had entered into contracts with the various persons named in the answers for the cutting of logs from dead and down timber on said Mississippi Indian reservation, but it denied that the logs in controversy had been cut pursuant to said contracts, or in accordance with the act of congress of February 16, 1889, authorizing the cutting of dead and down timber on Indian reservations. It averred, on the contrary, that the logs on account of which it sued were cut from pine trees on said reservation which were alive and standing. The United States admitted that it had seized and taken possession of the logs in controversy, subsequent to the delivery thereof to the defendants; that it had thereafter entered into a contract with the defendants, such as was described in the answer, for the driving of the logs down the river to the city of Minneapolis, and that it had thereafter, on March 10, 1893, accepted from the defendants the bonds which were set forth in full in the answers. After the case was at issue on the aforesaid pleadings, the defendants the Pine River Logging & Improvement Company, and Joel B. Bassett and William L. Bassett, composing the firm of J. B. Bassett & Co., filed a motion for judgment against the government on the pleadings, for the sole reason, as stated in the motion, that on the facts admitted by the pleadings "the plaintiff above named [the United States] is not entitled to maintain an action of trover or conversion against said two defendants, or either of them, for the matters and things set out in said cause of action." This motion was sustained by the circuit court, and a judgment was entered against the United States. To reverse said judgment the case was removed to this court by a writ of error.

The grounds upon which the defendants in error seek to sustain the summary judgment which was entered in their favor by the circuit court is that by accepting the two bonds of date March 10, 1893, the United States, in effect, agreed to relinquish all of its right, title, and interest in the logs which had been cut on the Indian reservation, and to look to the bonds for whatever indemnity it might be able to obtain for the wrong and injury complained of. It is urged, in substance, that by accepting the bonds the government not only

agreed that the logs might be sawed into lumber, but that it also impliedly agreed that the lumber might be sold by the defendants for their own benefit; that the government cannot count on the sale of the lumber by the defendants, after it was sawed, as a wrongful act, nor maintain an action against the defendants, except for a trespass on lands belonging to the United States, and that in such action the damage recoverable is merely compensation for the injury done to the land over and above the value of the timber which was cut and removed. We are not able to assent to that view of the case. By the terms of the bonds it is obvious that the government cannot maintain a suit thereon against the defendants, until it has first recovered a judgment against them in some other form of action; therefore the view contended for denies the right of the government to recover any compensation for the large amount of standing timber alleged to have been cut on the reservation, and limits its recovery to compensation for such injury as may have been done to the land over and above the value of the severed trees, while the defendants were engaged in removing the timber. The bonds contained no provision authorizing the defendants to sell the timber in controversy after it should be manufactured into lumber at Minneapolis; and in view of the recitals found therein, and the circumstances under which they were executed and accepted, it is clear, we think, that the government neither intended to authorize a sale of the lumber, nor to part with its title thereto, nor to relinquish any of its rights growing out of the original wrongful acts described in the complaint. After the logs were seized, the government, by the agreement of May 27, 1892, consented that the logs might be driven "without charge or cost to the United States, and under the supervision of the special agent of the general land office, * * * to such boom in the Mississippi river, at or near the city of Minneapolis, as the Mississippi & Rum River Boom Company may designate," for the purpose of preserving the property for the benefit of the party who should be adjudged to be the rightful owner; provided, however, that nothing done in that behalf "should be held in any proceeding, legal or otherwise, * * * to impair any right, title, property, or interest that the said parties of the second part, or either of them, or the United States, may have in or to the said logs, or any of them." The object of the contract was declared to be "to recognize and continue possession in the United States, and to allow said logs to be driven without in any way affecting the question of right, title, property, or interest in the logs, and to leave such questions for future determination."

When the logs had reached Minneapolis, it was found necessary to manufacture the same into lumber, as the bond recites, "for the preservation of the property for the interest of all concerned, pending said investigation, and a suit to be instituted by the United States, if it shall elect to do so, to determine the questions at issue between the parties." We fail to discover in the provisions of these bonds anything tantamount to a consent on the part of the United States that the defendants might market the lumber, when the logs should have been sawed, for their own account, or any implied agreement by the United States that it would relinquish its title thereto. By the

acceptance of the bonds the government contemplated no relinquishment of its property rights, and no alteration in the legal status of the parties. It did consent that the form of the property might be changed from logs to lumber for the purpose of preserving its value, but beyond this its consent did not extend. The manifest purpose of the parties in entering into the agreement of May 27, 1892, and in executing the bonds of May 10, 1893, was to put the property in such form and shape that its value might be preserved, pending the litigation which was in contemplation, without altering the legal rights of either party. After the logs were manufactured into lumber, the defendants held the lumber as agents or bailees of the United States, precisely as they had previously held the logs under the agreement of May 27, 1892, while they were being driven down the river to Minneapolis.

It results from these views that the sale of the lumber by the defendants, and the appropriation of the proceeds to their own use, was a wrongful act, on account of which the United States may maintain an action for conversion, provided it appears on the trial, as is alleged in the petition and in the reply, that the lumber was in fact made from growing trees which were felled on the Indian reservation in question, and were cut into logs, and removed therefrom, in violation of law. Moreover, the government did not lose its right to maintain an action for conversion on account of the wrongful removal of the logs from the reservation, the same having been cut from growing trees, by reason of the fact that it subsequently seized the logs, assumed the possession thereof, and entered into the contract aforesaid for driving them down the river to the city of Minneapolis. The doctrine is well settled that the recovery of the possession of property, otherwise than by judicial process, which has been wrongfully converted, does not deprive the true owner of his right to maintain an action of trover. In such a case the recovery of the property from the wrongdoer cannot be pleaded in bar to the action, but merely in mitigation of damages. *Cattle Co. v. Hall*, 33 Fed. 236; *Bank v. Leavitt*, 17 Pick. 1; *Curtis v. Ward*, 20 Conn. 204; *Ewing v. Blount*, 20 Ala. 694; *Pierce v. Benjamin*, 14 Pick. 356, 361; *Sparks v. Purdy*, 11 Mo. 219, 223.

The question does not arise upon this record whether, in the event of a recovery by the United States, the defendants will be entitled, by way of mitigation of damages, to an allowance for the services rendered by the defendants in driving the logs from the place of seizure to Minneapolis, and sawing them into lumber, whereby the value of the property was enhanced. No such question was considered by the circuit court, and no opinion on that point will be expressed by this court on the present occasion. The trial court decided the case upon the theory that the facts admitted by the pleadings disabled the United States from maintaining the present action, and in so ruling we think that the trial court erred.

It is further contended in behalf of the defendants in error that, although the ground upon which the trial court based its judgment was erroneous, yet that the judgment in their favor ought not to be disturbed, because the record discloses a misjoinder of causes of

action, in that the Pine River Logging & Improvement Company and J. B. Bassett & Co. should have been sued separately for acts of conversion by them separately committed. There are two answers to this contention. The complaint which was filed by the United States does not disclose a misjoinder of causes of action. The allegations of the complaint are sufficient to show that all of the defendants were jointly concerned in the cutting and removal of the logs from the reservation, and the plaintiff may elect to rely for a recovery on the original act of conversion, rather than upon the sale of the lumber after the logs were sawed with the consent of the United States. A second reason why the judgment cannot be upheld on account of the alleged misjoinder of causes of action, even if that point was well taken, is that the judgment rendered by the circuit court is in such form that, if sustained, it would bar a subsequent suit against either of the defendants for the wrongful conversion of the property. The circuit court "ordered and adjudged * * * that the plaintiff * * * take nothing of the said defendants, the Pine River Logging & Improvement Company and Joel B. Bassett and William L. Bassett, * * * and that they, and each of them, do go hence without day." This is, without doubt, a final judgment on the merits; whereas, if the defendants were entitled to no greater relief than an order quashing the summons or dismissing the complaint because separate causes of action against different defendants had been erroneously united in the same complaint, the judgment should have been so expressed. The trial court evidently intended to dispose of the case on its merits, and entered a judgment accordingly. No attention was paid to the plea in abatement, and no action by the trial court was predicated upon that plea. We think, therefore, that the judgment cannot be upheld on the ground last suggested. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

STANDARD SEWING-MACH. CO. v. LESLIE.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1897.)

No. 345.

1. PAROL EVIDENCE—CONSTRUCTION OF CONTRACT.

Evidence of the situation of the parties, the subject-matter of the contract, and the circumstances under which it was entered into cannot authorize a construction which would make it conform to what the parties may have secretly intended, but failed to express, but only to explain the terms actually employed, if the language is of obscure or doubtful meaning.

2. CONSTRUCTION OF CONTRACT—PATENT RIGHTS.

By a contract between a patentee of rotary shuttle sewing machines and a corporation, the patents were to be vested in a trustee; the corporation was "immediately to engage in and carry on with energy the business of making and selling sewing machines during the life of the contract, and shall make such number of machines as to keep the supply as nearly as practicable up to the demands of the trade"; the contract was to endure during the life of the patent, unless terminated by the corporation by giving written notice; the corporation was to pay a fixed royalty "upon each machine manufactured by it embodying the principles covered by the first party's patent," but was not obliged "to make rotary shuttle sewing machines like any model that

has been or may be construed [constructed] or settled upon as a standard, but it may from time to time make such changes as may seem to it expedient," but no such alteration was to relieve it from paying royalties so long as the machine involved "any of the essential principles" covered by the patent; the corporation was to make monthly statements "of the number of said machines shipped from the factory," and make settlements accordingly; it was expressly stated that the patentee did not guaranty the validity of the patents; and the royalties were to cease whenever the patents should be decreed invalid by a court of competent jurisdiction. *Held*, that the corporation was not restricted to the manufacture of machines embodying the principles of the patent, or bound to pay royalties on all machines made, whether covered by the patent or not, so long as it did not terminate the contract by written notice, but was required only to make and pay royalties on machines sufficient to meet the demands of the trade for that machine, and that in an action for royalties it was entitled to show that the machines made and sold did not embody the principles of the patent.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The defendant in error, Arthur M. Leslie, brought an action in assumpsit against the plaintiff in error, the Standard Sewing-Machine Company, formerly the Leslie Sewing-Machine Company, upon the following contract:

"Whereas, Arthur M. Leslie and the Leslie Sewing-Machine Company, both of the city of Cleveland, Ohio, did upon April 1, 1884, enter into a contract touching the use of certain letters patent for improvements in sewing machines, under which contract said Leslie assigned to Charles H. Bulkley, as trustee to hold for both parties during the continuance of said contract, all his right, title, and interest in and to all United States letters patent which had been granted said Leslie for improvements in sewing machines, and all patents held by him on the rotary shuttle sewing machine, which said letters patent said trustee now holds in trust as aforesaid; and whereas, said parties wish to rescind said contract, and enter into a modified agreement in relation to the subject-matter thereof: Now, therefore, this agreement made this August 20, 1884, by and between said Arthur M. Leslie of the first part and the Leslie Sewing-Machine Company of the second part, witnesseth: (1) Said original contract of April 1, 1884, shall be, and the same is hereby, rescinded and canceled. (2) Said Charles H. Bulkley shall continue to hold said letters patent assigned to him by said first party in trust for the parties hereto under and in accordance with the terms of this agreement. Said first party further agrees to convey to said Bulkley upon the same trusts all letters patent which have been since said assignment, or which may hereafter be, granted to him for improvements on rotary shuttle sewing machines, and all improvements made or which may be hereafter made thereon. In case of the death of said Bulkley during the continuance of this agreement, the interest theretofore vested in him as such trustee shall be vested in such trustee as the then probate judge of Cuyahoga county shall appoint upon application of either party with notice to the other, and thereupon all the stipulations of this contract shall be carried out by the parties hereto as though no change had been made. (3) Said first party agrees to permit second party to take out such foreign patents as it may desire on said rotary shuttle and improvements (the invention of the first party) at any time made thereon, at the expense of second party, and all such foreign patents shall be the joint property of the parties hereto. (4) In consideration of this contract and of past services rendered by first to second party, second party hereby releases first party from all his existing indebtedness to it. (5) Second party hereby agrees to pay first party as royalty the sum of seven and one-half (7½) cents upon each machine manufactured by it embodying the principles covered by the first party's patent up to the number of one hundred thousand (100,000), and the sum of five cents (5) upon each such machine in excess of said number, said machines to be counted for this purpose on their shipment from the factory. Said royalties shall be paid in cash, and one thousand dollars (\$1,000) thereof paid in advance to said first party. (6) Said first party shall not be held to guaranty the validity of said patents or any of them, or to protect said second party against infringement thereof, or against actions brought against it for infringements, but

all royalties hereunder shall cease upon the date of a decree of any court of competent jurisdiction declaring the invalidity of said patent or patents. (7) Said second party agrees immediately to engage in and carry on with energy the business of making and selling sewing machines during the life of this contract, and shall make such number of machines as to keep the supply as nearly as practicable up to the demands of the trade, and this contract shall endure during the life of the patents issued in 1882, unless sooner terminated as hereinafter provided. (8) Said second party shall not be obliged to make rotary shuttle sewing machines like any model that has been or may be construed [constructed] or settled upon as a standard, but it may from time to time make such changes as may seem to it expedient; but no such alteration or change shall relieve second party from the payment of royalties as hereinafter provided, so long as the machine made by it involves any of the essential principles covered by the patent of the first party. (9) Second party shall render to first party once in each month a correct and true statement under oath of the number of said machines shipped from the factory, and make settlements of royalties with first party as follows, to wit, on October 1, 1884, and quarterly thereafter; and first party shall have the right to examine the books of the company on the 1st days of October, January, April, and July of each year during the continuance of this contract to satisfy himself as to the correctness of such monthly statements. (10) Second party shall have the exclusive right to make and sell machines under said patents as above provided during the term of this agreement. (11) Second party may terminate this contract upon giving written notice to the first party, and notifying said trustee that it has no further interest in said patents, and that the same may be reassigned to first party. In witness whereof said parties have hereunto set their hands at Cleveland, O., the day and year above written.

Leslie Sewing Machine Company.

"By E. H. Hary, Sec. and Tr.

"By Frank Mack, President.

"Arthur M. Leslie."

At the trial it was proven that the \$1,000 specified in the fifth clause of the contract had been paid, but that no other moneys for royalties had been paid. It was further proven that the plaintiff in error had manufactured 179,591 sewing machines between the date of the contract and the bringing of the action, which machines were like one or another of five models produced to the jury; and the plaintiff below offered expert testimony, which was received, tending to prove that each of the five models produced to the jury embodied some one or more of the principles contained in one or more of the patents issued to the defendant in error. The plaintiff in error, defendant below, gave evidence tending to prove that no "Leslie" machines were made by it after September 1, 1885, but only such as were known as the "Standard" machines; and thereupon called as witnesses certain mechanical experts, duly qualified as such, and propounded to each the question, in substance, whether the essential principles of the claims of the patents to Leslie, or any of them, were involved in the machines so manufactured by the company. The trial court, without objection by the plaintiff below, ruled the question to be immaterial, to which ruling a timely exception was made and duly preserved. In connection with that question it was proposed to prove by such witnesses that none of the machines manufactured, shipped or sold by it since January 1, 1887, involved the essential principles of any of the claims of the patents to Leslie, either in identical construction or by way of mechanical equivalent. This offer was ruled against by the trial court, and timely objection to such ruling was made and preserved. The defendant below further offered to prove that at the time of the contract in suit, and for a long time prior thereto, the Leslie machines made in accordance with the plaintiff's patent were unsuccessful in their operation, unpopular with the trade and the public, and that the business of their manufacture and sale had constantly dwindled, and that practically the business was at the point of failure when the contract was made. This offer was ruled against by the court, and an exception duly made and preserved. Many requests to charge with respect to the construction of the contract were preferred to the court and refused, but need not be here specifically stated.

The trial court charged the jury as follows: "My interpretation of that contract being that it was the duty of the defendant, if it chose to cease operations under that contract, to manufacture sewing machines under the patents or some of the patents owned by the plaintiff, it should exercise that option under the eleventh

clause of the contract by serving notice and surrendering to the plaintiff the patents, or authorizing the trustee to surrender the patents to the plaintiff. It being entirely undisputed here in the evidence that there was no such action by the defendant, and it being undisputed that the defendant proceeded in the manufacture of sewing machines to an amount shown by the undisputed testimony, it is the view of the court, and you are so instructed, that the plaintiff is entitled to recover the royalties provided in the contract on the machines which are so shown to have been made; that is, on all of the machines shown to have been made by defendant under the testimony, without regard to variations appearing in the form of the machines as shown by the testimony,"—to which charge an exception was duly made and preserved. The court thereupon directed a verdict for the plaintiff below for royalties according to the contract upon all machines manufactured by the defendant. Such verdict was rendered, and judgment entered thereon, and a writ of error sued out to review the judgment.

Charles S. Holt, for plaintiff in error.

William Prentiss, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after this statement of facts, delivered the opinion of the court.

It is undoubtedly true that proof of the circumstances out of which the contract grew, and which surrounded its adoption, may be proven to ascertain its subject-matter and the standpoint of the parties in relation to it, where the language of the contract is obscure or doubtful; but such evidence cannot be received to vary the contract by addition or substitution. *West v. Smith*, 101 U. S. 263-271; *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.*, 18 U. S. App. 438, 453, 7 C. C. A. 660, and 59 Fed. 49. Possibly, under the doctrine of these cases, the trial court should have entertained the evidence with respect to the situation of the parties, the subject-matter of the contract, and the circumstances under which it was entered into. We need not, however, pause to consider this question, because such evidence could not avail to a construction of the contract which would conform it to what the parties may have secretly intended but failed to express, but only to explain the meaning of the words actually employed if the language used was of obscure or doubtful meaning. We find the instrument in question to be couched in plain and unambiguous language. It is therefore the best possible evidence of the intent and meaning of the parties. The provisions are not antagonistic, nor is the language obscure. There is, as we read the contract, no uncertainty whatever in respect to the object and extent of the engagement. We are therefore to look to the terms of the contract to ascertain the intention of the parties, and that we must find "from the entire contract, without ignoring or forcing from their true significance the plain and unequivocal words and expressions of other articles." *Bast v. Bank*, 101 U. S. 96; *Crimp v. Construction Co.*, 34 U. S. App. 598, 606, 18 C. C. A. 595, and 72 Fed. 366, 371.

The defendant in error, the inventor of the patented improvements, manifestly desired to provide for the manufacture and sale of machines embodying the features of his inventions. It is mat-

ter of common knowledge that for many years sewing machines of many and different modes of operation had been in use and were upon the market, so that it was questionable whether, in the then state of the art, improvements could be effected which could be properly classed within the domain of invention or be deemed other than mechanical equivalents. Leslie was unwilling to guaranty the validity of his patented inventions, or to protect the company against liability in their use should they prove to infringe upon another's protected rights. This risk was assumed by the company, upon the condition, however, that the payment of royalty should cease when a competent court should declare the invalidity of the invention. It thus appears that the inventions of Leslie were not recognized to be of established merit, or to be such that a monopoly in their use was assured to the company. It was clearly, therefore, an adventure of doubtful outcome, depending in part upon the question whether a monopoly in the manufacture and sale of these inventions should be established, and therefore uncertain whether their manufacture and sale would prove remunerative. It was under these circumstances that this contract was made. We therefore naturally find that those who were to invest capital in their manufacture should seek to protect themselves, so far as possible, against the risk assumed, by providing, as is done in the sixth clause of the agreement, that all royalties should cease upon the date of the decree of any court of competent jurisdiction declaring the invalidity of such patent or patents, and also by providing, as is done by the eleventh clause, that the company might terminate the contract at any time upon written notice, thereupon relinquishing all interest in the patents which had been assigned to a trustee in trust for the purposes of the contract. The company was willing to assume the risk of infringement upon other patented rights until the invalidity of the patents was declared, if payment of royalty should thereupon cease, and it had also the right to terminate the contract. This eleventh clause furnished the company another protection. Although the patents might be sustained, it was still problematical whether the inventions were such as to commend themselves to popular favor, and whether the manufacture and sale of machines embodying those inventions would prove pecuniarily remunerative. The company chose to bind itself to the manufacture of the Leslie machine during the terms of the patents, but reserved to itself the right to terminate the contract at any time when it deemed it advisable so to do.

By the seventh clause the company agreed "immediately to engage in and carry on with energy the business of making and selling sewing machines during the life of this contract, and shall make such number of machines as to keep the supply as nearly as practicable up to the demands of the trade, and this contract shall endure during the life of the patents issued in 1882, unless sooner terminated, as hereinafter provided." It is insisted for the plaintiff in error that this provision has reference to the making and selling of sewing machines generally, and is not limited to the man-

ufacture of those conforming to the Leslie patent, and that the company was bound to manufacture sewing machines of different designs sufficient practically to supply the needs of the market, so that Leslie's inventions, if they should prove popular and valuable, might find a larger market. We think this a strained and unwarranted construction of the contract. We are unable to understand that the flooding of the market with machines of different construction could be beneficial to the marketing of Leslie's machine. Upon the contrary, it would be detrimental. Leslie was only concerned to supply the market with machines containing his own invention, not the devices of others. It was not only foreign to his purpose, but counter to his interest, to supply the market with other and competing manufactures. The limitation of the contract to the period of the life of the patent lends additional force to this construction, if any support were needed. The plain meaning of the compact is that the company should energetically pursue the manufacture of the Leslie machines so that the supply should not fall short of the demand for these machines. It does not follow, however, if there were a breach of the agreement in this respect,—which we do not understand to be charged,—that the damages arising from the breach are measured by the amount of royalty specified in the contract to be laid upon all machines made by the company. That is to say, if the company was prohibited to manufacture machines other than the Leslie machines, and violated its contract in that regard, we do not understand that the company would be liable to respond for the specified royalties upon all the machines they manufactured, because it does not follow, necessarily, that the company could have sold the Leslie machine to the extent that they might have sold machines of other character and embodying other inventions. We cannot, however, find in this contract any language or any intent to restrict the company to the manufacture and sale of Leslie machines. It is true the company agreed to carry on energetically the business of manufacturing Leslie machines sufficient to supply the demands of the market. That manufacture might be great or small, according to the popularity which the Leslie machines might attain, and according to their merit, as might be established by their practical use, and as the validity of the patents might be determined by the court. It is not to be assumed, in the absence of restrictive provisions, that the company bound itself to invest considerable capital in a manufacturing plant which must lie idle unless the Leslie machine should prove to be a valid monopoly and entitled to and obtain popular indorsement and demand. The company was indeed bound to manufacture the Leslie machine up to the demand of the market, but beyond that it was not restricted in the use of its plant. We not only do not find in this contract any word of exclusion or prohibition in this regard, but we discover language which, to our thinking, clearly recognizes this right. Thus, in the fifth clause of the contract the royalty is laid upon each machine manufactured by the company "embodying the principles covered by the first party's pat-

ent"; and in the eighth clause it is provided that the company shall not be obliged to make rotary shuttle sewing machines like any model that had been settled upon as a standard, but it had the right to make such changes as should seem to it expedient, provided that no such alteration should relieve the company from the payment of royalties as provided, "so long as the machine made by it involved any of the essential principles covered by the patent of the first party." Unless, under this contract, the company could rightfully make machines other than Leslie machines, this language is meaningless. If, as ruled below, the company must pay royalties upon all machines made by it so long as the contract was operative and until it was canceled by the act of the company, the language of these two clauses fulfills no office. These provisions are, then, mere surplusage. We have no right to so regard them. We must disregard a cardinal canon of construction to expunge them or to ignore them. They are not in conflict with any other term of the contract. They must be given full effect. That can only be done, in the absence of any words of exclusion or prohibition, by holding that the company had the right to engage in the manufacture of machines other than the Leslie machine. The provisions of the ninth clause clearly relate to a statement of the number of Leslie machines shipped, and not to those of another character, for Leslie was only interested in royalties upon machines manufactured according to his patents.

We fail to perceive the force of the interpretation of the trial court that it was the duty of the company, if it chose to cease operations under the contract and the manufacture of sewing machines under the patents owned by Leslie, to first exercise its option under the eleventh clause to terminate the contract. Undoubtedly, so long as the contract continued in force, the company was bound to manufacture the Leslie machines sufficient to meet the demands of the trade in that machine, but this does not prohibit the company from the manufacture of machines under other patents or of different construction; for to hold that, as we have before observed, would be to fly in the face of the express language of the fifth and eighth clauses of the contract. The company could terminate the contract whenever it found the business unremunerative, but, the contract continuing, it must meet the market demand for the Leslie machine. To the objection that under such construction the company could retain the exclusive control of the patents while refusing to supply the market demand for the Leslie machines, it may properly be answered that for such breach of the agreement the company would be answerable in damages, and if the remedy at law were inadequate equity would find a way, possibly by annulling the contract and compelling a reconveyance of the patents, to stay the threatened wrong. Courts of law, however, do not sit to relieve from improvident contracts, but to interpret and enforce the agreements which parties have themselves made. We are of opinion that the trial court erred in its exclusion of evidence which would tend to show that the machines manufactured did not involve any of the essential principles covered

by the Leslie patents and in its direction of a verdict. The judgment will therefore be reversed, and the cause remanded, with directions to the court below to award a new trial.

APGAR et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1897.)

No. 330.

1. APPEALS IN CUSTOMS CASES—FINDINGS OF BOARD OF APPRAISERS.

The circuit court of appeals will not review a finding of facts by the board of general appraisers, not controverted by new evidence in the circuit court, unless manifestly unsupported by the evidence or clearly against the weight thereof.

2. CUSTOMS DUTIES—CLASSIFICATION—"NUCOA BUTTER."

"Nucoa butter," made, by a process not clearly shown, from cocoanut oil, which process consists in part in pressing the oil in a solid state to eliminate the softer oils, then melting the remaining solid, and washing it with steam, is dutiable as "cocoa butterine," under paragraph 230 of the act of August 27, 1894, and is neither exempt from duty as "cocoanut oil," under paragraph 568, nor dutiable as an unenumerated manufactured article, under section 3, of said act.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was an application by Apgar & Co. for a review of the decision of the board of general appraisers affirming the action of the collector at Chicago in assessing duty upon certain imported goods. The circuit court affirmed the decision of the board, and the importers have appealed.

N. W. Bliss, for appellants.

John C. Black, U. S. Dist. Atty., and Oliver E. Pagin, Asst. U. S. Atty.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This appeal involves the question of the proper classification of an article of merchandise imported by the appellants as "nucoa nut oil," under the act of August 27, 1894, which contains the following provisions: First, from the schedules of duty-paying articles: "230. Cocoa butter or cocoa butterine, three and one-half cents a pound." Second, from the free list: "568. Oils, * * * nut oil or oil of nuts, not otherwise specially provided for in this act, * * * palm and cocoa nut. * * *"

The foreign sellers, in the original invoice, gave to the goods the name of "nucoa butter," but, in brackets, gave what is claimed by appellants to be its real descriptive name, as "solidified cocoanut oil." The United States consul general at London certified the goods to be "solidified cocoanut oil." The statement by the shippers, certified by the local consul, described the goods as "nucoa butter." The goods were entered for consumption, and transported to Chicago, as "cocoanut oil," where the collector demanded a duty of

3½ cents per pound, under the above provision for "cocoa butterine." The importers paid this duty under protest, claiming the goods to be exempt under paragraph 568, as above, or, if dutiable at all, to be so at 20 per cent. ad valorem, under section 3, covering unenumerated manufactured articles. The case was referred to the board of United States general appraisers, at New York, where testimony was taken, and a report made affirming the action of the collector. No testimony was taken or offered on the hearing in the circuit court, where the decision of the general appraisers was affirmed, and so the case stands here upon the testimony taken before the board of appraisers, and their decision thereon, affirmed by the circuit court. In the opinion given by the board, it is said:

"The merchandise is invoiced as 'nucoa butter.' It is used chiefly by confectioners as a substitute for cocoa butter. It was assessed for duty, as 'cocoa butterine,' at 3½ cents a pound, under paragraph 230, act of August, 1894, and is claimed to be exempt from duty under paragraph 568, as cocoa nut oil, or to be dutiable at 20 per cent. under section 4. In a circular submitted in evidence, the following description appears: 'Nucoa is a hard butter, extracted from sweet nuts, prepared by patent process, its melting point being 87° F. It is as good and genuine an article for chocolate thinning as cocoa butter itself, and presents a saving of nearly 50 per cent. In caramels it is being successfully used by some of the largest makers instead of cream, and renders wax and wrappers unnecessary. Nucoa must not be confounded with ordinary cocoa butter substitutes. It is an exceptionally good article, sells freely in Europe, and has already been taken hold of by the American trade.' The manufacturers make affidavit that the following is the process of manufacture: 'Nucoa, prepared according to British patent No. 16,854, 1892: The cocoanut oil is placed, in a solid condition, in hydraulic presses, and submitted to a second pressing at a suitable temperature, until the soft oils are expressed from it. We then take the hard oil remaining, and refine it by carefully washing it with steam, in order to remove its characteristic odor, as is more particularly described in the aforesaid patent. This extra-refined cocoanut oil is then colored, to make it more pleasing to the eye, with a little yellow coloring matter, dissolved in stearic acid.' It is evident, from this description, that the merchandise is a product of cocoanut oil, rather than the cocoanut oil of commerce. We find that it is not cocoanut oil, and overrule the claim that it is exempt from duty, under paragraph 568. As nucoa butter is a cocoa butter substitute, we find, in accordance with G. A. 1, 174, that it is cocoa butterine, and overrule the claim that it is dutiable at 20 per cent., under section 3. Reference is made to the principle held in the classification of lanoline (*Movius v. U. S.*, 66 Fed. 734); and of concentrated cherry juice (*Fed. Rep. C. V. p. 984*)."

There is also in the record an affidavit by one of the directors of the manufacturing company, which says:

"The product 'nucoa' is manufactured solely from cocoanut oil roughly after the following manner: The crude cocoanut oil is submitted to the temperature of 70° F., and then pressed by suitable means until all the oils liquid at that temperature, or most of them, are removed. The remaining hard fat is then further refined by melting it at a higher temperature, and washing it with steam, until the volatile oils or ethers are expelled. This refined oil is then tinted with yellow color, about one part to 5,000, to make it more pleasing to the eye, and is then run into molds, and allowed to cool. It sets hard upon cooling, and in this condition is exported."

The case here turns upon the question of fact whether the article is cocoa butterine, as found by the board of general appraisers, or is cocoanut oil, within the meaning of paragraph 568. It appears, from the evidence, that, in preparing this merchandise for the exportation to America, it is submitted to a first pressing, of which no

details are given, and to a second pressing, of which partial details appear, and of the effect of which pressings this court cannot well judge, to say nothing of the process under the English patent, the effect of which, in reducing the article to the resultant article, nucoa, is not given. How much effect these things may have in reducing the article from a state properly denominated "cocoanut oil" to a substance more nearly allied to a product of cocoanut oil, and properly denominated "cocoa butterine," this court is not in so good a position to judge as was the board of general appraisers, who heard the evidence, and had, presumably, more expert knowledge of the subject. In a proper case, no doubt, this court may go back of the decision of the board of general appraisers and the circuit court, and review the case upon the evidence, and, if need be, overrule their decision. But it requires a clear case to enable the court to do that. This court ought not, and will not, review a finding of facts made by the board of general appraisers and not controverted by new evidence in the circuit court, except it be manifest that the decision of the board of appraisers is unsupported by the evidence, or is clearly against the weight of evidence. See *In re White*, 53 Fed. 787; *U. S. v. Van Blankensteyn*, 5 C. C. A. 579, 56 Fed. 474; *In re Muser*, 49 Fed. 831.

In this last case Judge Lacombe very properly says:

"It was plainly contemplated by the framers of the act that the board would sit as experts to decide in a summary manner questions of value and classification arising under the tariff laws, reaching their decision from their own expert knowledge, and from the evidence submitted to them, or such as they might obtain."

We are unable to say that the decision of the board of general appraisers is either unsupported by the evidence or is opposed to weight of evidence. On the contrary, we are of opinion that the finding of facts was justified by the evidence in the case, and the decision of the circuit court is affirmed.

UNITED STATES v. DOMINICI et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

CUSTOMS DUTIES—REIMPORTATIONS—IDENTIFICATION—TREASURY REGULATIONS—BOXES AND "SHOOKS."

The circular letter of the secretary of the treasury of October 20, 1890, continuing in force articles 381-383 of the treasury regulations of 1884, prescribed the regulations under which proof should be made of the identity of American articles reimported, under paragraph 493 of the tariff act of 1890. Such regulations apply to boxes imported filled with fruit, which have been exported from the United States in the form of shooks, and proof of the identity of such boxes with the shooks exported, furnished in any other form than that prescribed by such regulations, will not entitle the boxes to free entry. 72 Fed. 46, reversed.

This is an appeal from a decision of the circuit court (72 Fed. 46), Southern district of New York, reversing a decision of the board of general appraisers, which had affirmed a decision of the collector of the port of New York, assessing duty on certain boxes containing

oranges and lemons, and imported into this country while the tariff act of 1890 was in force, the assessment being made under paragraph 301 of that act, which imposes "a duty of 30 per cent. ad valorem upon the boxes or barrels containing said oranges, lemons or limes." There is no question that, if the boxes are made of shooks not of American manufacture, the rate of duty is correct; but it is contended that these boxes are entitled to free entry.

Max J. Kohler, Asst. U. S. Atty.

C. B. Smith, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Paragraph 493 of the act of October 1, 1890, which is included in the free list, and upon which the importers rely, reads as follows:

"Articles, the growth, product and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; * * * but proof of the identity of such articles shall be made, under general regulations to be prescribed by the secretary of the treasury; and if such articles are subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded."

A shook is defined in Webster's Dictionary as: "(a) A set of staves sufficient in number for one hogshead, cask, barrel, and the like, trimmed and ready to be put together; (b) a set of boards for a sugar box." It is not disputed that the word, as used in the statute, covers a set of boards for a box for lemons or oranges. The board of general appraisers found that some of the shooks reported by the appraiser to be of American production or manufacture were such in fact, and that the other articles not so reported were of foreign manufacture and production. It further found that the importers had failed to furnish any proof of the identity of any of the articles in question with those originally exported, as required by the regulations of the secretary of the treasury made pursuant to law; wherefore the board found the issue of identity against the importers in each case, and sustained the decision of the collector.

The importers contend that no regulation of the secretary of the treasury applicable to proof of identity of shooks has been prescribed; and that, even if one had been prescribed, compliance with it is not necessary to entitle to free entry. The judge who heard the cause in the circuit court, and decided it orally upon the trial, seems to have felt constrained by an earlier decision of the same court to the conclusion that no regulation applicable to shooks had been prescribed. It is thought that the record presented here is more complete than it could have been in the earlier case. Certainly it leads us to an opposite conclusion. The provisions of paragraph 493 of the act of 1890, quoted above, are a reproduction in the same terms of paragraph 649 of the tariff act of 1883; and by

a circular letter of the secretary of the treasury, issued promptly (October 20, 1890) after the passage of the new act, certain articles of the treasury regulations of 1884 touching proofs of identity were continued in full force and effect. The pertinent paragraphs of the regulations are as follows:

"Art. 381. Other barrels, casks, carboys, bags and vessels of American manufacture, on which no drawback has been allowed, exported filled with American products, or exported empty and returned filled with foreign products, including shook when returned as barrels, or boxes, and bags other than of American manufacture, in which grain shall have been actually exported from the United States, returned empty, are entitled to admission free of duties; but proof of the identity of such articles must be made, and if any of them were subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded. Rev. St. § 2503; Act. Feb. 8, 1875 (18 Stat. 307); §§ 2839, 4260, 4572, 4594, 4760; Circulars, October 25, 1879, and February 17, 1875.

"Art. 382. Before such entry the following proofs shall be required by the collector of customs:

"First. A certificate from the shipper, executed in triplicate (and attested by a consul or consular agent of the United States) in the following form:

"Foreign Certificate Relating to Bags or Other Vessels Re-imported.

"I hereby certify under oath, that, to the best of my knowledge and belief, the *— hereinafter specified, are truly of the manufacture of the United States, †— or were exported from the United States filled with *— and that it is intended to reship the same to the port of —, in the United States, ‡— on board the —, now lying in the port of —. I further certify that, to the best of my knowledge and belief, the actual market value of the things herein named, at this time and in the form in which the same are to be exported to the United States, is as follows: § — — — —.

"Sworn to before me this — day of —, 18—."

"*Name the articles.

"† If the packages are empty, insert statement of the facts as 'and were exported from the United States filled with the produce of that country.'

"‡ If the packages contain foreign merchandise, insert 'filled with' and a description of the merchandise they contain.

"§ This blank is to be filled only when the merchandise contained in the package, is subject to a duty ad valorem.

"The consul will be required to verify the facts alleged in this certificate, so far as practicable, and to furnish information to the proper officers of the customs in case its correctness may be questioned.

"If it is impracticable to obtain the consular attestation, the department will consider that of some other proper officer having a seal and authorized to take affidavits, on special application, made by the parties concerned, through the proper collector of customs.

"Such certificate may be accepted in lieu of an invoice for empty articles. But if the articles are filled with foreign merchandise, their value must be separately stated in the invoice, and the certificate be attached to or made a part of the invoice. If the certificate cannot be produced at the time of the entry, bond may be taken therefor in a penalty equal to twice the duties, to run for six months.

"Second. A declaration in the entry by the importer of the name of the exporting vessel, the date of the shipper's outward manifest, and the marks and numbers on the articles for which entry is sought. The marks and numbers should be such as to prove beyond any reasonable doubt, the identity of the articles with those entered on the outward manifest. If the articles are not marked with the name of the firm to which they belong, and with consecutive numbers, the name of the firm alone, or of its private initial letter or letters, may be accepted in the discretion of the collector. If they are returned to any port other than that from which they were exported, a copy of that portion of the outward manifest relating to the articles, certified by the collector of customs at the port whence they were exported, must be produced as well as a certificate from the same officer, countersigned by the naval officer, if any, that he is satisfied no drawback or bounty has been paid thereon.

"Third. An affidavit by the importer (which affidavit must be attached to the entry) that no drawback or bounty has been allowed on the exportation of the articles for which free entry is claimed, and also that the articles mentioned in the entry are, to the best of his knowledge and belief, truly and bona fide manufactures of the United States, or were bags exported therefrom filled with grain."

"Fifth. Verification by actual examination by the proper officer of the appraiser's department with an endorsement of the fact of examination, and also of the fact whether in his opinion the articles are of domestic or foreign manufacture, as the case may be.

"On the production of the above proofs the articles may be admitted to free entry, if the collector shall be satisfied that they are entitled to such entry, under the laws cited in the preceding articles, and that no drawback or bounty has been allowed thereon.

"No evidence of declaration at the time of exportation of intent to return the articles empty will be required.

"Art. 383. Such bags and vessels exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the manifest upon which they are exported. Section 3314."

The reasonableness and propriety of these regulations is not questioned; indeed, it is difficult to see on what ground it could be claimed that they were unreasonable, or contradictory of the provisions of the statute. The contention of the importers is that they are inapplicable to shooks which when exported do not leave this country filled with anything, and in a strictly technical sense do not leave here empty, since they do not leave as barrels or boxes. This is hypercriticism. With equal literalness it might be said that the barrels or boxes returned did leave here "empty," since the shooks of which they are composed did not at that time inclose anything, but were themselves packed in bundles. But this is not so much a question of juggling with words as it is of practical common sense. Article 381 calls attention to the fact that besides the other barrels, carboys, bags, etc., of American manufacture, "shooks, when returned as barrels or boxes," are free, but proof of identity must be made, and article 382 begins with a statement that before "such" entry—i. e. of any of the articles enumerated in the preceding article—the "following proof shall be required by the collector." Next comes a form of consular certificate relating to "bags and other vessels, reimported." Certainly the word "vessel" is broad enough to cover boxes or barrels. This certificate is manifestly elastic, for it contains blanks to be filled appropriately to the facts. Because in the annotations indicated by the asterisks and dagger, suggestions are made as to the form of words to be used when the articles were exported from the United States filled with something, it by no means follows, as the appellee contends, that the regulation requires that the blank spaces shall be filled "no otherwise." The statute accords free entry to barrels, carboys, etc., which are exported empty, and returned filled with foreign products. All that is necessary to make the certificate cover such articles is to strike out the conjunction "or" and the words "filled with," and write the word "empty" in the third blank space. Or, if we are to stick in the bark of a strictly literal interpretation, we need not even strike out the words "filled with"; it will be sufficient to write into the blank space the word "nothing." It is a curious com-

mentary on the effects of excessive literalism that appellee's counsel, who has evidently analyzed article 382 most carefully, has fallen into the error of supposing that the note prefixed with the double dagger refers to the contents of the vessels when exported from this country, whereas in fact it refers to the contents of the vessels when they leave the foreign port on their way back to the United States. It is difficult to conceive how an intelligent person could find any difficulty about filling up the blank certificate so as to retain all its essential requirements and make it apply to a lot of boxes made of American shooks. Certainly the shipper of the articles which are the subject of this appeal found no such difficulty. To some of the shipments there is found attached a consular certificate duly executed, as follows:

"I, Ferdinando Ferro, duly-authorized agent of Marino, of Palermo, do hereby certify under oath that to the best of my knowledge and belief the 1,172 boxes or barrels mentioned in the annexed invoice are made of shooks of the manufacture of the United States, and were exported from Bangor by Andrea Lovice, per Andrea Lovice, on the 9th September, 1890, and that it is intended to reship the same, filled with fruits, to the port of New York, in the United States, on board the steamship Caledonia, lying in the port of Palermo. I further certify that the actual market value of said fruit, boxes, or barrels is as stated in the annexed invoice."

This carefully conforms to the requirements of the regulations touching the consular certificate.

It is not disputed that upon the record before this court it appears that the proof of identity required by the treasury regulations was not furnished, but the importers insist that the furnishing of such proof is not a prerequisite of free entry if they can show to the court in some other way that their shooks are in fact of American manufacture. We are unable to assent to any such proposition. Congress expressly laid a duty upon boxes or barrels containing oranges or lemons. In withdrawing any particular kind of boxes from the obligation to pay that duty it could couple the privilege of free entry with any restrictions it chose. By the paragraph (493) of the act above quoted it has coupled that privilege with the requirement that proof of identity shall be made under general regulations to be prescribed by the secretary of the treasury. The case is very different from those cited on the appellee's brief, where the regulations under consideration had been made under the general power of the secretary as head of the treasury department to regulate the administrative details of customhouse business. There has been no attempt to defeat the provisions of the statute by an arbitrary refusal to prescribe any regulations at all, nor by the prescribing regulations which it is impossible to comply with. The rights secured to the importer by the statute are in no wise modified or interfered with or injuriously affected by the regulations, which are nowhere suggested to be contradictory of the statute, or unjust, unfair, or even unreasonable. "When a mode of proof is prescribed by the terms of the law, or by its fair interpretation, no other than the statutory evidence can be admitted." *Dutilh v. Maxwell*, 2 Blatchf. 541, Fed. Cas. No. 4,207. Here congress has expressly provided for one mode of proof, and for one

only, in the very same sentence in which it provides for free entry, and it is difficult to understand on what theory it could be held that this express provision as to proof is not of the essence of the exemption from duty which that sentence accords to the importer who may bring his importations within its terms. See, also, *Gauthier v. Bell*, 10 Fed. Cas. 103.

Inasmuch as it is conceded that proof of identity was not made under the regulations which the statute called for, the decision of the circuit court is reversed.

UNITED STATES v. DUCAS.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—ACETATE OF COPPER.

Acetate of copper, though a variety of verdigris, and known commercially as "pure or distilled verdigris," was dutiable under paragraph 76 of the tariff act of 1890, as a chemical compound, and was not entitled to free entry under paragraph 749 of the same act, as verdigris or subacetate of copper. 71 Fed. 954, reversed.

This is an appeal from a decision of the circuit court, Southern district of New York (71 Fed. 954), reversing a decision of the board of general appraisers, which affirmed the action of the collector of the port of New York in assessing duty on certain imported merchandise.

James T. Van Rensselaer, for the United States.

Albert Comstock, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The article imported is acetate of copper. The collector assessed it for duty under paragraph 76, which imposes 25 per cent. ad valorem on "products or preparations known as alkalies, * * * and all combinations of the foregoing and all chemical compounds and salts, not specially provided for in this act." The importers protested, claiming it was entitled to free entry under paragraph 749, which reads: "749. Verdigris, or subacetate of copper." The board of appraisers found, and it is conceded, that the article is acetate of copper; that it is a chemical salt, and, of course, a chemical compound; and that it is not subacetate of copper. The testimony produced by the importers shows that there are several kinds of verdigris known in trade and commerce in this country; 10 different varieties, says one witness. These differ in purity, in dryness, in form, but commercially they are all spoken of as verdigris. Among them is the subacetate of copper, and also the article here imported. The witness called by the government, speaking from a business experience of 25 or 26 years, testifies that commercial verdigris included different varieties of subacetate of copper, which differed slightly in the presence of acetic acid or copper; and that there is also a neutral acetate of copper, which is known by the term "pure or distilled verdigris."

The witness further testified that when people in trade asked for "commercial verdigris," or simply for "verdigris," they would be given the subacetate; when they want the pure, they ask for "distilled" or "pure verdigris"; but he admitted that if any one should come into his place, and ask for a sample of every grade of verdigris that he had, he would include both the "commercial" and the "distilled." There is in reality no conflict of testimony. Both acetate of copper and subacetate of copper are known in commerce as "verdigris," but they are different varieties of verdigris, of different purity and grade. If the word "verdigris" is used in its broadest meaning, it will include the acetate of copper, such as was imported in this case; if used in a more restricted sense, it may or may not include this variety.

In what sense, then, did congress use the word? Examination of the statutes gives a conclusive answer to this question. In the Revised Statutes (section 2504, Schedule M, re-enacting an act of 1861) the broad general provision for all chemical compounds and salts does not appear. Many different chemical compounds and salts, however, are provided for either specifically by name, or by inclusion in general classes, not as comprehensive as the "chemical compound" group. There is a provision making certain enumerated acetates dutiable, and among them the acetate of copper, and in the same act the free list includes "verdigris, or subacetate of copper." Here is a plain distinction drawn by congress between the two substances,—acetate and subacetate. The one which, although a variety of verdigris, is known to the trade as "pure or distilled verdigris," is assessed for duty; and the other, also a variety of verdigris, and known as "commercial verdigris," is put on the free list. The article thus put on the free list is the article which congress calls "verdigris," making the scope of that word entirely plain by coupling it with the defining phrase "or subacetate of copper." Under this act there could be no possible doubt how to classify the present importation. It would pay duty as an acetate of copper, because, although recognized in commerce as one of the verdigris family, it was not the member of that family which congress had designated as duty free.

In the tariff act of 1883 there was a change of phraseology. Several of the minor classifications of various chemical compounds disappeared from the duty schedules; among them, the provisions for acetates of ammonia, baryta, copper, iron, lead, etc. And for the first time in a tariff act we find the comprehensive phrase, "all chemical compounds and salts, by whatever names, and not specially enumerated or provided for in this act." Manifestly, the acetate of copper, having lost its old classification, with acetates of baryta, iron, lead, etc., would go into this broad group, unless it were elsewhere specially provided for. Being a variety of verdigris, it would come within that classification, if congress had made it broad enough to cover all varieties of verdigris. But congress seems to have been careful to restrict the privilege of free importation to the same variety of verdigris to which it had accorded it before. The paragraph of the free list in the act of 1883 reads: "635. Uranium,

oxide of, verdigris or subacetate of copper." The failure to strike out the qualifying description "subacetate of copper" is most significant. While the tariff of 1883 was in force, the treasury department made a decision upon "distilled verdigris or acetate of copper," which is the same article in question here, classifying it among the "chemical compounds and salts." Synopsis Treas. Dec. No. 8,593, Dec. 23, 1887. The contemporaneous interpretation of tariff acts by executive officers charged with the duty of acting under such statutes may be considered in construing such legislation; and it may be presumed that congress had this decision of the treasury department in view when it passed the act of 1890. The pertinent paragraphs of that act have already been quoted. They are not materially different from those in the act of 1883. It must be assumed then that congress, when carefully retaining the same phrase, "verdigris or subacetate of copper," which it had used in the two tariff acts immediately preceding the act of 1890, intended to give free entry only to the same article which had been accorded such privilege under those earlier acts. The decision of the circuit court is reversed.

FLAGLER v. KIDD et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. DISTILLED SPIRITS—REIMPORTATION—TAX.

Distilled spirits withdrawn from bond under Rev. St. § 3330, which authorizes withdrawals for export without payment of the internal revenue tax, and forbids the relanding of the goods in the United States, cannot be re-imported on payment of the original tax, pursuant to section 2500. 54 Fed. 367, reversed.

2. REVIEW ON ERROR—BILL OF EXCEPTIONS—FINDINGS OF FACT.

Where there is no bill of exceptions in a case tried by the court, only the sufficiency of the facts found to support the judgment can be considered on error.

3. SAME—GENERAL ASSIGNMENTS—WHEN CONSIDERED.

The rule that assignments pointing out no particular error will not be reviewed may be disregarded in case of plain error where the merits have been fully considered below, and discussed in the brief of one of the parties.

In Error to the Circuit Court of the United States for the Northern District of New York.

W. A. Poucher, U. S. Atty., for plaintiff in error.

Hale, Bulkeley & Tennant, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error to the circuit court for the Northern district of New York by the defendant in that court to review a judgment for the plaintiffs. The action was brought against the defendant, as collector of customs of the port of Suspension Bridge, to recover damages for the seizure and detention by him of 65 puncheons of spirits, the property of the plaintiffs. The action was tried before the court without a jury, a trial

by jury having been waived by the written stipulation of the parties; and in ordering a judgment for the plaintiffs the judge made and filed special findings of fact. There is no bill of exceptions, consequently the review can only extend to the consideration of the sufficiency of the findings of fact to support the judgment. *Insurance Co. v. Boon*, 95 U. S. 117. The assignments of error are defective, because they merely state that the judgment should have been for the defendant instead of the plaintiffs, and that neither the complaint nor the findings state any good cause of action. They fail to point out any "particular error asserted and intended to be urged," as is required by the rule. As was said by the court of appeals for the Seventh circuit (*Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891), "an assignment of errors cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented." See, also, *Oswego Tp. v. Travelers' Ins. Co.*, 17 C. C. A. 77, 70 Fed. 225; *Doe v. Mining Co.*, 17 C. C. A. 190, 70 Fed. 455. We are very reluctant, in a case of respectable importance, to deny a review upon the merits of the controversy by a rigid adherence to the rule. As the merits were fully presented in the court below, and considered in its opinion (54 Fed. 367), and are fully discussed upon the brief of the defendant in error, and as the enforcement of the rule is discretionary with the court, and in case of plain error will be relaxed, we have concluded to disregard the objection.

It appears by the findings of fact that in July, 1884, the plaintiffs withdrew the spirits from a bonded warehouse at Des Moines, Iowa, for export to Canada, without paying the internal revenue tax thereon, and complied with all the requirements prescribed by the statutes and regulations in that behalf, intending to send them to New York City via Windsor, Canada, and pay the tax at New York City. When the spirits arrived at Windsor, they were taken out of the cars in which they had been shipped, and placed in a warehouse under the charge of Canadian customs officers. They remained there from July 12 to August 16, 1884, and were then shipped by the plaintiffs, in cars under the seal of the consul of the United States at Windsor, invoiced to the collector of the port at New York. When they arrived at Suspension Bridge, which was August 18, 1884, they were seized and detained by the defendant, acting under instructions from the secretary of the treasury, upon the ground that they had been improperly withdrawn from the warehouse at Des Moines, and there had been no exportation of them. On October 28th they were released by the defendant, upon the giving of a bond by the plaintiffs for exportation, and payment of certain charges for storage, etc. The court found that the plaintiffs were at all times ready and willing to pay the internal revenue tax upon the spirits, and that in consequence of the seizure and detention they sustained damages in the sum of \$2,526.97. Upon these facts the court decided as matters of law that the seizure and detention of the spirits were wrongful and unlawful, and that the plaintiffs were entitled to recover their damages.

It appears by the opinion of the judge of the circuit court that judgment was awarded to the plaintiffs upon the legal theory that the spirits had been withdrawn from the warehouse for exportation, and the plaintiffs were entitled to reimport them upon paying a duty equal to the original revenue tax under the provision of the act of congress of July 28, 1866, entitled "An act to protect the revenue and for other purposes," and reproduced in the Revised Statutes as section 2500, and which reads as follows:

"Upon the reimportation of articles once exported of the growth, product or manufacture of the United States, upon which no internal revenue tax has been assessed or paid, or upon which such tax has been paid and refunded by allowance or drawback, there shall be levied, collected and paid a duty equal to the tax imposed by the internal revenue laws upon such articles."

The provision for withdrawing distilled spirits from warehouse is section 3330 of the Revised Statutes, and reads as follows:

"Distilled spirits may be withdrawn from distillery bonded warehouses, at the instance of the owner of the spirits, for exportation in the original casks, in quantities of not less than one thousand gallons, without the payment of tax under such regulations, and after making such entries and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury; provided, that bonds given under this section shall be canceled under such regulations as the secretary of the treasury shall prescribe; and provided further, that the bonds required to be given for the exportation of distilled spirits shall be canceled upon the presentation of satisfactory proof and certificates that said distilled spirits have been landed at the port of destination named in the bill of lading, or upon satisfactory proof that after shipment the same were lost at sea without fault or neglect of the owner or shipper thereof. * * * Every person who intentionally relands within the jurisdiction of the United States any distilled spirits which have been shipped for exportation under the provisions of this act * * * shall be fined * * * and imprisoned * * *; and all distilled spirits so relanded * * * shall be forfeited to the United States."

The question in the case is whether these spirits were withdrawn for exportation within the meaning of section 3330. If they were not, it is immaterial that they may have been reimported. It is quite inadmissible to construe section 2500 as authorizing the reimportation of spirits or any other articles upon which an internal revenue has not been paid by reason of a fraudulent or illegal evasion. It cannot be construed as intended to facilitate a fraud upon the revenue, which the act of which it is a part was enacted to protect. If the spirits were not withdrawn for exportation, they were lawfully seized by the defendant, because they were forfeited to the United States.

The statutes of congress, in force in 1884, are carefully devised to prevent the evasion of the taxes upon distilled spirits. The manufacture is at all times subject to the inspection of the officers of internal revenue. The spirits must be drawn off into receiving cisterns at stated intervals, and on the third day after be drawn into casks and removed directly to a bonded warehouse in charge of a government storekeeper. There they are to be stored until withdrawn. The tax must be paid within three years after the date of entry if they are not withdrawn, and, if they are withdrawn, must

be paid before their removal. Their removal from the warehouse otherwise than in compliance with law is made a criminal offense, and forfeits them to the United States. They can only be withdrawn without payment of tax when withdrawn for exportation pursuant to the terms of section 3330.

The findings of fact do not disclose whether or not the plaintiffs intended to unload the spirits at Windsor, and leave it wholly to inference whether they were unladen and stored there voluntarily, or because of the interposition of the Canadian customs officials. But as the findings state that the plaintiffs intended to remove them to New York, and pay the tax there, and as the only tax they could pay there was the duty which could be levied by the collector of that port under section 2500, it may be fairly inferred that the plaintiffs intended to have them unladen at Windsor, and consigned thence to the collector. In the view which we have reached, however, the fact is not material.

Ordinarily, goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. Goods en route from one place to another in the United States are not exported merely because, while in transit, in cars or vessels, they may be temporarily outside the boundaries, or within the boundaries of a foreign country. Conversely, goods are imported when they are brought within the country with intent to land them here. The intent characterizes the act, and determines its legal complexion. *U. S. v. Vowell*, 5 Cranch, 368; *The Mary*, 1 Gall. 206, Fed. Cas. No. 9,183; *The Boston*, 1 Gall. 239, Fed. Cas. No. 1,670. In the absence of language in the statute indicating a contrary intention, it would be assumed that in section 3330 congress used the term "exportation" in the sense thus attributed to it, and consequently it might well be urged that the section should be interpreted as authorizing a withdrawal of spirits without payment of tax when it was the purpose of the owner to transfer them to a foreign country, and give them a temporary situs there, notwithstanding he may all the time have intended to subsequently remove them back again to this country, and reimport them upon the payment of a duty equal to the original revenue tax. But the statute itself denounces such an interpretation by making it criminal to "intentionally reland" within the jurisdiction of the United States distilled spirits which have been shipped for exportation, and declaring them forfeited to the United States. Articles can be re-landed without having been exported, but they cannot be reimported without being relanded; and the term includes both the cases. The language, in effect, forbids the reimportation of spirits upon which the tax has not been paid when they have been withdrawn from warehouse, and does not rationally permit a less comprehensive import to be given to it. If the spirits have been shipped for exportation, it matters not whether they have been actually exported or not. If they are intentionally relanded, the penalty is incurred. Unless this language is ignored, the statute cannot mean to permit the withdrawal of spirits for an exportation which is to be followed

by a reimportation. The provision may be designed to reach a case where spirits might be warehoused, and before the expiration of the three years from entry within which the tax must be paid be withdrawn for exportation, and then reimported, thus obtaining an indefinite extension of the time of paying the tax. This part of the section is one of the stringent provisions calculated to enforce a strict compliance with all the requirements of the law taxing distilled spirits. We are unable to doubt that the spirits in controversy were properly seized by the defendant, and that the court below should have ordered judgment for the defendant. The judgment is reversed, with costs.

UNITED STATES v. MATHEWS et al.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—NEEDLE CASES.

Coverings or cases made of silk, leather, or paper, and containing needles, such cases being ornamental articles, arranged as permanent receptacles for the needles, are dutiable under the tariff act of 1890, according to their component material of chief value, as manufactures of silk, leather, or paper, and are not entitled to free entry, as usual coverings of the needles, under section 19 of the act of June 10, 1890.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry C. Platt, Asst. U. S. Dist. Atty.

Everet Brown, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges:

SHIPMAN, Circuit Judge. In the year 1891, the firm of Mathews, Blum & Vaughan imported into the port of New York sundry invoices of articles which they styled coverings or cases containing needles. These cases were made either of silk or of leather or of paper, but were not like the well-known folded paper covers in which needles are wrapped. The collector assessed the cases as entire articles, according to their component material of chief value, either as manufactures of paper, under paragraph 425, or manufactures of leather, under paragraph 461, or manufactures of silk, under paragraph 414, of the act of October 1, 1890. The importers protested against this assessment, upon the ground that needles are free under paragraph 656 of the tariff act of 1890, and that the cases were usual coverings of the needles, and therefore, under section 19 of the act of June 10, 1890, were also free of duty. The action of the collector was affirmed by the board of general appraisers, who found that needle cases of this general character are specific articles of merchandise, and, although they are used for holding needles imported in them, they are not usual coverings, but are articles designed for use otherwise than in the bona fide transportation of needles in the United States. The board also found, upon a similar

protest, which, in their opinion, related to the same substantial facts as those in this appeal, that the cases "are arranged as permanent, convenient, and ornamental receptacles for the needles which they contain, and that they are, with their contents, invoiced and imported as an entirety, and designed to be sold as 'furnished needle cases.'" In the present case the books were not invoiced as entireties. The circuit court reversed the decision of the board of general appraisers, upon the ground that the cases were usual and ordinary coverings.

We concur in the finding of facts of the board, and think that while the cases cover needles, and while the articles are extensively imported, the books are more than coverings, and are not designed to be used in the ordinary transportation of needles. They are ornamental articles, designed to be sold and used as such, and are properly described as furnished needle cases. A description of them as coverings for needles conveys an inadequate idea of the merchandise. The facts in the case are substantially different from those in *Magone v. Rosenstein*, 142 U. S. 604, 12 Sup. Ct. 391, or in *U. S. v. Leggett*, 26 U. S. App. 531, 13 C. C. A. 448, and 66 Fed. 300. The decision of the circuit court is reversed.

CARTER MACH. CO. v. HANES et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 175.

1. PATENTS—COMBINATION CLAIMS—SEPARATE ELEMENTS.

When a patent is for a combination only, none of the separate elements of which it is composed are included within the monopoly.

2. SAME—INFRINGEMENT.

There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used.

3. SAME—TOBACCO FLAVORING MACHINE.

The King patent, No. 494,960, for a tobacco flavoring machine, consisting of the combination of a rotary flaring drum, a feed hopper emptying into the smaller end of the drum, and a spraying device located within the drum, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This was a suit in equity by the Carter Machine Company against Pleasant H. Hanes and John W. Hanes, trading under the firm name and style of P. H. Hanes & Co., for alleged infringement of a patent for a tobacco flavoring machine. The circuit court dismissed the bill, and the complainant has appealed.

W. D. Baldwin, for appellant.

W. W. Fuller and Clement Manly (Watson & Burton, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge. This case comes up by appeal from a decree of the circuit court of the United States for the Western district of North Carolina. The complainant below filed a bill in equity against the defendant, alleging an infringement of its patent. The circuit court dismissed the bill, and the complainant appealed to this court.

The appellant holds, by assignment, patent No. 494,960, granted to James M. King, April 4, 1893, and assigned to the appellant April 10, 1893. The patent is for a tobacco flavoring machine. The first claim, and the only one in suit, is "the combination, in a tobacco flavoring machine, of a rotary flaring drum, provided with driving mechanism, a feed hopper emptying into the smaller end of the drum, and a spraying device located within the drum, whereby the tobacco is sprayed and leaves separated as they pass through the drum, substantially as described." Mechanical devices for applying a flavoring liquid to tobacco were well known before the date of this patent. The patent of Smith & Messenger (No. 172,666, January 25, 1876) shows a flavoring machine, consisting of an inclined cylindrical rotating drum, through which tobacco passes, and in its passage is sprayed by a spraying device located outside of the drum at its lower end. Smith & Messenger improved on this by patent No. 187,187. These have expired. C. F. Bjick also had a patent (No. 195,578, October 9, 1877) for spraying tobacco leaves. His device has an inclined cylindrical drum, through which the leaves of tobacco pass, and in their passage are sprayed from a spraying nozzle at the upper end of the drum. So King was not a pioneer in seeking and obtaining this result by means of a revolving cylinder and a spraying device.

His claim is for the combination in a tobacco flavoring machine of three parts,—a hopper, a flaring drum, and a spraying device within the drum. His claim, then, is for an entirety. He cannot abandon a part, and claim the rest. He must stand by his claim as he has made it. If more or less than the whole of his ingredients are used by another, such party is not an infringer, because he has not used the invention or discovery patented. *Shumacher v. Cornell*, 96 U. S. 549. When a patent is for a combination only, none of the separate elements of which the combination is composed are included in the monopoly. *Rowell v. Lindsay*, 113 U. S. 101, 5 Sup. Ct. 507. Or, as expressed by Mr. Justice Bradley in *The Corn-Planter Patent* (*Brown v. Guild*), 23 Wall. 181:

"When a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new."

See, also, *Voss v. Fisher*, 113 U. S. 213, 5 Sup. Ct. 511.

The parts of the combination claimed by the patentee are not new. The hopper has long been well known, and numerous patents are cited in the answer, showing its frequent use before the date of this patent. Indeed, the concise and clear definition given of this term

by the expert of the appellant to the court below establishes this. "A hopper is a mechanical device which, in the progress of the arts, was resorted to to take the place of the hands for the purpose of feeding or conducting a substance from one position to another." So, also, the flaring drum was not unknown to the art before the date of this patent, and it is frequently spoken of as the equivalent of an inclined cylinder. In the patent of Justus (No. 317,461, May 5, 1885) is shown a conical drum, and in his specification he says: "The conduit, B, instead of being made flaring or conical, may be in the form of a true cylinder." So Coker's patent (No. 249,009, November 1, 1881) shows a conical drum, and the patentee says, in his application: "The drying cylinders are arranged in an inclined position, so that the grain will gradually work its way from the upper to the lower ends of said cylinders, or the same thing can be accomplished by making the cylinders conical." So in Coleman's patent (No. 111,612, February 7, 1871) a conical drum is used. "It consists," says the patentee, "of a large, hollow, revolving vessel, which may be cylindrical in shape, or it may be slightly tapered, so as to be somewhat smaller at one end than the other." He goes on: "The vessel, C, is either cylindrical, or it may form a hollow frustrum of a cone, in which case the necessary inclination will be given to the bottom without inclining the axis on which it revolves." Also, as has been seen, a spraying device, for spraying leaf tobacco within a revolving cylinder, was used both in the Smith & Messenger patents and in that of Bjick. So the spraying of leaf tobacco, being well known, the use of the hopper being general, the utilization of the inclined cylinder or its equivalent, the conical or flaring tube, having been discovered, and a mode of spraying from a tube being also known, the appellant can rely only on the combination of the patent, and it must stand by the claim of the patentee as he made it.

The machine of the defendant, which is charged with the infringement of this patent, was originally constructed under the direction of John C. Frost. It has the flaring tube, and a spraying device at the lower end of the tube, outside of it. It differs with the machine of appellant in the hopper. The hopper, in the patent, is attached to the rear or smaller end of the drum. The hopper is supported between uprights, on bars, and at its inner lower end is a spout. In the lower end of the hopper is a feed roller, mounted on a shaft, which is moved by a belt passing over belt pulleys. In operation, the feed roller (which begins to rotate as soon as the machine is put in action) carries the supply of tobacco in the hopper out through the spout at the lower end of the hopper into the rotary flaring drum. The machine used by the defendant has no hopper like this, and no device by which the leaves of tobacco are put into any receptacle, and are fed into the drum by the action of the machinery. It has an opening at the back of the drum, with a sort of shute, and through this hole the tobacco is fed by hand into the drum. This, clearly, is not a mechanical device, resorted to to take the place of the hands, for the purpose of feeding or conducting a substance from one position to another. So, in this important feat-

ure of the combination, the machine of the defendant is lacking. "There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used." *Eames v. Godfrey*, 1 Wall. 78. A combination of the mechanical parts of an entire machine is not infringement, except by the use of the entire combination. *Brown v. Guild* (quoted as "The Corn-Planter Patent") 23 Wall. 181.

Again, the claim of the patentee places his spraying machine within the drum. That of the defendant is without the drum. Is this an essential part of the machine of the appellant? The application of the patentee for his patent met with frequent disallowance and rejection by the commissioner, and in every instance of rejection the location of the spraying device was not fixed. The claim which finally passed was that which located the spraying device within the drum. Indeed, the patents of Smith & Messenger and of Bjick all had spraying devices for the same purpose, but outside of the drum. The expert for the defendant thus clearly contrasts these spraying devices of appellant and of the defendant:

"In the King patent the spraying device is due to the presence of the valve, Q, which acts as a dash plate or spray disc, against which the streams of liquid issuing from the nozzle impinge. If this construction is properly proportioned, the liquid will issue from the spraying device as a sheet of spray, of approximately fan shape, in a substantially downward and nearly vertical direction. The effect will be to form a sheet of spray, extending in a substantially vertical direction, in very much the same manner, as every one has noticed to result from placing his finger immediately contiguous to the mouth of an ordinary water-supply faucet or spicket. Every one who has used a garden hose knows how to send the water out in the form of a spray by placing his finger properly over the nozzle. And in King's construction the flap valve, Q, fulfills the same purpose as a person's finger in using a garden hose. Since the construction of King's spraying device results in a downwardly flowing sheet of spray, it follows that his spraying device must be located inside of the drum, in order that the spray may come in contact with the tobacco passing through the drum. If we regard the interior of the drum as being divided by a vertical plane, cutting the drum longitudinally through its axis of rotation, and then view the drum while in operation, it will be seen that substantially all of the tobacco leaves are located in the right-hand half or section of the drum, and that the left-hand section is empty of leaves, with an occasional exception. This location of the leaves, during the practical operation of the machine, at the right-hand side of the drum, has been taken advantage of in locating and constructing defendant's spraying device. The spraying device is located at the left-hand side of the drum, about half way between its extreme top and bottom, so that it is adjacent to the descending wall of the drum and its side which contains no tobacco leaves. The spraying nozzle is so constructed that the liquid emerges from it in a substantially horizontal direction, in a fan-shaped sheet of spray. The direction of this sheet of spray is such that, if the drum should be empty, the spray would fall upon the lower portion of the rising side of the drum, in a belt extending all the way from the junction of the perforated and imperforated sections of the drum to the discharge mouth of the drum. Consequently, when the drum is in operation, a sheet of spray shoots across the empty side of the drum, and comes in contact with the tobacco leaves as they fall downwardly through the drum, during the entire travel of the leaves through the imperforated section of the drum. The consequence is that each leaf, since it rises and falls a number of times during passage through the drum, frequently falls through the spray, so that every exposed portion of the leaf is uniformly and fully sprayed."

Frost, whose invention is used by defendant, after he had made application for a patent, conceded priority of invention to King,

under whom appellant claims. Before that time, however, he had made and sold one of his machines to defendant. This was burned in May, 1893. The one now in use by them was built after that date. Be this as it may, defendants were not parties to the concession, the motive and consideration for which are not disclosed, nor are they or the court estopped from considering the two inventions on their merits. The most that can be said of Frost's action is that it must be considered with the other evidence in the cause.

We see no error in the conclusion, reached by the circuit court, that the appellees do not infringe the patent of the appellants. The decree of the circuit court is affirmed.

BIRMINGHAM CEMENT MANUFACTURING CO. et al. v. GATES IRON WORKS.

(Circuit Court of Appeals, Fifth Circuit. April 28, 1896.)

No. 407.

1. PATENTS—INVENTION—STONE BREAKERS.

The following patents for improvement in stone-breaking machines are void, for want of invention, as to the claims specified, namely, the Rusk patent, No. 110,397, claim 1; the Raymond patent, No. 237,320, claim 1; the Gates patent, No. 272,233, claims 1, 2, and 3. *Iron Works v. Fraser*, 14 Sup. Ct. 883, 153 U. S. 332, followed and applied.

2. SAME—INFRINGEMENT.

The Brown patent, No. 201,646, *held* not infringed as to claims 1, 2, and 3.

3. SAME—COMBINATION OF OLD PARTS.

The Gates patent, No. 243,545, is void, because of anticipation and prior use, as to claims 3 and 4, which are for combinations of various well-known parts of a stonebreaker, with a loose collar around the shaft and below the diaphragm, to protect the machine from dust and small particles. *Iron Works v. Fraser*, 14 Sup. Ct. 883, 153 U. S. 332, followed.

4. SAME—ANTICIPATION—PRIOR USE.

The Gates patent, No. 250,656, for improvement in stone-breaking machines, consisting in combinations of a shaft, a bearing for the shaft, a hard-metal plate in the lower end of the shaft, an adjustable sliding step block, and an oil step box, is void, especially as to claims 2, 3, and 4, because of anticipation and prior use. *Iron Works v. Fraser*, 14 Sup. Ct. 883, 153 U. S. 332, followed.

5. SAME—COMBINATIONS.

The Gates patent, No. 259,681, for a "journal bearing for stone and ore crushers," is void, as to claim 1, as being for a combination of old parts without attaining any decidedly new and useful results.

6. SAME—NOVELTY.

The Gates patent, No. 265,957, for an improvement in stone breakers, consisting in an inclined diaphragm chute, separate from the case of the machine, and having a removable lining to secure durability, is void for want of patentable novelty.

7. SAME—PATENTABLE IMPROVEMENTS—MECHANICAL SKILL.

One who employs mere mechanical skill in the improvement of details is not entitled to patents therefor, although, by the application of such skill, together with diligence, pertinacity, and money, he makes a success of a machine which before was a failure.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a suit in equity by the Gates Iron Works against the Birmingham Cement Manufacturing Company and others for alleged infringement of 10 patents relating to improvements in stone breakers. There was a decree in the circuit court for complainant upon 8 of these patents, and defendants appeal.

L. L. Bond, for appellants.

Louis L. Coburn, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge. This is a suit commenced in the circuit court August 11, 1887, for the infringement of several letters patent of the United States on certain improvements in stone-breaking machines, and is brought by the Gates Iron Works to recover the gains and profits realized by using the alleged infringing machine, as well as damages sustained by the complainant. The bill declared on 10 several patents, to wit: No. 110,397, December 20, 1870, to J. H. Rusk; No. 201,646, March 26, 1878, to C. M. Brown; No. 237,320, February 1, 1881, to G. & A. Raymond; No. 243,545, June 28, 1881, to P. W. Gates; No. 250,656, December 13, 1881, to P. W. Gates; No. 259,681, June 20, 1882, to P. W. Gates; No. 265,957, October 17, 1882, to P. W. Gates; No. 272,233, February 13, 1883, to P. W. Gates; No. 246,608, September 6, 1881, to P. W. Gates; No. 305,172, September 6, 1881, to P. W. Gates. The title of the Gates Iron Works to the above-mentioned patents is not disputed, nor is it disputed in this court that, if the said patents are valid, the appellants' machine substantially infringes some, if not all, of the above-mentioned patents. The cause was heard in the circuit court, and a decree was rendered October 4, 1889, sustaining the first eight above-mentioned patents, as valid, and holding that the appellants infringed some one or all of the several claims contained in each patent. No reasons were given by the trial judge for his several findings in the case, and we are therefore compelled to examine the record without any assistance from the trial judge, save what is to be found in his ultimate findings of law and fact, the correctness of which is the matter in dispute. By appropriate assignments of error, the appellants question each finding as to each patent, and the claim thereunder, and also the general finding in the whole case.

When the suit was decided by the circuit court a suit was pending in the Seventh circuit against the makers of appellants' machine, in which suit was involved five of the patents included in the present controversy, with others not herein involved. In that suit the bill was dismissed in the circuit court for want of equity. See 42 Fed. 49. An appeal was taken to the United States supreme court, which court affirmed the decision of the circuit court. *Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. 883. The opinion in the case deals with five of the patents involved herein, and, so far as it is applicable to the present controversy, is controlling.

In the case at bar the first and second of the errors assigned relate to the Rusk patent, No. 110,397, which was for an improvement

in grinding mills, in regard to which the court below found that the appellants infringed the first claim, which is as follows:

"The combination, substantially as described, of soft-metal pins or plugs, c, with a driving gear of a grinding mill."

The third and fourth assignments of error question the court's finding in regard to the Raymond patent, No. 237,320, for grinding wheels, holding the said patent valid, and that the appellants infringed the first claim of said patent, to wit:

"The combination of the shafts, the safety pin, and the reducing devices provided with the exposed hub to co-operate with the pin, such parts being constructed substantially as described, to permit the instantaneous removal and replacement of the pin."

The fifth and sixth assignments of error are that the court erred in holding the third claim of the patent No. 272,233, to P. W. Gates, to be, in its relation to the prior art, a valid claim, and that the court erred in finding that the devices of the defendants' machine infringed the third claim of said patent.

The third claim of said patent is as follows:

"The combination of the leverage break pin, G, hub, E, hub, F, fastening screw, g, main shaft, B, driving pulley, C, bevel gear wheel, H, I, and crusher shaft, K, substantially as and for the purposes described."

It is to be noticed that these claims are for combinations wherein a safety pin cuts the important figure, and that the safety pins mentioned in the Rusk patent are made of soft metal, in the Raymond patent of wood, and in the Gates patent is a so-called "long-leverage break pin of any suitable material." In regard to this last, the patentee says:

"I do not claim a safety break pin applied to the fly wheel of machinery, as this would not instantly stop the machine, neither do I claim a short break pin applied to the driving pulley of grinding and other machines; that is, a break pin with its entire body or length supported and requiring a sheering action to cut it in two. Neither do I claim, broadly, a break pin which is accessible without moving the wheels. Neither do I claim the loose collar specifically as my invention, but what I claim as my invention is * * * the combination of the leverage break pin, G," etc.

In *Iron Works v. Fraser*, supra, the court discusses the question of the application of safety pins to prevent the breaking or overstraining of machinery, and holds in regard thereto that "the use of safety pins for saving machinery from the strain of a sudden jar does not involve patentable invention." If this be the case, it is difficult to see how any one of the combinations in the three patents above referred to, in each of which the safety pin is the main figure, and is combined with old devices, can be valid, even if it be conceded that the appellants' machine contains the features of all. In this view of the case, it is not necessary to consider the seventh assignment of error, which is that the court erred in finding or holding that the single break pin device of the defendant's machine infringed three separate patents, to wit, Nos. 110,397, 237,320, and 272,233.

The eighth, ninth, and tenth assignments of error complain of the court's finding as to the first, third, and fourth claims under the Brown patent, No. 201,646. With regard to these assignments, it is substantially admitted that the decision of the supreme court in the case of *Iron Works v. Fraser*, supra, disposes of claims 3 and 4 under

said patent adversely to the appellee's claims as to infringement in this case, and the only contention made in regard to this patent at this time is that the first claim of said patent is valid, and that the appellants infringe in respect thereof. The appellants contend that the first claim of said patent, which is for "the combination of the gyrating spindle, B, B, and conical breaking head, C, C, with the exterior breaking surface, L, L, the sliding socket bearing, e, e, the eccentric bearing at the bottom of the spindle, B, B¹, and the adjusting screws, s, as substantially described," is not in the case, because there is no evidence with regard to the same in the appellee's main case, and none at all in the record, except the evidence of Melville E. Dayton, called in rebuttal; and, besides, that the appellants' machine, as shown by themselves and also by the appellee, does not have in it the spindle, B, B¹, unless the taper spindle is the full equivalent of the Brown spindle, which is of the ball and socket form, nor does it have a sliding bearing at the bottom end of the spindle or the adjusting screw. We agree with the appellants in both contentions.

The eleventh and twelfth assignments of error are to the effect that the court erred in sustaining the validity of the Gates patent, No. 243,545, and in holding that the appellants' machine infringed the third and fourth claims of said patent. The third and fourth claims are for combinations of various well-known parts of a stone or rock breaker, with a loose collar around the shaft and below the diaphragm, so as to protect the operating machinery from dust and small particles. In regard to this patent, which was involved in the case of *Iron Works v. Fraser*, supra, the supreme court held that the machine, as a whole, is a reproduction of the main features contained in the Brown and Rutter machines, although exhibiting some changes and improvements in details; and, further, that the claim in this patent of a novel application of a loose collar around the eccentrically gyrating shaft to prevent dirt getting into the bearing was anticipated in the Brown machine, as changed in 1878, by a circular washer or collar upon the top of the sleeve that surrounded the breaking head, which fitted around the shaft, the object being to keep the dust from the machinery below; and, further, that several of the features claimed in Gates' patent, including the loose, adjustable collar, were illustrated in the reformed Brown machines actually in public use more than two years before Gates applied for his patents. With regard to this two-years prior use of the important features contained in the third and fourth claims of the patent under consideration, it is admitted that the same proofs are before this court that were before the supreme court, and the main contention is that in regard to the matter the supreme court came to an incorrect conclusion as to the fact of full two years' prior use. An examination of the opinion of *Iron Works v. Fraser*, supra, shows that the conflicting evidence was fully considered by the supreme court, and we do not deem it necessary or profitable to re-examine the matter.

The thirteenth, fourteenth, and fifteenth assignments of error attack the finding of the court below in sustaining the validity of

Gates' patent No. 250,656, and in holding the second, third, and fourth claims of said patent were not anticipated by the prior art, and in holding that the defendants' machine infringed the second, third, and fourth claims of said patent. In *Iron Works v. Fraser*, supra, the supreme court, in considering this same patent, held as follows:

"The alleged invention in Gates' patent, No. 4, is for a combination of old features, to wit, a shaft, a bearing for the shaft, a hard-metal plate in the lower end of the shaft, an adjustable, sliding step block, and an oil step box. All the elements of this combination were shown to be present in the Brown machine, as made and sold more than two years before Gates applied for this patent, except the hard-metal plate at the end of the shaft. But the use of hard or steel wearing plates was shown to be old, and several letters patent, viz. C. M. Savoye, an English patent, 1831; T. Varney, No. 63,675, issued April 9, 1867; Palen & Avery, No. 111,239, issued January 24, 1871,—and several others, were put in evidence by the defendants, and exhibited the feature of a hard-metal wearing plate at the end of the working shaft."

Counsel for the appellee concedes that this language of the supreme court is sufficiently comprehensive to cover the points at issue, so far as this Gates patent is concerned; contending, however, that the supreme court overlooked the main features of this patent.

The sixteenth and seventeenth assignments of error relate to the finding of the court as to the validity of the Gates patent, No. 259,681, entitled, "Journal bearing for stone and ore crushers," and are to the effect that the court erred in finding that the patent disclosed a patentable subject-matter in respect to the first claim thereof, and in holding that the said first claim was not anticipated in and by the prior art. The record shows that the first claim of the patent, and the only one in controversy, is "for a gyrating crusher shaft, having the tapering journal, C, in combination with a journal bearing, whereby only a portion of said tapering journal stands parallel and in contact with the vertical surface of said bearing during the gyration of the shaft, substantially as described." The "whereby" part of the said claim, added for the purpose of specifically defining the claim and showing the operation of the journal in connection with the bearing, does not add anything to the claim, which must be taken and considered as for "a gyrating crusher shaft, having the tapering journal, C, in combination with a journal bearing." The file record of this patent shows that Gates, the patentee, originally made a claim "for a gyrating shaft with a tapering journal, C, substantially as and for the purpose described," and that this was rejected on an old patent to Walters, No. 24,268, May 31, 1859. After this rejection the application was amended several times, and resulted in erasure of all the original claims, and the insertion of a claim as above recited. In his original specification, Gates says: "The invention which I have made is a revolving, gyrating crusher shaft, C, having a journal, c, of taper form at its upper end; that is, shaped from its base, c¹, to its top, c², to correspond to a truncated cone, as shown." This claim of invention, which was for a certain shaft, was subsequently amended so as to be for a combination, and to read as follows: "The invention which I have made is the combination with a journal bearing, of suitable form, of a gyrating

crusher shaft," etc. From this it appears that not only was the original claim for the shaft itself abandoned, but the description of the invention was changed to that of a combination of a shaft to a suitable bearing box. The specification, as finally perfected, substantially shows that the patentee admits the machine to be an old one, for he says, "In the accompanying drawings, my invention is shown applied to a stone breaker in common use, * * *" and, after describing the several parts, continuing, says that they "are of ordinary construction, and operate in the usual manner, and require no further description. Any other form of combination and arrangement of these well-known parts may be adapted in connection with my invention, so long as the same produce a revolving, gyratory motion of the conical crusher head." In relation to these statements, counsel for the appellants well says:

"From the statements just quoted, it will also be apparent that anything brought from the same or other arts into these old machines is simply a matter of transference from one machine to another, and brings them within the doctrine of analogous use. Every shaft to which movement is to be imparted must necessarily have a bearing box. So that the combination of a shaft with its supporting or holding bearing box is old, and is to be found in every machine ever built which had a shaft in its structure. The combination claimed resolves itself down, therefore, simply to the words 'tapering journal combined with a suitable bearing box.' All bearing boxes are adapted to their shafts, so that, the form of either being given, that of the other necessarily follows: A shaft and its bearing or journal box are always inseparable companions, so that a claim for combining them is absurd on its face."

The claim under consideration being, as finally amended in the patent office, "for a combination," it would seem clear that we may hold that the devices entering into such combination are old, and common property. In *The Corn-Planter Patent*, 23 Wall. 181, 224, it is said:

"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration—as conclusive, so far as that patent is concerned, as if it were expressed—that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this, but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old, or common, and public." See *Miller v. Brass Co.*, 104 U. S. 352.

An examination of the record as to the prior art shows, beyond implied admission, that all of the component parts of the combination claimed in the patent are old, and a reference to the *Klinkerman* patent of 1864, the *Pearce* patent of 1866, the *Varney* patent of 1867, and the *Wheeler* patent of 1868, all found in the record, is all that is necessary to determine the fact. Our examination of the record in this case does not convince us that by the combination claimed in the patent any decidedly new and useful results are attained. It is probable, however, that a gyrating crusher shaft, having a tapering journal in combination with a suitable journal bearing, as compared with a gyrating crusher shaft having a ball and socket bearing, will save expense, and, to some extent, give better results; but it still appears to be a change only in form, the substitution of equivalents doing the same thing in the same way by substantially the same means. According to *Smith v. Nichols*, 21 Wall.

119, such improvement is not such invention as will sustain a patent.

The eighteenth, nineteenth, and twentieth assignments of error complain that the court below found that the Gates patent, No. 265,957, was not void upon its face, that it disclosed a patentable subject-matter, that the second claim of said patent was not anticipated in and by the prior art, and that the defendants' machine infringed the second claim of said patent. In his application, which is for a patent on a new and useful improvement on stone breakers and crushers, Mr. Gates says:

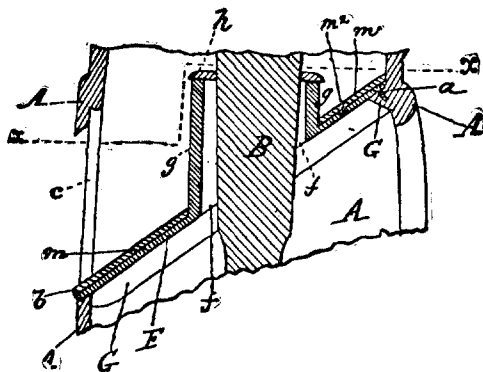
"My invention relates—First, to an improved, removable, inclined diaphragm chute, applied transversely in the outer framing or case of the crusher at a point between the crusher head and its concave, and the gearing and step box of the gyrating shaft carrying the crusher head; second, to a means whereby the diaphragm chute may be constructed partly of common cast iron, and partly of hard, white or chilled iron, or steel, and thus a durable wearing surface be secured at moderate cost; this part of my improvement being applicable to the diaphragm chute, whether it is made separate from the outer framing or case, or is cast integral with said framing or case of the machine. In the P. W. Gates patented stone breakers or crushers, as heretofore constructed, it has been found inconvenient, in some instances, to grind off the bearing upon which the loose dust-excluding collar rests, on account of the inclined diaphragm chute being formed by casting it integral with the cylindrical case or framing of the machine; and it has also been found that the diaphragm chute wears away on its upper side to such an extent as to render renewal thereof necessary, or, what is more expensive, to substitute a new casting, with chute in it, for the one with wornout diaphragm. To overcome these difficulties is the object of my invention, and I effect the same by the means shown in the accompanying drawings."

Further on in the specifications we find this statement:

"To render the diaphragm chute durable, and its entire removal unnecessary, except when breakage occurs, I, in some cases, construct the diaphragm proper, F, with a removable hard or chilled metal or steel upper surface portion, m, which corresponds in form with the diaphragm chute proper, except that a flange, g, on this portion, m, may be omitted around the passage through which the shaft, B, passes."

To explain these quotations, Fig. 1 accompanying the application is here given:

Fig. 1.



The second claim of the patent is as follows:

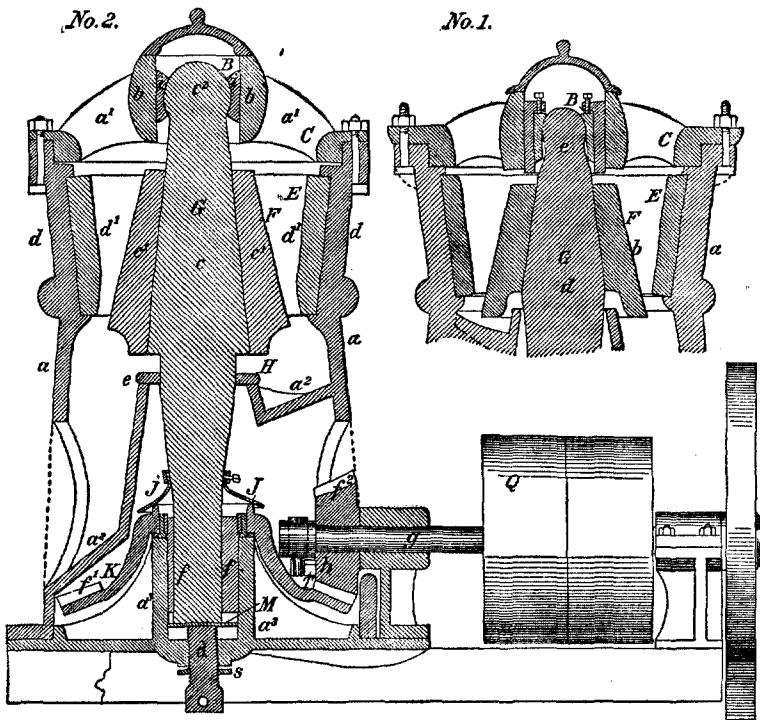
"The inclined diaphragm chute, formed of a base portion, F, and a removable wearing portion, m, substantially as and for the purpose described."

Counsel for the appellants contends with great force that the patent is not only void for uncertainty, but also because, according to the specifications, the claimed invention of a removable wearing portion or lining, which gives what life the patent may have, may or may not be applied, according to the judgment of either maker or user. We do not find it necessary to consider these phases of the case, because we find the patent void for want of novelty. As we understand the specifications and claims, the patent is intended to cover the casting of the inclined diaphragm chute separate from the case of the machine, and to give the inclined diaphragm chute a removable covering or lining to secure durability in that part of the machine. It certainly cannot be novel, so far as a machine made of iron is concerned, to cast it in two parts, and coverings or linings to preserve the wearing of machines are as old as any application of skill for the protection of machinery; and certainly the alleged inventor cannot take anything for a supposed discovery for casting the wearing portion of a machine out of hard or chilled iron, as against a previous composition for the same parts of soft iron.

In dealing with the fifth and sixth assignments of error, we considered the Gates patent, No. 272,233, in relation to the third claim thereof, for a combination of a leverage break pin with other parts of a stone-breaking machine; and we now have to consider the twenty-first and twenty-second assignments of error, which complain of the finding of the circuit court in respect to the validity and infringement of the first and second claims of said patent No. 272,233. An inspection of the file wrapper and contents of this patent will be instructive to the amateur inventor, for it will show that the applicant for this patent started in the patent office with a description of a coupling pin in connection with a shaft and driving wheel of a stone crusher, and a short description of a dust collar,—the invention of which he disclaimed,—and claiming only the combination of a coupling pin with the shaft and a wheel loose upon said shaft. He eventually obtained, after many amendments and references,—several at the suggestion of the patent officials,—a full-fledged patent for combinations, in various ways, of nearly all the well-known parts of a stone-crushing machine. The first and second claims of this patent, as perfected, are:

"(1) The combination with the concave, M, the crusher head, k², the crusher shaft, K, and suitable mechanism for operating the crusher shaft, of the outer frame or shell, A, having an inclined discharging and shielding chute, a, forming a bearing below the crusher head, and the loose, dust-excluding collar, k³, substantially as described.

"(2) The combination of the outer frame, provided with a base plate having an oil step box, with the bevel wheel, I, having an eccentric bearing suspended within the step box, said bevel wheel being on top of the step box, the step block, adjusting screw, the gyrating shaft passed through the eccentric bearing and resting on the step block, the crusher head, concave, and inclined diaphragm and shielding chute, substantially as and for the purpose described."



The foregoing attached cut is a reproduction of the machine shown in the Brown drawing No. 2, and of the upper end of the machine shown in the Brown drawing No. 1. The black letters [capitals in the above cut] are mainly from the Gates patent, No. 243,545; the red letters [small letters in above cut] on No. 2 are copied from the Gates patent, No. 272,233, and on No. 1 they are copied from the Gates patent, No. 259,681. All the parts and construction in these drawings unquestionably relate to the prior art.

In *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, where it is held that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ, Mr. Justice Jackson, after reviewing the authorities, says:

"The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim, more generic in its character than the specific claims contained in the prior patent, is also void; but that where the second patent covers matter described in the prior patent, essentially distinct and separate from the invention covered thereby and claims made thereunder, its validity may be sustained. In the last class of cases it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction

of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the second patent is absolutely void."

Under this decision the contention of the appellee that the patent No. 272,233 is an older patent than No. 243,545, because it has a prior file date, is untenable; but, even if this was not ordinarily the case, an examination of the file wrapper and contents shows that although the original application for the patent was filed on February 17, 1879, it was not until October, 1882, that the applicant attempted to make claims and specifications covering the parts now covered by the first and second claims of the patent, and it was only then that the applicant gave specifications describing a base plate and step box which are the particular parts in regard to which appellee's counsel undertakes to differentiate the first claim of the patent from the Brown machine. Counsel for appellee contends that claim 1 of the patent under consideration is virtually for the loose, dust-excluding collar. He says "that the Brown patent, No. 201,646, has no cap or loose collar around the crushing cone on the uprising tube of the diaphragm which surrounds the gyrating shaft." In view of the fact that in the first application for the patent under consideration the applicant disclaimed the invention of this loose, dust-excluding collar, the contention of counsel does not appear to merit serious consideration.

This disposes of all the specific assignments of error. The others need not be considered.

Counsel for appellee concludes his very ingenious and elaborate brief as follows:

"The stone-breaking machine known as the 'Gates Stone Breaker' was the first stone breaker of this gyratory type that was ever made, and worked as a successful, valuable machine. The first patent showing a machine of this type was the Pearce patent, a copy of which is on page 238, vol. 2, printed record. This patent the Gates Iron Works purchased, and still owns. In this machine the crushing arbor or shaft gyrated at the top, instead of at the bottom; the driving wheel that drove it was located at the top; the lower end of the shaft was supported in a step in a crossbar held up by rods. The next patent in the art showing a machine of this character of construction was the Rutter patent, shown on page 266, vol. 2, printed record. The crushing shaft in that patent was suspended from the top by a ball, E, while the lower end of the shaft passed into an eccentric box in the gear wheel, the gear wheel being below the bottom plate of the machine. The crusher shaft was rigidly fixed in the gear wheel, and the machine simply ground and rubbed the stone, instead of crushing it. * * * The next patent in the order of the development was the Brown patent involved in this suit. That was really the first stone-breaker machine of this type in which the arbor of the crushing cone was gyrated at its lower end, and would break the stone by impingement, without rubbing or grinding the stone. The machine was in the shape of the Brown patent when Mr. P. W. Gates, who had had a lifelong experience in the manufacture of other kinds of stone crushers, as well as general machinery, took hold of this machine. It was not in practical shape at that time. Brown had put into the machine the important feature of a diaphragm, and certain bearing boxes and adjusting screws. All the witnesses agree that these machines were not a success. Gates improved this machine, overcoming one objection after another, investing upwards of \$40,000 in making his improvements before he succeeded in getting a thoroughly practical machine. His various improvements resulted in making this machine one of the most valuable machines made in the country. They have gone into use throughout the world, wherever there is stone to be broken or quartz to be crushed. It is certain that, had it not been for Mr. Gates' persistency, this machine would never have become a success. What he did to the machine in making the improvements is delineated in his patents above discussed. Whatever merit the machine possesses as a practical

operating machine was added to it by Gates, excepting the diaphragm feature in the Brown patent. Some of the Gates improvements may be on the border line between the skill of a mechanic and the ingenuity of an inventor; but, when considered in connection with his complete line of improvements, from the time that he took hold of the machine until it was a great success, there are certainly displayed marked and important changes in the machine, which could have been produced only by a superior quality of inventive ingenuity."

Our examination of the record leads us to substantially agree with all of this, except the last sentence, in its entirety. The gyrating crushing shaft and the inclined diaphragm chute were inventions in the construction of a successful stone-crushing machine. All the other improvements, in our judgment, were within the domain of skill. As Gates was not the pioneer inventor of either the gyrating crusher shaft or the inclined diaphragm chute, he can take nothing by his claimed invention of details, although, through his pertinacity, diligence, money, and skill, the stone-breaking machine has been made a success. In *Atlantic Works v. Brady*, 107 U. S. 199, 2 Sup. Ct. 231, it is said:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle, and injurious in its consequences. The design of the patent laws is to reward those who make some such substantial discovery or invention which adds to our knowledge, and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly of every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privilege tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers, who make it their business to watch the advancing wave of improvement, and gather its foam, in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens, and unknown liabilities to lawsuits, and vexatious accountings for profits made in good faith."

The decree appealed from is reversed, and the cause remanded, with instructions to dismiss the bill.

THOMSON-HOUSTON ELECTRIC CO. v. JOHNSON CO. et al.

(Circuit Court, W. D. Pennsylvania. January 14, 1897.)

PATENTS—PRELIMINARY INJUNCTION—TRAVELING CONTACTS FOR ELECTRIC RAILWAYS. The Van Depoele patent, No. 495,443, for improvements in traveling contacts for electric railways, sustained, and preliminary injunction granted, on the strength of prior adjudications.

This was a suit in equity by the Thomson-Houston Electric Company against the Johnson Company and others for alleged infringement of a patent for traveling contacts for electric railways. The cause was heard on a motion for a preliminary injunction.

Betts, Hyde & Betts, Geo. H. Christy, and Knox & Reed, for complainants.

Harding & Harding, for defendants.

ACHESON, Circuit Judge. This suit is upon letters patent No. 495,443, issued on April 11, 1893, to the administrators of Charles J. Van Depoele, for improvements in traveling contacts for electric railways, and the case is before the court upon a motion for a preliminary injunction. The patent was sustained by Judge Townsend, after exhaustive litigation, in the case of Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co., 71 Fed. 192. The defense based upon the earlier granted Van Depoele patent, No. 424,695, was carefully considered by Judge Townsend, and overruled by him. That conclusion, in accordance with the settled rule, I accept as sound, for the purpose of the present motion.

The defense most pressed here is the alleged prior use of this improvement at the works of the Daft Electric Light Company, at Greenville, N. J., in the years 1881 and 1882. This same defense was set up to defeat a motion for a preliminary injunction to restrain infringement of this patent in a suit by the Thomson-Houston Electric Company against Albert Anderson and others in the circuit court of the United States for the district of Massachusetts, brought after Judge Townsend's decision sustaining the patent. Leonard S. Dumoulin there deposed that, from 1879 to 1882, he "was employed with Mr. Leo Daft in the capacity of an assistant," at Greenville, N. J., and that, in the year 1881, he (Dumoulin) conceived of this improvement, and put it into practice upon a narrow-gauge road at the Daft works, and that it was successfully and openly used there for several months in the electrical propulsion of a box car, and that many people saw this car in operation. Judge Colt overruled this defense and granted a preliminary injunction.

In the present case Mr. Dumoulin has made an affidavit similar to the one he made in the Massachusetts case, but somewhat fuller; and the defendants have produced affidavits of several other persons, who depose, to their personal knowledge, of the alleged anticipating construction at the Daft works in the years 1881 and 1882. If such a construction as Mr. Dumoulin describes was employed at the Daft works at that time, Leo Daft, by reason of his connection with and presence at the works, must have known of it. Now, in a rebutting affidavit made by Mr. Daft and submitted by the plaintiff, Mr. Daft flatly and specifically contradicts the statements of Mr. Dumoulin with respect to the alleged anticipating use at Greenville. The plaintiff also produces affidavits to the same effect, made by several other persons, who were, at the time in question, connected with the Daft works, and, by reason of their positions and duties, must have had personal knowledge of the alleged anticipating construction, had it existed. These rebutting affidavits are not merely of a negative character, but they contain full, positive, and specific statements of fact in disproof of the statements of Mr. Dumoulin and his fellow witnesses. In my

judgment the decided preponderance of proof is on the side of the plaintiff in this matter.

Having regard, then, to the adjudication by Judge Townsend, a presumption in favor of the validity of this patent should prevail. I think, at this stage of the present case. It is true that this particular defense was not raised in the Winchester Avenue Railway Case. The very omission, however, is significant. That was a warmly-contested case, and it is improbable that this defense would have been overlooked, had the fact been that an openly used, anticipatory construction was in operation at the Daft works, in Greenville, in 1881 and 1882. It is noteworthy that Leo Daft was a witness for the defense in the Winchester Avenue Railway Case.

Infringement by some of the defendants seems to be clear. I do not understand that this is denied as respects the Steel Motor Company. The moving papers justify the conclusion, I think, that the Johnson Company, of Pennsylvania, is involved in the infringement, and also R. T. Lane, by reason of his official connection with these companies. A preliminary injunction will therefore be granted against these three defendants. Let such a decree be drawn.

THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO. et al.

SAME v. NEW YORK, E. & W. P. RY. CO. et al.

(Circuit Court, S. D. New York. May 30, 1896.)

PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunction granted, on the strength of prior decisions, against the infringement of the Van Depoele patent, No. 495,443, for traveling contacts for electric railways.

These were two suits in equity, brought by the Thomson-Houston Electric Company against the Union Railway Company and others, and the New York, Elmsford & White Plains Railway Company and others, respectively, to restrain the alleged infringement of the Van Depoele patent, No. 495,443, for traveling contacts for electric railways. The cause was heard on motion for a preliminary injunction.

Frederic H. Betts, for complainant.

William C. Witter and George H. Lothrop, for defendants.

LACOMBE, Circuit Judge. The patent has been adjudicated in this circuit, and the claims declared on have been sustained. The defendant in that suit has acquiesced in the validity of the patent, and taken licenses. The validity of the patent is not assailed here, and the manufacturer of the very trolleys operated by defendants in both these suits, the Nuttall Company, has itself conceded validity, and taken licenses. The situation, therefore, is closely analogous to that in Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 930. Ten cars now in use on the Union Railway and four cars on the White Plains road have, or had, the

Nuttall trolley, and, as it is not entirely clear upon the papers but what defendants may be able to show that these particular trolleys are within the provisions of the license given by complainant to the Nuttall Company, it seems unnecessary at this stage of the case to interfere with these fourteen cars. Complainant, however, may take an injunction forbidding the defendant railways from hereafter using any infringing combination covered by the claims specified (except such as may now be in use on the fourteen cars), unless they show that such infringing combinations have been manufactured and sold under license from the owner of the patent.

THOMSON-HOUSTON ELECTRIC CO. v. H. W. JOHNS MANUF'G CO.
et al.

(Circuit Court, S. D. New York. June 8, 1896.)

PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunction granted, on the strength of prior decisions, against the infringement of the Van Depoele patent, No. 424,695, for a trolley frog or switch.

This was a suit in equity by the Thomson-Houston Electric Company against the H. W. Johns Manufacturing Company and H. W. Johns, R. H. Martin, and Charles H. Patrick, individually and as officers of the H. W. Johns Company. The cause was heard on motion for preliminary injunction.

Frederic H. Betts, for complainant.

Edmund Wetmore, for defendants.

LACOMBE, Circuit Judge. The complainant may take injunction restraining the making or sale of any trolley frog or switch devised or intended to be used in infringement of such claims of the patent sued upon as were sustained by the court of appeals. It is not intended, however, to enjoin against the sale of trolley frogs or switches by way of replacement of broken frogs or switches, or such as are worn out by use, or of substitution for trolley frogs or switches previously sold by the owner of the patent to purchasers from it. Defendants, however, must determine, at their peril, whether the purchaser buys to use for infringement, or only for legitimate repair; but this permission to repair does not give authority to reconstruct or rebuild a combination which has been sold by the owner of the patent. Injunction may run against the officers as well as the corporation defendant. Possibly, under the stimulus of an apprehended prosecution for contempt, they may familiarize themselves with the kind of goods their company is publicly advertising for sale, and thus infringement may be more satisfactorily checked than it would otherwise be.

THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO. et al.

(Circuit Court, S. D. New York. November 14, 1896.)

PATENTS—PRELIMINARY INJUNCTIONS—PUBLIC CONVENIENCE.

Inconvenience to the public, in stopping the running of electric cars, is not sufficient ground to require the refusal of an injunction, though it may induce a modification as to time of compliance therewith.

This was a suit in equity by the Thomson-Houston Electric Company against the Union Railway Company and others to restrain the alleged infringement of the Van Depoele patent, No. 495,443, for an electric trolley switching device.

Frederic H. Betts, for complainant.

William C. Witter, for defendants.

LACOMBE, Circuit Judge. When preliminary injunction was granted in this case these 10 trolleys were excepted, since upon the proofs there was a reasonable inference that they had been licensed. The case, as now made, shows quite clearly that they were not. It further appears, and is not disputed, that the Union Railway Company did not obtain these 10 infringing trolleys until April 18, 1896, more than four months after Judge Townsend's decision, and that, when it selected the equipment in which they were included from the Walker Company, in preference to that offered by the General Electric Company, it did so because it could get such equipment at a lower price. The Walker Company appears to be abundantly able to respond to any claim which the Union Railway Company may have by reason of its use of the equipment being stopped as an infringement of complainant's patent. There seems no longer any reason to except these 10 trolleys from the operation of the injunction, except the public convenience, it appearing that the cars equipped with them are in actual use. This is not sufficient to require a refusal of the injunction, although it may induce a modification as to time of compliance. *Campbell Printing Press & Manuf'g Co. v. Manhattan Ry. Co.*, 49 Fed. 930. Injunction, therefore, may issue against the further use of these 10 infringing trolleys, but its operation be suspended for 30 days after entry of order on this motion. So far as appears, that will be ample time for substituting noninfringing equipment.

NILSSON v. JEFFERSON et al.

(Circuit Court, N. D. California. December 31, 1896.

No. 12,296.

1. PATENTS—PRELIMINARY INJUNCTION—ACQUIESCENCE.

A patent only eight months old is too recent to have received sufficient acquiescence to warrant a preliminary injunction.

2. SAME—PECUNIARY RESPONSIBILITY.

Where defendants are pecuniarily responsible, and their infringing device is for use by themselves, and not for sale, there cannot be such irreparable injury as will outweigh the considerations against granting the injunction.

This was a suit in equity by Carl E. Nilsson against C. B. Jefferson and others for infringement of a patent for an aerial ballet. The cause was heard on motion for preliminary injunction.

J. J. Scrivner, for complainant.

Naphtaly, Friedenrich & Ackerman and John L. Boone, for respondents.

McKENNA, Circuit Judge (orally). This is an application for an injunction pendente lite on a bill for infringement of a patent and for an accounting. The patent is for an aerial ballet, and is described in the specifications by the patentee as follows:

"My invention relates to improvements in stage apparatus, and the object of my invention is to produce a simple apparatus which is adapted for use in producing an aerial ballet, and which, by being arranged above a stage, is capable of supporting ballet dancers in mid air, and may be conveniently and easily manipulated, so as to give to the aerial dancers the appearance of floating in the air, or moving laterally, and also of moving up and down."

There were affidavits filed supporting the bill, and affidavits against it. The facts need not be detailed.

It is conceded that an injunction pendente lite should not be granted unless the remedy is clearly demanded, upon a clear title and a clear detriment. An injunction certainly interrupts action. It may interrupt rights, and therefore do, instead of preventing, an irreparable injury, unless great care be used. This admonition is constantly made in the cases, and must be heeded now.

There is an objection to the jurisdiction. That is easily disposed of. The foundation of the action is an injunction. The accounting for profits is but incidental to that, and, if the bill should exclude the fact of the existence of royalties as a condition of equitable remedy, as contended for by the respondents, which I do not decide now, but only mention, it may be corrected by amendment. The same remarks apply to the other defects which are urged against the bill. We shall, therefore, assume the amendments as made, and the bill as sufficient, as also the affidavits.

The patent is a very recent one, issued in April of this year,—only eight months ago. It is conceded that the necessary conditions of an injunction pendente lite are: First, a judgment establishing the validity of the patent; second, an acquiescence in the patent for such a length of time as to afford a reasonable presumption of its

validity; third, the conduct of the respondents; fourth, conceding validity infringement. An infringement is not denied in this case, which leaves the issue, therefore, upon the validity of the patent.

There is no judgment, at law or otherwise, establishing its validity. Acquiescence in the patent for such a length of time as, under the conditions of the cases, would import a reasonable presumption of validity, is not established by the showing. Neither the facts relied on nor the time is sufficient. Judge Wheeler said, in *Johnston Ruffler Co. v. Avery Mach. Co.*, 28 Fed. 193, of a patent 11 months old, that it was too recent to have acquired any settled construction by acquiescence, and it had never received any construction by judgment or decree. Those remarks of Judge Wheeler are applicable to the patent in the case at bar. In that case there were, of course, circumstances not in this case, but upon that one point it is authoritative, if authority be needed.

Nor do I think there has been a concession of the validity of the patent by the respondents. There is an allegation of surreptitious making. But the apparatus is not one for sale, nor was it made for sale. It was only made for use, and by its use by respondents there seems to be everything but concession of its validity.

But, passing this, I doubt if an injunction should be granted anyway. I must say that I do not like the affidavits of the respondents. They are either evasive or very careless. They deny very little and affirm not very much, but their deficiency cannot alter or supply the defects in the complainant's showing, nor change the difference of inconvenience, maybe of injury, which would result in granting an injunction rather than in denying it.

There is no allegation of irresponsibility—pecuniary irresponsibility—in the respondents, or either of them. Indeed, there is an assumption that the Palmer-Cox Company, especially, is a powerful one. If so,—if all the respondents are pecuniarily able to satisfy damages or to respond to profits,—there cannot be such irreparable injury as will balance or outweigh other considerations against granting an injunction. Besides, the owner of a new patent must expect the delay necessary to establish his title, and the complainant seems to have had earlier opportunities to do so than the pending suit, of which he did not avail himself. I do not think he was guilty of laches, as properly understood and applied in the cases cited; but there is some justification for the accusation that he waited until some of the respondents were far from their residence, maybe the most important ones, and far from the means of a perfect information of the facts with which to reply to his allegations.

At any rate, upon a careful consideration of all the circumstances,—and I have given them very careful consideration, looking through all the different authorities, and taking time, as counsel knows, to decide the matter,—I think an injunction should be denied; and it is so ordered.

BLAKEY v. KURTZ.

(Circuit Court, W. D. Pennsylvania. January 13, 1897.)

No. 7.

PATENTS—PRELIMINARY INJUNCTION—DELAY.

A delay of five years in bringing suit, where defendant was operating under a subsequent patent, and the parties had factories in the same locality, and were engaged in active competition, *held* fatal to an application for a preliminary injunction, there being no allegation of inability to respond in damages.

This was a suit in equity by Mildred Blakey against Jacob H. Kurtz for alleged infringement of a patent. The cause was heard on an application for a preliminary injunction.

Geo. H. Christy, for complainant.

W. L. Pierce, for defendant.

BUFFINGTON, District Judge. This is an application for a preliminary injunction to enjoin alleged infringement of letters patent No. 341,171, granted January 27, 1885, to Mildred Blakey, for an improvement in thread protectors for wrought-iron pipes. Under a patent granted in 1890, the respondent or his company has been manufacturing thread protectors for five years and upward, has been in active competition with complainant, and both parties have had factories in this immediate locality. During that time the respondent has equipped a manufacturing establishment, and has acquired a very considerable trade. No allegation is made of respondent's inability to respond on final decree to damages recovered against him. The complainant meanwhile has brought no suit for alleged infringement. This fact should weigh heavily against him when he asks at this late day for a preliminary injunction (see *Hockholzer v. Eager*, 2 Sawy. 361, Fed. Cas. No. 6,556; *Curt. Pat. par. 417*; *Walk. Pat. par. 684*; *Keyes v. Refining Co.*, 31 Fed. 560); and, unaccounted for, such delay, in view of the facts shown in this case, is decisive against his application. The claim made of such financial inability as precluded his making the application at an earlier day has not been substantiated.

Without expressing any opinion on the question of infringement, we are of opinion that owing to the delay of the complainant, accompanied, as it has been, with knowledge of respondent's alleged infringement, application for a preliminary injunction should now be denied.

THE J. D. PETERS.

HOGAN et al. v. THE J. D. PETERS et al.

(District Court, N. D. California. December 18, 1896.)

No. 11,292.

1. SEAMEN'S WAGES—DEDUCTIONS AND OFFSETS—BURDEN OF PROOF.

Where the answer admits that the wages claimed have been earned, but claims deductions for payments on account and offsets, the burden is on the master to show such payments by preponderance of proof.

2. SAME—SHIPPING ARTICLES IN COASTWISE TRADE—ALLOTMENTS.

Repeals by implication are not favored. In the act of February 18, 1895, congress, in providing for the omission of item No. 8 of Rev. St. § 4511, relating to allotment of wages, in its application to the form and contents of shipping articles in the coastwise trade, did not repeal, by implication, the positive enactments of the acts of June 26, 1884 (23 Stat. 55), and June 19, 1886 (24 Stat. 80), permitting allotments.

3. SAME—SLOP CHEST—PROFIT ON SALES.

The provision in Act June 26, 1884, § 11, allowing but 10 per cent. profit on articles sold to seamen from the slop chest, on vessels mentioned in Rev. St. § 4569 (which mentions vessels bound on a voyage across the Pacific), will be applied, by analogy, to a sailing vessel on a voyage from our Pacific coast to Alaska, even though this be not considered a voyage across the Pacific.

4. ESTOPPEL—OFFER TO COMPROMISE—SEAMEN'S WAGES.

Pending a suit for seamen's wages, one of the libelants, needing money, wrote the master, offering to accept a certain sum in full payment, and saying that, if such sum was paid into court, the suit, so far as concerned his claim, might be dismissed. The sum was accordingly paid into court, but libelant never called for it, and subsequently pressed the suit for the full amount. *Held*, that his conduct did not prejudice his right to recover a larger sum.

Libel in rem for balances claimed for seamen's wages. Decree for libelants, after allowing claimants to deduct certain allotments authorized by section 10 of the act of June 26, 1884, as amended by section 3 of the act of June 19, 1886, in coasting voyages, and allowing a charge of 10 per cent. above the wholesale price for such articles of wearing apparel as were furnished by the master from the slop chest during the voyage to certain of the libelants.

H. W. Hutton, for libelants.

Geo. W. Towle, Jr., for claimants.

MORROW, District Judge. This is a libel in rem for balances claimed for seamen's wages. Libelants shipped before the shipping commissioner at Port Townsend, Wash., on board the bark J. D. Peters, for a voyage from Port Townsend to Port Clarence, Alaska, and back to San Francisco, via one or more ports on the Pacific coast. The shipping articles were introduced in evidence, and are in the usual form. The answer admits that the libelants earned the respective sums as alleged in their libel, but denies that the several balances claimed to be due, after allowing for certain allotments and the cost of slops furnished on the voyage, are correct, it being claimed that a much smaller sum is owing. The burden of proof, therefore, is on the claimants; for when wages are admitted to have been earned, but deductions are claimed for payments on account and other offsets, the burden of proof is on the master to show the payments, etc., by a preponderance of proof. *The Fritheoff*, 7 Sawy. 58, 14 Fed. 302; *The Hunter*, 11 Sawy. 426, 47 Fed. 744. As stated, the amounts in dispute relate to the validity of certain allotments paid by the owners, and deducted from the wages of libelants, and also with reference to the charges made by the master for certain articles of wearing apparel furnished from the slop chest to the libelants during the voyage.

All of the libelants, when they were shipped, appear to have represented to the master and the shipping officer at Port Townsend

that they were severally justly indebted to one Max Levy, for board and lodging, in the sum of \$25, excepting the libellant E. Peterson, who claimed to be indebted only in the sum of \$20. To secure the payments of these several indebtednesses, the libellants executed their several and separate allotment notes, payable in three monthly installments, two of the installments being for \$10 each, and the third for \$5. These allotment notes were executed in duplicate, and complied in all respects with the law relating thereto, and the regulations of the secretary of the treasury prescribed thereunder. The stipulations for these allotments were severally inserted in the shipping articles. The answer alleges that in due course of time, as they became due, they were paid. At the expiration of the voyage, in settling with the claims of libellants for their wages, it was sought to offset the several amounts paid on behalf of the libellants on their allotment notes against the respective amounts of the wages earned. Proctor for the libellants contends, however, that such allotments were and are void, and that the several amounts thereof cannot be deducted from libellants' wages. It is argued that all allotments for coasting voyages are, in effect, prohibited by the act of February 18, 1895 (28 Stat. 667), commonly known as the "Maguire Act," and that this act operates, by implication, to repeal section 10 of the act of June 26, 1884 (23 Stat. 55), as amended by section 3 of the act of June 19, 1886 (24 Stat. 80), which makes the payment of allotments lawful on being inserted in the shipping agreement, and subject to certain regulations prescribed by the secretary of the treasury. The proctor for claimants contends, on his side, that the act of February 18, 1895, was not intended to, and does not, repeal section 10 of the act of June 26, 1884, as amended by section 3 of the act of June 19, 1886, in so far as the validity of allotments is concerned. The question, therefore, to be determined, is whether or not, under the present state of the law, allotments in coasting voyages are lawful.

The purpose of the act of February 18, 1895, was, undoubtedly, to repeal certain sections of the Revised Statutes, imposing penalties and forfeitures upon merchant seamen, so far as the same had been made applicable to seamen engaged in the coastwise trade by the act of August 19, 1890 (26 Stat. 320), and to extend to them the beneficial provisions of certain other sections which are mentioned in the act of February 18, 1895. This is apparent from the text of the sections of the Revised Statutes, made applicable by the later act to the legal status of seamen shipped on coasting voyages. Most of them were enacted for the protection of the sailor, and affix penalties upon the master and owners for a failure to comply with their conditions and requirements. The act is entitled "An act to amend an act entitled 'An act to amend the laws relative to shipping commissioners,' approved August nineteenth, eighteen hundred and ninety, and for other purposes," and, so far as it is material to the present inquiry, reads as follows:

"When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, or the trade between the United States and the dominion of Canada, or New Foundland, or the West Indies, or Mexico, as authorized by

section two of an act approved June nineteenth, eighteen hundred and eighty-six, entitled 'An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes,' an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by sections four thousand five hundred and eleven and four thousand five hundred and twelve of the Revised Statutes, not however including the sixth, seventh and eighth items of section four thousand five hundred and eleven; and such agreement shall be posted as provided in section four thousand five hundred and nineteen."

It then provides that "such seamen shall be discharged and receive their wages" in accordance with certain other sections, and concludes as follows:

"But in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

The act of June 19, 1890, differed from the present law, as just set forth, in that it made applicable to the coastwise trade certain sections of the Revised Statutes, relating to the agreement that should be made with each seaman when shipped by a shipping commissioner, and imposed penalties and forfeitures for the violation of the agreement by the seaman. It also provided that section 4511 of the Revised Statutes should be observed and applied in its entirety,—that is, not omitting the sixth, seventh, and eighth items thereof; nor was there the clause which is inserted at the end of the present law, that "in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

Section 4511 of the Revised Statutes, with items 6, 7, and 8, provided as follows:

"The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or the republic of Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked 'A,' in the schedule annexed to this title, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars: First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate. Second. The number and description of the crew, specifying their respective employments. Third. The time at which each seaman is to be on board, to begin work. Fourth. The capacity in which each seaman is to serve. Fifth. The amount of wages which each seaman is to receive. Sixth. A scale of the provisions which are to be furnished to each seaman. Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by congress as proper to be adopted, and which the parties agree to adopt. Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law."

It is with the last or eighth item of the above section, which the act of February 18, 1895, provides shall be omitted, that we are

concerned. Before considering the effect of this omission, it is necessary to state that section 4511 of the Revised Statutes applied only to foreign voyages, and did not include coasting voyages. The only provision in the Revised Statutes, relating to the form of the shipping agreement, that did apply to coasting voyages, was section 4520; but that section applied to coasting voyages other than between adjoining states, and only related to the fact that the shipping agreement should state the voyage or term of time for which a seaman was shipped. It did not require that any of the other particulars enumerated in section 4511 should be set forth. But section 2 of the act of June 19, 1886, entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen and owners of vessels, and for other purposes," provided that seamen shipped on vessels engaged in the coastwise trade might be shipped by a shipping commissioner. It is to be observed that this act was not mandatory, and did not require seamen to ship before a shipping commissioner. However, it was deemed advisable that if the master or crew, from motives of convenience or otherwise, should desire to ship before a shipping commissioner, they should be able to do so; and it was for this reason that the authority of the shipping commissioner was thus enlarged. The act of June 19, 1890, required that, when a crew was shipped by a shipping commissioner for any American vessel in the coastwise trade, an agreement should be made with each seaman in the same manner as is provided by sections 4511 and 4512 of the Revised Statutes. The act of February 18, 1895, requires that an agreement shall be made with each seaman in the same manner as is provided by sections 4511 and 4512, "not including however the 6th, 7th, and 8th items of section 4511." From this change in these two statutes, the proctor for libelants seeks to deduce the conclusion that congress intended to prohibit absolutely all allotments to seamen in the coastwise trade. The law with respect to allotments was not provided for in the Revised Statutes, but was enacted in section 10 of the act of June 26, 1884, as amended by section 3 of the act of June 19, 1886, which provided that:

"It shall be lawful for any seaman to stipulate in the shipping agreement for an allotment of all or any portion of the wages which he may earn to his wife, mother, or other relative, or to an original creditor in liquidation of any just debt for board or clothing which he may have contracted prior to engagement, not exceeding ten dollars per month for each month of the time usually required for the voyage for which the seaman has shipped, under such regulations as the secretary of the treasury may prescribe, but no allotment to any other person shall be lawful."

This law had been in force for over 10 years, when the act of February 18, 1895, was passed. That act does not expressly repeal the act of 1884, as amended by the act of 1886, relating to allotments. No reference whatever is made to those acts. Whatever of repeal there may therefore be must be by implication. But repeals by implication are not favored. The general rule is that there will be no such repeal if it is possible to reconcile the two acts.

Sutherland, in his work on Statutory Construction, beginning at page 205, thus states the rule:

"If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together, and both will have effect. It is not enough to justify the inference of repeal that the later law is different. It must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative, or auxiliary. There must be some positive repugnancy; and even then the old law is repealed by implication only to the extent of the repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced, and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intentment. As laws are presumed to be passed with deliberation, and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

See *McCool v. Smith*, 1 Black, 459.

There is a further rule of statutory construction, which is important in this case. It is that:

"One statute is not repugnant to another unless they relate to the same subject, and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed." *Suth. St. Const.* p. 181, citing *Rex v. Downes*, 3 Term R. 569; *Bowen v. Lease*, 5 Hill, 221, 225; *U. S. v. Claflin*, 97 U. S. 546; *U. S. v. Gear*, 3 How. 120; *Miller v. Edwards*, 8 Colo. 528, 9 Pac. 632.

Such being the well-settled rules of statutory construction which should apply, the question arises whether the act of February 18, 1895, providing for the omission of item No. 8 of section 4511 of the Revised Statutes, operates, by implication, to repeal the act of 1884 as amended by the act of 1886, relating to allotments. In the first place, do these different acts relate to the same subject, and were they enacted for the same purpose? Clearly not. The purpose of section 4511 of the Revised Statutes was to provide what the shipping articles or agreement should contain, and the section was imperative in its demands that it should state, among other things, "any stipulations in reference to advance and allotment of wages, or other matters not contrary to law." Obviously, it simply related to the form and contents of the shipping agreement. It did not purport to provide what the law should be with reference to the several particulars required to be stated in the shipping agreement. These particulars or stipulations were, undoubtedly, subject to such laws as existed at that time or might subsequently be passed. The act of 1884, as amended by that of 1886, had, however, a different purpose, and related to a different subject. It did not relate primarily to the form and contents of the shipping agreement, nor did it pretend to legislate with respect to the duties of the shipping commissioner so far as the stipulations in the shipping agreement were concerned. It legislated upon, and was confined specifically to, advances and allotments, the former of which it prohibited absolutely, and the latter it permitted to a limited extent, and subject to certain regulations to be prescribed by the secretary of the treasury. Section 4511, Rev. St., had refer-

ence to the form of the shipping agreement so far as any stipulations with respect to allotments were concerned; while the subsequent acts referred to legislated specifically upon the right of a seaman to make an allotment. The latter law, if it did anything, certainly limited the eighth item of section 4511, for that item had reference to any stipulations that might be agreed upon between the master and seaman, while the acts referred to provided that only certain stipulations with reference to allotments should be valid. It would seem, therefore, that when the act of February 18, 1895, was passed, providing that item No. 8 should be omitted from section 4511 in its applicability to the agreement to be made between the master and each seaman, it did not affect the right to make an allotment under the conditions prescribed by the act of 1884, as amended by the act of 1886. In other words, it does not repeal these two acts by implication. To say that item No. 8 of section 4511, Rev. St., should be omitted from the agreement, and to say that there should not be any allotments of wages in coasting voyages, are two different things entirely. The act of February 18, 1895, certainly does not say the latter, although it may have been intended to do so; and to hold that congress, in providing for the omission of item No. 8 from section 4511, actually repealed the positive enactments contained in the acts of 1884 and 1886, would, I think, be giving to the language of the act of February 18, 1895, an interpretation not authorized by any of the established rules of statutory construction. Upon a close reading of the act under consideration, it will be seen that it does not even say that any stipulations with reference to allotments shall be omitted or not incorporated in the shipping agreement. It simply says that section 4511, Rev. St., so far as items 6, 7, and 8 are concerned, is not made applicable to the form of the shipping agreement when a seaman ships for a coasting voyage before a shipping commissioner. What, then, was the object and purpose of congress, in providing, in the act of February 18, 1895, that items 6, 7, and 8 should be omitted from section 4511 in its applicability to the shipping agreement? I think, from a consideration of the various acts referred to, that it deemed section 4511, so far as items 6, 7, and 8 were concerned, obsolete, unnecessary, and superfluous legislation. This is especially true with respect to item No. 8.

Furthermore, the act of 1884, as amended by the act of 1886, practically required that the stipulation as to allotments should be contained in the shipping agreement. We therefore have a legislative enactment, aside from item No. 8 of section 4511, requiring the stipulation as to allotments to be entered in the shipping agreement. Any requirement to that effect in section 4511 was therefore unnecessary and useless. But item No. 8 was not only unnecessary and useless, but it was in conflict with the law respecting advances, as declared in the act of June 26, 1884. That act absolutely prohibited any advances. The provision in item No. 8 that all stipulations respecting advances should be contained in the shipping agreement was therefore not only useless, but in conflict with the law as subsequently enacted. In brief, the purpose and object of

the act of February 18, 1895, seems to have been to make section 4511 applicable only in so far as the laws relating thereto warranted. It was additional legislation, with a view to making the stipulations in the shipping agreement, so far as coastwise voyages were concerned, conform to the law as it stood at the time of its enactment with reference to allotments.

It is contended, further, by the proctor for libelants, that, if the omission of item No. 8 of section 4511 be given its full effect, it will result that no stipulations can be inserted in the shipping agreement respecting allotments. Such a conclusion does not necessarily follow. Besides, as stated before, it is nowhere provided that a stipulation respecting allotments shall not be entered into, or, if entered into, that it shall be null and void. But, even if such a forced and strained conclusion could be arrived at, there is a saving clause in the act in question, which would permit of stipulations as to allotments. The clause referred to is contained at the end of the act of February 18, 1895, and has been recited before. After providing for the omission of items 6, 7, and 8, it provides:

"But in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner."

This, in effect, is tantamount to providing that master and seamen may contract for allotments. Of course, this right is subject to such restrictions as congress has seen fit to impose, which, we have seen, are contained in the act of 1884, as amended by the act of 1886. In other words, this clause preserves to master and seamen the right to enter into such contractual relations not otherwise provided for by the sections of the Revised Statutes made applicable to seamen shipping in the coastwise trade, and not contrary to law. In fact, when we scrutinize closely the terms of item No. 8 of section 4511 with this clause of the act of February 18, 1895, we will find that the latter was undoubtedly intended also as the substitute for that part of item No. 8 which provides that "any stipulations" "not contrary to law" should be inserted in the shipping agreement.

Counsel for libelants has referred to several expressions of opinion by the secretary of the treasury, made in the course of official communications, which tend to support the view that the act of February 18, 1895, in providing for the omission of item No. 8 from section 4511, operates to repeal the acts of 1884 and 1886, which permit allotments. It is claimed that these expressions of opinion are controlling on the court, and the general rule is cited that, "in all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." *Schell's Ex'rs v. Fauche*, 138 U. S. 562-572, 11 Sup. Ct. 376. See, also, *Railway Co. v. Phelps*, 137 U. S. 528-536, 11 Sup. Ct. 168; *Merritt v. Cameron*, 137 U. S. 542-552, 11 Sup. Ct. 174; *The Eclipse*, 53 Fed. 273-279; *Id.*, 8 C. C. A. 505, 60 Fed. 105.

But this rule does not render the ruling of an official absolutely conclusive of the question, and prevent its re-examination in a court of justice, where the question is presented pro and con, and subjected to searching and painstaking judicial investigation. It applies, properly speaking, to a case of ambiguity. But in the case at bar, after a careful consideration and mature reflection, I am satisfied that any ambiguity that may exist is more apparent than real; and I conclude that congress, in providing for the omission of item No. 8 of section 4511 in its application to the form and contents of the shipping agreement in the coastwise trade, did not repeal the positive enactments permitting allotments contained in the acts of 1884 and 1886.

It is further claimed that, even if the libelants could lawfully stipulate in their agreement for an allotment, the amount agreed to be paid was in excess of that allowed by the regulations of the secretary of the treasury. Under section 3 of the act of 1886, allotments to original creditors cannot be made to exceed \$10 per month for the time usually required for the voyage for which he has shipped, under such regulations as the secretary of the treasury may prescribe. In accordance with the spirit of the act, the secretary of the treasury, on June 21, 1886, issued a schedule of voyages for sailing vessels. See Synopsis of Decisions for 1886, No. 7,594, at page 277. It is therein provided that for coasting voyages, except between Atlantic and Pacific ports, including voyages from first coasting district to Atlantic ports in the dominion of Canada, an allotment not to exceed \$5 for each half month shall be paid. This would amount to \$10 for a month, as to voyages consuming that length of time. The allotment in the case at bar was \$10 a month for the first two months, and \$5 additional for the third month, or a sum total of \$25, excepting the libelant Peterson, whose total allotment amounted to \$20. The voyage took almost four months. The allotments, therefore, seem to have been properly allowed, and do not appear to exceed the scheduled amount prescribed by the secretary of the treasury. They should be deducted from libelants' wages.

We now come to the question as to the value of the wearing apparel furnished to most of the libelants by the master during the voyage. It is claimed by libelants that they were practically compelled to procure articles of wearing apparel from the slop chest, and that the captain dictated his own terms. The testimony tends to show that the captain did not disclose to libelants what he intended to charge them for the articles furnished them at the time. It was only when the voyage was completed, and their balances of wages had been calculated and tendered them, that they learned of the prices that the captain had charged them. The captain denies that he overcharged libelants, and states that they procured the articles voluntarily, and with full knowledge of what the price therefor would be. It is, however, unnecessary to enter into details. The question with which we are chiefly concerned is as to the price of the articles supplied. Section 11 of the act of June 26, 1884 (23 Stat. 56), provides that every vessel mentioned in section 4569

of the Revised Statutes shall be provided with a slop chest, which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, under-clothing and outer-clothing, oiled clothing, and everything necessary for the wear of a seaman; also, a full supply of tobacco and blankets. Any of the contents of the slop chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding 10 per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. Section 4569 of the Revised Statutes applies to every sailing vessel bound on a voyage across the Pacific Ocean, etc. It is claimed by proctor for respondents that this law is inapplicable to the present case, because the vessel did not sail across the Pacific Ocean in making a voyage from Port Townsend to Port Clarence, Alaska. This is controverted by proctor for libelants, who claims that, to all intents and purposes, the bark J. D. Peters crossed the Pacific Ocean when she traveled from Port Townsend, Wash., to Port Clarence, Alaska, owing to the gradual and regular contraction of the parallels of longitude as these approach the North Pole. But, irrespective of whether the statute in question is applicable to the voyage in this case, I should apply, by analogy, the rule of 10 per cent., contained in the statute, as being a just and equitable rule to follow. It seems to have been followed and applied in the same manner in other cases in this court. See *The Hunter*, 11 Sawy. 426, 47 Fed. 744. The evidence shows that the captain charged the libelants more than 10 per cent. on the wholesale price. A witness was introduced on the part of the libelants who appeared to be very familiar with the wholesale and retail prices of articles of wearing apparel similar to those sold to libelants. His testimony impressed the court as fair and trustworthy, and he was not successfully impeached or contradicted. From his statements it appears that the captain made exorbitant charges for the articles he furnished to the libelants. Some of these articles were brought into court, and identified. The captain, in his testimony, protested that some of these articles were not the same he had sold to libelants, and must have been procured elsewhere; but I am compelled to accept the statements of the libelants as being the more reliable. The articles produced were examined by the expert witness referred to, and he gave it as his opinion that they were of poor quality, and very cheap. In some instances the captain charged as much as 300 to 400 per cent. above the wholesale price of the articles. I have carefully gone over the slop account of each libellant, and made such reductions as seemed, under the testimony, fair and proper. As to a few of the articles, there is no testimony of their wholesale value, the expert witness declining to give an opinion, on the ground that he was not sufficiently familiar with the article and its price to justify him in so doing. For instance, this is true of a coat sold from the slop chest to one of the libelants; also, with reference to soap, matches, and other small articles furnished. With respect to these, I have made a reduction of percentage substantially in proportion to that made respecting the other articles.

I may say, however, that I have not followed strictly the 10 per cent. rule, but in almost every instance have given the claimant the benefit of the higher retail price in this city testified to by the expert witness. The result of my calculations, with the sums due the respective libelants, is as follows:

William Hogan, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	25 00
Balance due		\$ 72 40
(No slops seem to have been furnished to the above libelant.)		
Henry Kroger, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	18 45	43 45
Balance due		53 95
Hermann Golowin, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	20 50	45 50
Balance due		51 90
E. Peterson, seaman, wages earned.....	\$ 97 40	
Allotment	\$20 00	
Slop acct.	8 65	28 65
Balance due		68 75
George Backel, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	18 25	43 25
Balance due		54 15
William Grosett, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	16 50	41 50
Balance due		55 90
Alexander Holmburg, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	21 45	46 45
Balance due		50 95
Karl V. Ross, carpenter, wages earned.....	\$136 00	
Slop acct., including a charge of \$7 for a plow plane	\$33 00	
Cash advanced in San Francisco.....	5 00	38 00
Balance due		98 00
Henry Venezuela, seaman, wages earned.....	\$ 97 40	
Allotment	\$25 00	
Slop acct.	18 20	43 20
Balance due		54 20
Total		\$560 20

The point is made by proctor for claimants that libelant Ross is estopped from recovering more than the sum of \$56.58, which sum was left with the clerk of the court by the claimants on October 27, 1896. A letter was introduced at the hearing, signed by Ross, and addressed to the master in San Francisco, in which he states, substantially, that he is willing to accept the sum of \$56.58 in full payment of all sums due him for services rendered on the bark during the voyage in question, and that, if that sum were paid into court, the suit, so far as his claim was concerned, might be dis-

missed. As stated, the sum of \$56.58 was left by the claimants with the clerk of the court, to be by him paid to the libelant Ross; but the latter, it appears, has never called for the same, nor availed himself of it. On the contrary, he appeared as a witness in his own behalf at the hearing, seeking to recover the amount he originally sued for. He testified that the reason for applying to the master for a settlement and for signing the letter referred to was because he was then in need of money, and wanted to leave San Francisco. For some reason or other, he was subsequently induced to change his mind, and he never called for the sum left with the clerk of the court. I do not see how his action in this respect can prejudice his right to recover the sum which the court finds is actually due him. It is true that he agreed at one time to accept a smaller sum, but this was owing to the fact that it was in the nature of a settlement, which, he states, he was then anxious to bring about, being in need of money. He will therefore be allowed the full amount of \$98.

A decree will be entered as indicated in this opinion.

THE GLENCAIRN.

(District Court, D. Oregon. January 14, 1897.)

No. 4,068.

1. AGREEMENT TO ARBITRATE.

The masters of two vessels which had collided, having differed as to whether a certain part of one vessel was injured thereby, agreed that a certain third person should examine it, "and say if any damage had been done, and to what extent." *Held*, that this was not an agreement to submit to arbitration, especially as there were other matters in dispute to which the agreement did not refer.

2. COLLISION—DAMAGES—LOSS OF CHARTER.

A vessel injured by collision while in harbor awaiting a charter *held* not entitled to damages based on a decline in charter rates while she was undergoing repairs; it appearing that, before the accident, she has declined higher rates, and was held above the market price while rates were falling.

3. SAME—COMMISSIONS ON REPAIRS.

The injured vessel is not entitled to commissions on the money disbursed in making repairs.

4. SAME—SUPERINTENDENCE OF REPAIRS.

A claim for money paid to a third person for superintending the repairs to the injured vessel cannot be allowed, where no reason is shown why the master, who was actually present, could not himself have superintended the repairs.

5. SAME—COSTS—OFFERS OF SETTLEMENT.

Where the claimant of a vessel libeled for collision made reasonable offers of settlement, and, pursuant thereto, paid into court an amount equal to what was afterwards found due by the court, *held*, that he was entitled to his costs.

F. D. Chamberlain and Zera Snow, for libelant.

C. E. S. Wood and J. C. Flanders, for claimant.

BELLINGER, District Judge. The libelant is master of the British ship *Bedfordshire*, and the libel is for damages caused by a collision between the *Bedfordshire* and the *Glencairn* in the harbor at

Astoria. The Bedfordshire was at anchor. The Glencairn had just arrived in charge of a steam tug, and was coming to an anchorage. Through some mistake, or other fault, the Glencairn's anchor was dropped so close to the Bedfordshire that, in coming to, she swung around, and the two ships came in collision, the Glencairn's starboard quarter coming against the Bedfordshire's starboard bow. The libellant claims damages as follows:

Necessary repairs to the Bedfordshire, and commissions thereon.....	\$3,126 25
Loss of the use of the ship during the time required to make repairs...	3,650 00
Depreciation of market rates for ships of the class of the Bedfordshire in the meantime.....	1,618 20
Loss of time, and expenses of master and crew, and the wages thereof	500 00
Injury to the Bedfordshire by reason of the strain suffered, and other and additional losses incident to and resulting from the collision.....	600 00
Total	\$9,794 45

The claimant admits the liability of the Glencairn, and offers to pay all damages actually suffered by the Bedfordshire as a result of the collision, but denies that such damages are more than \$2,299.50, which sum the claimant has deposited in the registry of the court for the libellant's use.

The principal controversy in the case grows out of an injury to the main lower cap of the Bedfordshire. This main cap is a large double band of iron, weighing about 400 pounds, and shaped like a figure "8." It is almost nine inches in depth and one inch thick. It is the means by which the main topmast is secured to the mainmast. While the Bedfordshire was off Cape Horn, on her voyage to this port, her topsail lanyards were carried away during a storm, and the yard, weighing probably three tons, came down. The force of the blow was such that the main cap was cracked on the starboard side, the crack extending to the eye bolt hole, about the center of that part of the main cap through which the mainmast extends. As to this there is no question. It is claimed on behalf of the Bedfordshire that, among other injuries sustained by her by the collision in Astoria harbor, there is a second crack of the main cap, not so deep and serious as the former injury, but serious enough to make it necessary to replace the old cap with a new one, at an expense greatly above what would be required if the vessel could have had the repair made in her home port, as she might have done if it had not been for the second injury; the claim being that it was practicable, had there been but one crack, to have reinforced or temporarily repaired the main cap, with a lashing called a "Spanish Cap," so that the vessel could have completed her voyage. On the other hand, it is contended, for the Glencairn, that the second or smaller crack did not result from the collision, but was caused by the same blow that caused the injury on the starboard side (the lesser injury was on the port side and directly opposite the crack on the starboard side); and it is further contended that, without the smaller crack, the vessel could not safely have gone to sea without a new main cap, and that what is called the "second injury" did not, therefore, add to the cost of repair, or delay the vessel in this port.

The evidence bearing upon the question as to whether the injury

to the main cap on the port side was caused by the collision, or by the falling spar off Cape Horn, is conflicting. The captain of the Bedfordshire, the mate, and third mate all testify that they made careful examinations of the main cap after the accident off Cape Horn, and that the crack on the port side was not there until after the collision. The mate lashed the main cap with wire lashings. Hannaford, a seaman on the Bedfordshire, painted the main cap about a week before the vessel arrived at Astoria, first chipping off the blisters on it. He painted between the lashing, and would, so he testifies, have seen a crack on the port side, had there been one. Upon examination, made by the captain and the two officers named, and by Freeman, an Astoria blacksmith, after the collision, the crack on the port side appeared to be a fresh crack, and there was no paint to be seen on its edges. On the other hand, Capt. Wright, of the Glencairn, testifies that he examined the main cap shortly after the collision, that both cracks appeared to be old ones, and that he could see traces of paint on the edges of the crack on the port side. Hamilton, the Glencairn's first officer, testifies that this injury was an old one, and that he found a part of the port-side crack covered with paint; the crack extending beneath the paint, thus showing that this injury existed at the time the main cap was painted.

There is difference of opinion as to whether the strain upon the masts of the Bedfordshire, caused by the pulling off of the Glencairn, could have resulted in the port-side injury to the main cap. On the one hand, it is claimed that the backstays of the Bedfordshire would not permit her topmast to come forward, as it must have done to cause the injury. It is not claimed that there was anything unusual as to the condition of these backstays after the collision. On the other hand, Capt. Hugo, of the Bedfordshire, testifies that the backstays on his ship are of wire, with rope lanyards, and that these stays are always slack to a degree. Smith, the third mate of the Bedfordshire, testifies that, when the Glencairn was being hauled off by the tug, he saw the mainmast, the main topgallant mast, and the royal all bent forward. This proves too much. If the mainmast bent forward with the topgallant, it is not probable that the main cap connecting the two would have been subjected to an unusual strain.

I think the probabilities are that both cracks in the main cap resulted from the same cause. The effect of the blow from the falling of a spar weighing three tons, from such a height, upon the main cap, is demonstrated by the injury which it is admitted to have caused. Both sides of the main cap were subjected to practically the same strain by this blow, and, while a crack upon one side from this cause might not necessarily be accompanied by a like injury on the other, such would be its tendency. Furthermore, it is not probable that the backstays of the Bedfordshire could have been slack enough to permit the topgallant and royal masts to come forward so as to have produced this injury. The office of these stays is to prevent these masts from coming forward at all. If, however, the stays on the ship are slack to this degree, then what is claimed

to have happened when the Glencairn was pulled off after the collision would be likely to happen at sea in bad weather. The pitch of the ship in a rough sea would inevitably cause the topgallant and royal masts to come forward as far as the slack of the backstays would permit, and the strain upon these masts by the pulling apart of the two ships could do no more; so that one of two conclusions is unavoidable: Either the backstays prevented these masts from coming forward, and the injury on the port side of the main cap was not caused, as claimed for the Bedfordshire, or else the liability of the ship to this injury made it unsafe for her to proceed to sea without a new main cap.

I do not overlook what is claimed as to a temporary repair by the expedient of what is called a "Spanish Cap,"—a wire lashing around the main cap,—to enable the vessel to reach her home port. There was already a wire lashing around this cap at the time of the collision. How much more extensive the proposed Spanish cap was to be does not appear. The one already there did not suffice to prevent further injury, assuming that the port-side crack was caused by the collision. And, as to this, it is not shown that, but for the port-side injury, the Bedfordshire would have completed her voyage without the expense of a new main cap. It is true that Capt. Pope, acting as an arbitrator in the matter, stated, in his award, that it appeared to him that the damage to the cap on the starboard side, while to some extent a serious one, could have been temporarily repaired, and that the repair, supplemented by a Spanish cap, would have enabled the vessel to prosecute her voyage to a port where repairs could have been effected more reasonably than here. But, as a witness, Capt. Pope said: "With the single crack, I would possibly have allowed the vessel to go with the Spanish cap. With two cracks, I should certainly have not done so." In view of this statement, I cannot assume that the Bedfordshire could have completed her voyage without a new main cap. To say the least, the matter is left in such uncertainty as to preclude damages; and, furthermore, I am not inclined to encourage such makeshifts as this, whereby, regardless of the property interests involved, the lives of seamen are jeopardized merely that there may be saved to the owners of vessels the paltry difference between the cost of repairs as between this and some other port.

Libelant claims, also, that by agreement of parties the matter of this injury was submitted to the arbitration of Capt. Pope, who made a report favorable to the Bedfordshire. But, while the arbitrator proceeded in the utmost good faith, there is serious dispute as to whether any agreement to arbitrate existed. Capt. Pope was absent from the city when the understanding, whatever it was, in pursuance of which he acted, was had, and his information in the premises was derived from the libelant. Capt. Wright, of the Glencairn, says that there was no agreement to arbitrate, but merely an agreement on his part that Capt. Pope should examine the Bedfordshire's main cap, and report whether the second injury was a new or an old one. Capt. Hugo, of the Bedfordshire, testifies that there was an agreement to arbitrate,—that it was agreed verbally that

Capt. Pope was to go down, examine the cap, say if the Glencairn had done any damage to it in the collision, and, if so, to what extent.

There is no disagreement between the two masters as to the understanding in pursuance of which Capt. Pope acted. They disagree as to the effect of that understanding, one claiming and the other denying that it was an arbitration. To bind the parties, an agreement to arbitrate ought to be certain. The authority of the arbitrator to make a decision should not be left to implication. The law implies an agreement to abide the result of an arbitration, but it cannot imply the agreement to arbitrate from the questionable authority to examine "and say if any damage had been done, and to what extent." There is here no agreement to submit any question to the decision of Capt. Pope. The damage to the main cap, while the principal cause of dispute between the parties, is not the only one. There are other matters of dispute between them which would naturally and probably have been included in any arbitration of difference between them.

I cannot allow damages based upon the claim that the Bedfordshire was kept out of the market by reason of her injuries. The Bedfordshire was held for higher charters than were offered, and the market was a falling one. She was in the harbor nearly a month before the collision, and had declined offers for her charter as high as 35 shillings. She was, according to the testimony of Mr. Sibson, being held above the market. It is claimed that, at the date of the collision, and following, she was worth 32s. 6d.; but the testimony tends to show that she was held above that figure, and that the market continued to decline. She is not entitled to recover from the Glencairn the value of the market which she refused. She was not an exception in this regard. Other vessels equally valuable declined charters in the state of the market, and remained in port after the Bedfordshire had completed her repairs.

The claim for commissions on money disbursed in repairs is made on the authority of the case of *The Clan Mackenzie*,¹ but the claim was not contested in that case. I do not think that the fact of such an allowance is sufficient to establish the validity of claims of this character. It is argued that the fact that the claim was not contested in the case of *The Clan Mackenzie* goes to show that it is above controversy. There is force in this suggestion, and yet the fact, if it is a fact, as I assume from the failure to cite any other like case, that there is no other case where such an item has been included in an award of damages, compels me to disallow it in this case. It was probably submitted to in *The Clan Mackenzie* Case because of the fact, testified to in this case by Mr. Laidlaw, who made the claim in that case, that such charges are customary. I am not prepared to recognize a custom among shippers, in allowing between themselves commissions upon moneys disbursed, as establishing a rule of damages in cases of maritime collision.

Neither the claim for costs in the *Spreckels* libel suit against the

¹ Reported sub nom. *The Oregon*, 45 Fed. 62.

Bedfordshire, nor that for Mr. Cherry's services for superintending repairs, can be allowed. The Spreckels libel was against both vessels, and was for a salvage service. There was no foundation for such a claim against the Bedfordshire, and it is not the fault of the Glencairn that the Bedfordshire was included in the libel for its enforcement. The Glencairn, in its answer in that case, admitted that the towage service was made at its request, and it offered to pay what it contended was a reasonable compensation therefor, and finally compromised and paid the demand. It did not attempt to shift any part of the responsibility for what had been done upon the Bedfordshire. Nothing more was required of the Glencairn. One of the items claimed, on behalf of the libelant, as an expenditure of Mr. Cherry, is for \$125, services in superintending the repairs made upon the Bedfordshire at Astoria. There is no reason shown why the master could not have superintended these repairs himself, and, in fact, he was actually present during the whole period, and there is no more fit or proper person for superintending repairs of a vessel than her master, and this item cannot be allowed.

There are several other minor claims made on behalf of the libelant, but, on an examination of them, I cannot find that they fell either within the rule of "*restitutio in integrum*," or within the rule that only the damages resulting directly from the injury as a proximate cause ought to be made good.

Since the announcement of the foregoing opinion, the proctors for the libelant and claimant, respectively, have agreed upon certain items as falling within the tender, made in general language by the answer, that claimant would pay all damages resulting from the collision as a proximate cause. The gross amount of these additional items is \$340.15, which will be included in the decree. And I have also heard the proctors for libelant and claimant, respectively, upon the question of costs, but am of the opinion that the libelant should bear the costs, because, while the letter in evidence, dated January 13th, is not, in a strict legal sense, an acknowledgment of liability, it clearly admits the liability for the purposes of an amicable settlement, and asks only that further information be given in regard to itemizing certain lump charges. This was, I think, a reasonable request, and should have been answered; and, under the rule that the courts ought to do all that they can to favor amicable settlements, and to discourage litigation, I must adhere to my resolution to adjudge costs to the libelant. I am of the opinion that the amount tendered by the claimant and paid into court is all that libelant is entitled to recover, and that the claimant is entitled to his costs, and to this effect will be the decree. A decree will be prepared and entered in accordance with this opinion.

LUND v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, D. Nebraska. January 23, 1897.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT.

The jurisdiction of the circuit court, in a case removed from a state court, does not depend on the regularity of the order for removal, nor on the making of such an order, but only on the removability of the cause, and the compliance with the statute in respect to removal.

2. SAME—FEDERAL QUESTION—FEDERAL CORPORATIONS AND RECEIVERS.

A suit against a corporation of the plaintiff's state, jointly with the Union Pac. Ry. Co., a corporation chartered by congress, and its receivers appointed by a federal court, such suit being also brought against the receivers, without leave, by virtue of the federal statute, is a suit arising under the laws of the United States, and, if brought in a state court, may be removed to a federal court.

L. D. Holmes, for plaintiff.

W. R. Kelly and E. P. Smith, for defendants Union Pac. Ry. Co. and receivers.

McHUGH, District Judge. This is a motion to remand. The suit was begun in the district court of Douglas county, Neb. It is an action for damages for personal injuries, sustained, as alleged, through the negligence of the defendants. The petition alleges that the defendants were in the joint possession of a certain line of railway reaching from Council Bluffs, Iowa, to a point west of South Omaha, Neb.; that the defendants jointly operated certain passenger trains over said railway; and that plaintiff sustained injuries because of negligence on the part of the defendants in the operation of one of the trains aforesaid. The petition prays judgment against the defendants for the sum of \$25,000 and costs of suit. The defendants Union Pacific Railway Company and S. H. H. Clark, E. Ellery Anderson, Oliver W. Mink, John W. Doane, and Frederic R. Coudert, receivers of said company, filed in due time a petition, together with a bond, for the removal of the cause to this court. This petition and bond came before Hon. W. W. Keyser, one of the judges of the district court aforesaid, at chambers. The bond was by him approved, and the cause ordered removed to this court. A transcript of the proceedings in the state court was duly filed in this court. The plaintiff has filed a motion to remand the cause to the state court.

His first point is that the judge of the state court had no power to enter, at chambers, in vacation, the order removing the cause to this court, and that the removal is therefore illegal. There is nothing in this point. The jurisdiction of this court does not depend upon the order of removal entered in the state court. It is not necessary that such an order be entered. The supreme court of the United States has said (*Kern v. Huidekoper*, 103 U. S. 485):

"If the cause is removable, and the statute for its removal has been complied with, no order of the state court for its removal is necessary to confer jurisdiction on a court of the United States."

Inasmuch as the removal statute was complied with in this case by the defendants petitioning for removal, if this cause is remova-

ble, the jurisdiction of this court is complete without reference to the regularity of the order of removal entered in the state court.

It is further urged in support of the motion to remand that this action is against all the defendants jointly; that one of the defendants, the Chicago, Rock Island & Pacific Railway Company, Consolidated, is a corporation organized under the laws of the state of Nebraska; that the action is not separable; and, inasmuch as one of the defendants is a Nebraska corporation, the action is not removable. The Union Pacific Railway Company is a corporation deriving its corporate powers from acts of congress. It has been decided that, since every suit against this federal corporation necessarily involved the exercise of the corporate power it received in a federal law, therefore all suits against the company were suits arising under the laws of the United States; and hence that suits against the corporation could be removed to the federal courts. *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113. The receivers of the Union Pacific Railway Company were appointed by this court. All the powers of the receivers in the possession, control, and operation of this road and properties were derived from this court. The court acted by virtue of the judicial power possessed and exercised under the constitution and laws of the United States. Therefore all the power possessed and exercised by these receivers in respect to this railroad property was by virtue of federal law. Every suit against these receivers, therefore, as it necessarily involves the exercise of these powers, is a suit arising under the laws of the United States, and is removable to the federal court. *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905.

Moreover, the right to maintain this action against the receivers grows out of a federal law. A receiver having been appointed by a court, that court had exclusive jurisdiction over him, and no suit at law could be prosecuted against him without leave of the court. But our federal statute permits such suits to be brought against these receivers without leave of court. Hence this suit was begun and is being maintained against these receivers by virtue of a federal statute. It is plain from these considerations that this suit, as it affects the Union Pacific Railway Company and the receivers, is an action arising under the laws of the United States.

It is urged, however, that, conceding the correctness of what has been said, this cause is not removable, because the defendant Chicago, Rock Island & Pacific Railway Company, Consolidated, is a Nebraska corporation; that as to it no federal law is involved; that, since this last-named company could not, if sued alone, remove the cause to this court, this cause, being against all the defendants jointly, cannot be so removed. I do not think this position well taken. The fact that the action is against the defendants jointly, under the circumstances of this case, makes it removable. In this suit it is sought to hold the defendants jointly liable. We have already seen that all suits against the Union Pacific Railway Company and the receivers are suits which, of necessity, arise under federal law. No suit can be brought against them which does

not involve the power under which they act, which is, as we have seen, the laws of the United States. So every action against them jointly with another must be a suit arising under federal law. No joint recovery can be had, no joint suit can be prosecuted, which does not reach all the defendants. To reach the Union Pacific Railway Company and the receivers in this case it is necessary to involve the laws whence they derive their power. Since this suit against the receivers and the Union Pacific Railway Company necessarily involves the federal law, it is clear that this case arises under federal law. A suit against the Rock Island Company could be maintained without reference to the federal laws. But when it is sought to hold jointly with this company the Union Pacific Company and its receivers, then a new character is given the action, a new element is introduced, to wit, the laws of the United States. Therefore, as it is necessary, in order to maintain this action against the defendants jointly, to invoke federal law, the case is one arising under the laws of the United States, and hence was removable under the statute.

In the case of *Landers v. Felton*, 73 Fed. 311, it is said:

"The question here arises whether an action brought against the receiver of a United States court and others, who are citizens of the same state as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another can be asserted against him, except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tortfeasors is also several. He might, therefore, have maintained his action against the resident defendants in a state court, without any possibility of a removal to a federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the federal statutes. Hence the cause of action is removable."

The motion to remand is overruled.

BRADLEY v. OHIO R. & C. RY. CO.

(Circuit Court, W. D. North Carolina. December 17, 1896.)

REMOVAL OF CAUSES — CITIZENSHIP OF CORPORATIONS — CHARTERS FROM DIFFERENT STATES.

In 1885 the legislature of South Carolina, by an amendatory act, recognized the corporation of the G. Ry. Co., and gave it the name of the C. Ry. Co. In 1886 the C. Ry. Co. consolidated with two North Carolina railroad corporations, under its name of the C. Ry. Co.; and such consolidation was ratified by the North Carolina legislature by an act of February, 1887, which also conferred important franchises, within North Carolina, on the corporation. The C. Ry. Co., as thus organized, also had charters from South Carolina, Tennessee, and Kentucky, and was authorized to build a railroad passing through the four states. A mortgage upon its road was foreclosed, the whole road sold, and bought by one H. After taking possession, H. executed and filed

a declaration, under sections 697, 698, and 2005 of the North Carolina Code, for the purpose of constituting a new corporation to succeed to the rights and property bought by him, to which he gave the name of the O. Ry. Co. of North Carolina, and to which he conveyed the railroad property within that state. H. afterwards obtained charters in Virginia and South Carolina for the O. Ry. Co., and conveyed to it the railroad property and franchises purchased by him. *Held*, that the corporation operating the railroad in North Carolina could not found any claim to be considered a citizen and resident of South Carolina on any relation it had with the C. Ry. Co., nor on the obtaining of charters from South Carolina and Virginia, and conveyance of the property by H., but that it was a domestic corporation of North Carolina, and, as such, not entitled to remove to a federal court, on the ground of local prejudice, a suit brought against it in a court of that state.

A Motion to Remand to the State Court.

E. J. Justice, for plaintiff.

P. J. Sinclair and H. N. Hardin, for defendant.

DICK, District Judge. This action was instituted in the state court for the county of McDowell to recover damages for personal injuries occurring in this state; and the defendant availed itself of the right given by the act of congress of the 13th of August, 1888, to nonresident defendants, to remove an action pending in a state court to the United States circuit court on the grounds of local prejudice, etc. The application was received and considered, and this court adjudged that local prejudice did exist in said county, as alleged and proved by evidence; and an order was made for the removal of this case from the state court to this court at Charlotte. In the said order, leave was granted to plaintiff to file a motion to remand at the next term of this court; and such motion was duly made, and is now before this court for determination. This order was not recognized and observed by the state court, which declined to relinquish jurisdiction, on the grounds insisted upon by the plaintiff: "(1) That the Ohio River & Charleston Railroad Company is a corporation and citizen of North Carolina; (2) that this fact also appears in the record and pleadings." From this order in the state court the defendant prayed an appeal, which was allowed, and the clerk was directed to send up a full transcript of the record, and all the papers filed in the case. On a hearing in the supreme court in the term just closed, the court affirmed the order of the court below, not upon the grounds stated in the order appealed from, although fully presented in the record, briefs, and argument before the court, but upon a defect that appeared in the proceedings of this court for the removal of the cause. 26 S. E. 169. I concur in this decision of the supreme court, founded upon the fact that "it does not affirmatively appear, either in the petition, or in the order of removal, or anywhere else in the record, that the diverse citizenship of the parties existed also at the time of the commencement of the action." This decision is not important, if the substantial grounds set forth in the order of the state court are not well founded; for, as the case was properly retained, and is still pending, in the state court, and this court acquired no jurisdiction, by reason of its defective proceedings, the defect mentioned could be reme-

died by the defendant filing a new petition, alleging the facts omitted by inadvertence, and obtaining a correct and legal order of removal; for common justice would require that the defendant should not be deprived of a substantial legal right by the nonobservance of his counsel and the court of a matter that is, to some extent, often refined and technical.

The material question of law for this court to decide on the pending motion to remand is whether the defendant is a foreign or domestic corporation, before allowing a new petition to be filed. It is insisted on the part of the plaintiff that defendant is a domestic corporation, for the purposes of this action, because in its answer it did not specifically answer to a positive allegation in the complaint that "it is a corporation incorporated under the laws of North Carolina, owning and operating a railway and doing business in said state as a common carrier of passengers and freight," etc. To this allegation the defendant made answer that it "has not sufficient knowledge or information to deny or admit this allegation of the complaint, and denies the same." This court is of opinion that this general denial by the defendant of the allegation of its legal existence as a domestic corporation is sufficient, and the only matters of fact admitted were due service of process, and that it was an organized association acting as a corporation within this state. The plaintiff, on objection to this general denial of matter of law, as indefinite and uncertain, could not, on motion, have obtained an order on defendant to make the answer more specific as to the legality of its domestic corporate existence, for the allegation contains matter of law. Matters of law, or mere inferences of law, are questions to be judicially noticed and determined by the court, and such matters which are not proper subjects of traverse are not taken as admitted by pleading over. This matter of law was distinctly presented in the order of the state court appealed from, and was the material point in the case; and the fact that the state supreme court, after full argument of counsel, failed to make adjudication of the point, tends strongly to show that the court regarded the question of law as a matter of some difficulty and importance. A railroad corporation is an artificial person, created by positive law, and invested with franchises involving specific powers and privileges, conferring some of the attributes of sovereignty, to be exercised primarily for the benefits and advantages of the public. Such corporate franchises can never arise and be invested by any kind of implication. If the defendant is not a domestic, but a foreign, corporation, its failure in its answer to make specific denial of a direct and positive allegation of matters of law in the complaint did not estop it from claiming a right of removal of this case from the state court to this court under the provisions of the act of congress of the 13th of August, 1888.

The chief ground for the motion to remand—strongly insisted upon by counsel of plaintiff—is that the defendant, at the time of the injury sustained by plaintiff's intestate, was a domestic corporation, duly incorporated under the laws of the state of North Carolina, owning and operating a railway and doing business in said

state as a carrier of passengers and freight, etc., and, being in fact and in law such domestic corporation, it was not entitled, under the said act of congress, to the order of removal heretofore made by this court, which has not now jurisdiction to retain and dispose of this case. I have examined and considered this question of law with more than ordinary care, as the counsel of defendant, in their briefs and arguments, insisted that this court, in the case of *Hudson v. Railroad Co.*, decided "that, for jurisdictional purposes, the C., C. & C. R. R. Co. was a foreign corporation within the state of North Carolina, and was a citizen of South Carolina, and that the act of the general assembly of this state amounted only to a license, and did not create a new corporation." I have examined such case, reported in 55 Fed. 248, and find that the court decided that said railroad company was a citizen of South Carolina, and had a right of removal of the case from the state to the federal court. The question as to its citizenship in this state was not presented on the trial, as the injury sued for in the state court occurred in South Carolina. On a petition of plaintiff to have his judgment declared to be a lien on the property of the defendant under the laws of this state, I referred this question to the circuit court of South Carolina having original and prior jurisdiction of the subject-matter. *Ex parte Hudson*, 61 Fed. 369. Many motions were made in this court before the trial, and in some of them I may have expressed views as stated by counsel, and, according to my recollection, such were my impressions, but the question was not fully argued and decided. It now appears, from documentary proofs before this court, that the general assembly of South Carolina, by an amendatory act of December 22, 1885, recognized the pre-existing corporation of the Georgetown & North Carolina Narrow-Gauge Railroad Company, and gave it the name of the Charleston, Cincinnati & Chicago Railroad Company. Previous to this date there were existing in the state of North Carolina two duly chartered and organized domestic corporations, respectively known as the Rutherford Railway Construction Company and the Rutherfordton, Marion & Tennessee Railway. These domestic corporations were desirous of consolidating with and merging into the said Charleston, Cincinnati & Chicago Railroad Company so as to make a continuous line, and to extend the said road into and across the state of North Carolina, and to enable said road to be continued across the states of Tennessee, Virginia, and Kentucky to the Ohio river. In September, 1886, terms of consolidation were agreed upon by these respective railroad companies, which were duly approved, ratified, and confirmed by an act of the general assembly of North Carolina of the 17th of February, 1887 (Acts 1887, c. 77). By this act the Charleston, Cincinnati & Chicago Railroad Company was recognized and adopted as one corporation, with its consolidated organization, for the purposes of the general management of its property and conducting its business in the several states through which its railway should be constructed and operated. As it acquired the property and franchises of two domestic railway corporations of this state, and was also, in express terms, authorized and empowered

to have and exercise all the powers, privileges, and franchises to the extent conferred on the North Carolina Railroad Company and other railroads in the chapters of the State Code entitled "Corporations" and "Railroads," it became a domestic corporation, to be governed by the laws of this state as to its property and business situated and transacted therein; and it also became liable to answer for all acts done within such territorial limits as a domestic corporation. *Railway Co. v. Meeh*, 16 C. C. A. 510, 69 Fed. 753, and cases cited. This act was not a mere enabling act, granting a license to a foreign corporation to operate a railroad and transact other business in this state under chartered powers derived from the state of South Carolina; for this legislative grant conferred other important franchises, which were accepted and exercised in this state, in the construction and operation of its railway, to as full an extent as could have been done by a North Carolina corporation under the most liberal charters ever granted. *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878. This act expressly authorized this consolidated corporation to mortgage its road and property to secure its indebtedness. In order to carry on the contemplated plans and purposes of consolidation and extension of its railroad in and through the several states mentioned, this corporation on the 9th of August, 1887, executed a mortgage in the nature of a deed of trust, whereby it conveyed to the Boston Safe-Deposit & Trust Company all of its property and franchises, etc., to secure the payment of certain specified first mortgage bonds, and said mortgage was duly delivered and recorded in the manner required by the laws of the several states through which its railroad extended. This corporation having failed to make payment of interest on its bonds at the time and in the manner provided for in the mortgage, the whole debt secured became due and payable. The mortgagee, after reasonable indulgence, duly instituted proceedings in the United States circuit court in the district of South Carolina to obtain a decree for foreclosure and sale of the property and franchises conveyed as a security for the payment of the bonds mentioned in the mortgage; and on the 6th of February, 1893, a decree was made for the purpose of affording the relief prayed for by mortgagee. In this decree it was ordered, adjudged, and decreed "that the Charleston, Cincinnati & Chicago Railroad Company is a corporation organized and chartered by the states of North Carolina, South Carolina, Tennessee, and Kentucky for the purpose of constructing, owning, controlling, and operating a railroad," etc., and the special master appointed was authorized and directed to advertise the premises, property, and franchises of said company and make sale as provided in decree. This decree was also entered as a decree of the circuit court of this district in the ancillary proceedings which had been regularly instituted and conducted. By virtue of this decree the special master made sale on the 2d May, 1893, and executed a deed to the purchaser, Charles E. Hillier, of Boston, conveying to him all the property and franchises of the Charleston, Cincinnati & Chicago Railroad Company. The said Charles E. Hillier, after having been put in

possession of said property and franchises, determined to form a new corporation, in accordance with the laws of the state of North Carolina (1 Code N. C. §§ 697, 698, 2005). In compliance with these sections, on the 20th of June, 1894, he executed, under his hand and seal, a declaration constituting a new corporation, to be invested with all the rights, powers, privileges, and franchises of the Charleston, Cincinnati & Chicago Railroad Company in this state. For the purpose of effecting a complete working organization, he gave this new corporation the name of Ohio River & Charleston Railroad Company of North Carolina, appointed six directors, and designated the amount of capital stock, and the number of shares into which the capital stock should be divided, and caused a certificate of such organization to be duly filed in the several counties of North Carolina in which the said railroad was situated. On the 13th of November, 1894, the said Charles E. Hillier executed and delivered a deed to the Ohio River & Charleston Railway Company of North Carolina, conveying to said company so much of the property and the rights, privileges, and franchises of the Charleston, Cincinnati & Chicago Railroad Company as were conveyed to him, as purchaser, by the special master, which are situated in the state of North Carolina, or were derived from the laws of said state. The granting of the rights, privileges, and powers which constitute the franchises of a corporation are matters under the control of the legislature, and, within the limits of constitutional power, the legislature may adopt, by statute, any mode of conferring and investing such corporate franchises, or continuing the existence of those franchises previously granted, which had been acquired by a purchaser under execution sale, or under sale made by the decree of a court having authority by virtue of the laws of the state to order sales. Reasons of public policy require the continuance of railroads in a condition of useful and efficient operation, and statutes enacted for such beneficial purposes should be liberally construed in ascertaining the intention of the legislature for preserving the full accommodations and advantages arising to the public from such corporations. After careful consideration, I am of opinion that the said proceedings of Charles E. Hillier were regular, sufficiently specific, and in accordance with the laws of this state; that the former charter of the Charleston, Cincinnati & Chicago Railroad Company has been dissolved in accordance with state laws, and that said company no longer has corporate existence in this state; that the Ohio River & Charleston Railroad Company is a separate and independent domestic corporation, and has no other connection or relation with the dissolved Charleston, Cincinnati & Chicago Railroad Company, except it is legally invested with the property and franchises that formerly belonged to the said dissolved corporation. There can be no doubt as to the power of the legislature, under the present constitution of North Carolina, to repeal and dissolve railroad charters granted since the adoption of said constitution. *Railroad Co. v. Rollins*, 82 N. C. 523; *Young v. Rollins*, 85 N. C. 485; *Marshall v. Railroad Co.*, 92 N. C. 322. I have carefully examined and con-

sidered the cases cited by counsel of defendant, and have the opinion that the principles announced do not conflict with the legal views I have expressed in relation to the facts of the case before the court. I will cite only one case mentioned in briefs, as it refers to other cases relied upon by counsel of defendant: *Goodlett v. Railroad*, 122 U. S. 391, 7 Sup. Ct. 1254. I concur with counsel of defendant in their opinion that the legislature of this state has, in sections 1932 to 1934 of the Code, manifested a clear and positive intention that railroad corporations shall not be created by the action of associated persons otherwise than as provided in such sections. Those sections refer only to the mode and manner or creating railroad corporations, and not as to the methods of continuing the existence and operation of railroad franchises in the hands of purchasers at judicial sales. The property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in the Code of North Carolina, in sections 697, 698, 2005, and other sections. *Gooch v. McGee*, 83 N. C. 59. The defendant, in its petition for removal, claimed to be a citizen and resident of the state of South Carolina. It could not found this claim upon any relation which it had to the Charleston, Cincinnati & Chicago Railroad Company, for all of the title, estate, interest, and equity of redemption of this company to the mortgaged premises, rights, property, assets, and franchises were barred and forever foreclosed by the decree for sale and foreclosure made in the circuit court, which was duly executed by the special master. In the briefs of counsel, residence and citizenship in South Carolina are founded upon the alleged facts that Charles E. Hillier, after his purchase, "obtained a charter by special act of the legislature of Virginia approved February 12, 1894, and filed certain articles of incorporation with the secretary of state of South Carolina, under the laws of said state; he, the said Hillier, having conveyed the property and franchises of his said railroad purchase to the Ohio River & Charleston Railway Company." Conceding these alleged facts to be fully established, I am of opinion that the foreign corporation organized under that act has never been recognized and adopted by the legislature of this state, and has not superseded or destroyed the domestic corporation organized by the said Hillier under the laws of this state, or absolved the Ohio River & Charleston Railway Company of North Carolina from the discharge of the functions, duties, obligations, and responsibilities which were assumed by its domestic organization. The said Hillier had no authority or power to dissolve such domestic corporation, or transfer its franchises and property, without the consent and approval of the legislature of North Carolina.

As the proceedings for removal of this case were defective and ineffectual, and the case is now rightfully pending in the state court, I cannot make an order to remand. It is therefore consid-

ered and ordered that the proceedings in this court for removal be dismissed, with costs to be taxed against the petitioner, the defendant in this case.

BAKER v. AULT et al.

(Circuit Court, D. Washington, N. D. February 5, 1897.)

FEDERAL COURTS — INJUNCTION AGAINST PROCEEDINGS IN STATE COURT — INSOLVENT NATIONAL BANKS.

When a valid judgment has been obtained in a state court against a national bank, and the lien thereof has attached to its property, before the appointment of a receiver, Rev. St. § 720, applies to prohibit the issue of an injunction by a federal court, at the suit of the receiver, to restrain the enforcement of such judgment.

Stratton, Lewis & Gilman, for complainant.

F. M. Headlee, for defendants.

HANFORD, District Judge. This is a suit for an injunction to restrain the defendants from proceeding to obtain satisfaction of a judgment in their favor against an insolvent national bank by a sale of real estate under a writ of execution. The judgment was rendered by the superior court of the state of Washington for Snohomish county, and became a lien upon real estate owned by the bank situated in said county, prior to the closing of the bank. The plaintiff, as receiver of said bank, claims the land as part of the assets in his custody as receiver, and that there will be a loss to the trust estate if the defendants are permitted to sell the property under an execution. Section 720, Revised Statutes of the United States, provides that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This is a mandatory law, prohibiting the exercise by the federal courts of the power to issue injunctions to stay proceedings in any court of a state except in special cases, when authorized by some other law. I find it unnecessary to consider the other questions argued by counsel, for the reason that this statute is applicable to this case, and it must control the decision. Where a judgment has been obtained by fraud, or rendered by a court having no jurisdiction, a United States circuit court may exercise its power to restrain a party from taking any benefit from a judgment so obtained, or rendered in his favor. *Marshall v. Holmes*, 141 U. S. 589-601, 12 Sup. Ct. 62. But in the case at bar the validity of the judgment is not brought into question, and it is admitted that a judgment lien attached to the property before the receiver was appointed. I can find no ground for excepting this case from the rule prescribed by the statute. If the receiver wishes to save the property from being sacrificed by an execution sale, he must discharge the lien by satisfying the judgment, or else apply to the court which rendered the judgment to stay proceedings. Let there be a decree of dismissal, with costs.

BLANKS et al. v. KLEIN et al.

STARCKE et al. v. KLEIN et al.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1896.)

No. 464.

APPEALABLE DECREES—DECREE FOR COSTS.

An appeal from a mere decree for costs of the court below must be dismissed, as a matter within that court's discretion. But, where one item included in the decree is for clerk's fees in making and certifying the transcript on a former appeal, the appellate court may review the same on the merits.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Mississippi.

Wade R. Young, for appellants.

M. Dabney, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. This appeal is from a decree of the circuit court taxing costs in two equity causes which were decided in the circuit court July 16, 1891. Both causes were afterwards appealed to this court, where *Blanks v. Klein* was affirmed (3 C. C. A. 585, 53 Fed. 436), and *Starcke v. Klein* was dismissed for failure to file the record within the proper delay (14 C. C. A. 672). The contested items of costs, with one exception, are costs incurred in the circuit court in the trial of the causes, and were approved by the judge who rendered the decrees, apparently in compliance with section 983, Rev. St. U. S. The proceeding in which the decree under consideration was rendered appears to have been provoked by a motion of the appellants to retax costs. Proceeding under this motion, the court, on the application of movers, referred the matter to a special master, with directions to tax the costs of said suits due by movers, and to make report to the judge of the court in vacation. The special master made an investigation, hearing evidence of several parties by way of deposition, and reported that the items complained of were properly and lawfully taxed. Exceptions were filed to this report, complaining of the special master's findings both of fact and of law. The decree of the court overruled the exceptions to the master's report, confirmed the same in all respects, and declared as follows:

"And it is further considered by the court that inasmuch as nothing is involved in said motion and report except costs in said causes, and that both of said causes have heretofore been appealed to the court of appeals, and said appeals finally disposed of in that court, no appeal lies from this decree."

It seems to be settled that no appeal will lie from a mere decree for costs. *Clarke v. Warehouse Co.*, 10 C. C. A. 387, 393, 62 Fed. 328; *Du Bois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729. If this case covered only the costs incurred in the circuit court in an equity cause, which costs are unquestionably within the sound discretion of the court (*Canter v. Insurance Co.*, 3 Pet. 307; *Kittredge v. Race*, 92

U. S. 120), we are clear that this appeal should be dismissed. As, however, one item included in the decree is for making and certifying the transcript in the appeal to this court, and incidentally, therefore, an item of costs incurred in this court, we are disposed to consider the merits of the same.

The contention of appellants is that, owing to the circumstances attendant upon making up the transcript, the clerk agreed to accept a less sum than the fee allowed by law for such services. The master finds, in respect to this matter, that the clerk was entitled to his full fee for the preparation of the transcript, unless the agreement claimed by complainants (appellants) to have been made with him for compensation was established by the testimony, and then, upon a review of the evidence, finds that such agreement is not established. It is doubtful, under the system of compensation to clerks of the circuit courts of the United States, whether in any case the clerk may remit fees allowed by law, without making himself liable for the full amount, because the United States are interested in the fees of such clerks, and entitled to the overplus after deducting the compensation fixed by law. However this may be, we have examined the evidence found in the transcript, and we reach the same conclusion as did the master, that the agreement on the part of the clerk to remit any part of the lawful charges for making and certifying the transcript is not established. The decree appealed from is affirmed.

UNITED STATES v. GLEASON.

(Circuit Court, E. D. New York. January 30, 1897.)

NATURALIZATION—ISSUANCE OF CERTIFICATE—CONCLUSIVENESS.

The administration of the oaths and issuing of a certificate to an applicant for naturalization by a court having jurisdiction of such applications constitute a judgment of admission to citizenship, which is conclusive as to the existence of the necessary facts and the status of the applicant; and such certificate cannot be set aside upon the ground that the facts were falsely represented to the court.

James L. Bennett, U. S. Atty.
F. H. Van Vechten, for defendant.

WHEELER, District Judge. This cause has been heard on demurrer to the bill, which alleges, in substance, that the defendant was born prior to April 6, 1841, at Fishmoynce, in the parish of Down and Inch, and county of Tipperary, Ireland, and was an alien; that he remained there till 1882, when he came to this country, and arrived at New York about May 13th of that year, when over 18 and about 20 years old; that on October 22, 1867, without having made any declaration of intention to become a citizen of the United States, he presented a petition for naturalization to the superior court of the city of New York, setting forth, among other things, that he had resided in the United States 3 years next prior to arriving at the age of 21 years, knowing this to be false; that thereupon the required oaths were taken, and a certificate in due form was issued out of, and under the seal of, that court, showing that he had complied with the stat-

utes in such case made and provided, and had become qualified as a naturalized citizen of the United States, which he then knew, and the plaintiff did not till July, 1896, know, to be false. The prayer of the bill is for a decree that he was not then qualified to become a citizen of the United States; that the certificate was obtained by this false representation; that it be ordered to be surrendered by him, and be canceled; and for further relief.

The constitution provided (article 1, § 8) that the congress should have power "to establish a uniform rule of naturalization"; and (by article 4, § 2) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Congress provided that an alien might "be admitted to become a citizen of the United States" by declaring on oath before certain courts of the United States, "or a court of record of any of the states having common-law jurisdiction, and a seal and clerk, two years at least prior to his admission," that it was bona fide his intention to become a citizen of the United States, and to renounce other allegiance, and making to appear to the satisfaction of the court that he had resided within the United States five years, and during that time had behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and that an alien who had resided in the United States 3 years next preceding arriving at 21 might be admitted without having made the previous declaration of intentions. Rev. St. §§ 2165, 2167. Thus, universal citizenship of the United States and of the several states, and a mode of admission to it, were established, which were confirmed by the fourteenth amendment to the constitution, which provides (section 1) that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." The defendant had not, according to the allegations of the bill, in fact become entitled to admission to this citizenship when he was admitted, for he had neither resided in the United States three years next before becoming of age, nor made the preliminary declaration of intention to become a citizen of which such residence might take the place; and his application probably would not have been granted without the representation, alleged to be false, of that residence. But, whatever the fact was, the administration of the oaths and issuing of the certificate showed the satisfaction of the court as to the requirements, constituting a judgment of admission to citizenship, with the force of such a judgment upon the status of the applicant.

In *Campbell v. Gordon*, 6 Cranch, 176, Washington, J., said:

"But if the oath be administered, and nothing appears to the contrary, it must be presumed that the court before whom the oath was taken was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights."

In *Spratt v. Spratt*, 4 Pet. 392, Chief Justice Marshall said:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to

compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."

And in *Ex parte Cregg*, 2 Curt. 98, Fed. Cas. No. 3,380, Mr. Justice Curtis, upon a question as to the court, said:

"The importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, 'should prevent allowing any requirement of an act of congress from having its full weight,' in an application for this great right, so as to make an absolute and unimpeachable grant of it."

The conclusive effect everywhere of such judgments affecting the status of persons is alluded to in *Hilton v. Guyot*, 159 U. S. 113, at page 167, 16 Sup. Ct. 139, at page 145. Thayer, J., in *U. S. v. Norsch*, 42 Fed. 417 (much relied upon in behalf of the plaintiff), seems to treat the liability of a judgment of naturalization to be set aside for fraud like a patent as conceded, and to have considered only the power of courts of the United States to set aside such judgments of state courts, and to intimate that the relief would be accomplished by setting aside the certificate, or by injunction against exercising the right. Such would seem to be the only modes of relief, if any could be granted, for technically no court not authorized by law to review a judgment could directly set it aside. *Barrow v. Hunton*, 99 U. S. 80. And a court of equity can affect a judgment only by decree to prevent carrying it out or enforcing it. 2 Story, Eq. § 885. The surrender of the certificate, which is only evidence of the judgment, would not affect the citizenship established by the judgment; and an injunction which could only run against further exercise of the rights of citizenship would not affect past acts.

The defendant became a citizen of the state of New York, as well as of the United States. Other citizens became entitled to vote for him for such offices as citizens could hold, as well as he became entitled to vote, hold office, hold lands, or do what else citizens can do. Neither the state, nor any citizen of New York or of the United States, is a party to this suit; nor do they hold their right to vote for him, or to have him hold office, under him, and no decree against him here could affect their right. An attempt to carry out such a decree, especially after the right has been enjoyed 29 years, would produce great confusion and mischief. Chief Justice Marshall, in *Spratt v. Spratt*, before cited, stated that the inconvenience which might arise from holding the judgment conclusive had been pressed upon the court; "but the inconvenience might be still greater if the opposite opinion be established."

Upon these authorities and considerations, the naturalization in the superior court of the city of New York must be held conclusive; and no ground for relief appears, if such as is prayed could be had in this form. Demurrer sustained.

PENNINGTON v. SMITH et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

1. DECREES OF ORPHANS' COURT—TRUSTEE'S ACCOUNT.

S., as executor of his wife's will, held a considerable amount of personal property and some real estate, one-half of both belonging to him under the will, and one-half going to him as trustee for his children. He filed an account of the personalty, in which he charged himself with \$13,800, overpaid beyond the actual amount of property received, as if with an asset of the estate, and credited himself with sundry items, including large disbursements for general expenses of the estate and family, and \$88,900, paid to himself as trustee for his children, which would be the correct amount of their interest, if the other items were correct, and the \$13,800 overpayment represented an actual receipt of property. The account was approved by the orphans' court as filed. Upon the theory that he was entitled to reimburse himself for this overpayment out of the beneficiaries' share of the real estate, he took and deposited with his own funds, in the hands of his second wife, a part of the proceeds of the sale of the infants' share of the real estate. S. having died, and litigation having arisen in the United States circuit court, between his widow and his successor as trustee, seeking to reclaim from her hands the share of the proceeds of the real estate taken by S., the widow claimed the right to show the overpayment, and charge it against the payment to the infants' estate, which the trustee resisted unless permitted to open the whole account, and show that the overpayment was properly chargeable against other items. *Held*, that the circuit court could not go behind the decree of the orphans' court for one purpose, and not for all, and would apply the rule that the adjudication of a competent court will be accepted as a settlement of the questions before it. 75 Fed. 157, reversed.

2. FEDERAL JURISDICTION—CITIZENSHIP OF TRUSTEE OR SPECIAL GUARDIAN.

A testamentary trustee, or a special guardian appointed under a state statute for the sale of infants' land, suing in either capacity, is not a mere guardian ad litem or next friend; and the federal courts have jurisdiction of a suit brought by him against a citizen of a state other than his own.

3. TRUSTEES—DEALINGS WITH TRUST FUNDS—NOTICE TO THIRD PARTIES.

S., who held a mortgage as special guardian and trustee for his children, received a payment on the mortgage in a check payable to him as guardian, which he turned over to his wife, who deposited it in her bank, and afterwards returned a part of the sum to S., and expended a part under his direction for the maintenance of the children. S. claimed a right to the proceeds of the mortgage as his own, which his wife knew; but, it being afterwards held that he was not so entitled, also *held*, in a suit by the successor of S., appointed after his death, against S.'s widow, that she was chargeable with knowledge that the money was a trust fund, and was accountable for all of it but that returned to S., the principal of the trust fund not being applicable to the maintenance of the beneficiaries, and the widow being chargeable with knowledge of that fact.

Appeal from the Circuit Court of the United States for the Southern District of New York.

John B. Leavitt, for appellant.

Alex. Thain, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Sallie L. B. Smith, the first wife of George Condit Smith, died in July, 1890, leaving two young daughters. She was a resident of New Jersey, was possessed of real and personal property, and left a will, which was duly admitted

to probate in that state. After the bequest of a few specific legacies, the will provides as follows:

"I give, devise, and bequeath the equal undivided half part of all the rest of my property, as aforesaid, to my husband absolutely, and the other equal undivided half part thereof I give and bequeath, absolutely, to such child or children, and, if children, then in equal shares; but I direct that my husband shall hold the same in trust for such child or children during its or their minority, managing and investing the same according to law, and from time to time applying such parts of the income thereof to the support, maintenance, and education of such child or children as he may think advisable. The determination of my husband as to such management, investment, and application of income shall be final, and without appeal or question, as I have full confidence in his good sense and discretion."

Her husband was appointed executor, duly qualified, and proceeded to administer the estate. His account as executor was filed in December, 1891, and on February 23, 1892 the orphans' court audited and allowed said account as filed. It appeared therefrom that the executor had paid to himself, as trustee for each infant, on December 23, 1890, \$30,200; and again, on May 25, 1891, \$14,250, for each,—the total thus paid being \$88,900. These payments were in fact made by depositing 90 railroad bonds, valued at that amount, with the Central Trust Company, under an agreement which need not be recited, but which made the trust company the custodian of the bonds until the children's majority, with proper provisions for the disposition of the bonds and income therefrom. In July, 1892, George Condit Smith married the defendant Emma Condit Smith, having before that date become a resident of this state. He died October 7, 1894, leaving the said two children as his only heirs at law and next of kin, and by his will appointed his second wife, the defendant Emma Condit Smith, guardian of his children, and executrix of his estate. During the progress of this case through the circuit court, she received letters testamentary and of guardianship, in conformity with such appointment.

A portion of the residuary estate of the first Mrs. Smith consisted of a house and land in East Orange, N. J. Having removed from that state, it seemed to Smith desirable to sell this real estate; and in January, 1893, proceedings were begun in the court of chancery for New Jersey, under a statute entitled "An act relative to the sale and disposition of the real estate of infants." Revision, p. 481, approved March 27, 1874. That statute provides for the appointment of a special guardian to sell such lands, when the court may be satisfied that such sale is for the interest of the infants, and further provides as follows:

"Sec. 5. No sale of any real estate made in pursuance of the provisions of this act shall give to any person any other or greater interest in the proceeds of such sale than he or she would have had in the lands, provided the same had not been sold; but the said proceeds shall be considered relative to the statutes of descents and distribution, and for every other purpose as real estate of the same nature as the property sold."

"Sec. 9. When any special guardian appointed under this act shall have sold the lands and real estate of the infant, and his account been presented and approved by the chancellor, it shall be lawful for the chancellor to make an order directing the said guardian to pay the proceeds of such sale, after deducting such commissions and expenses as shall be allowed by the chancellor, to the general guardian of the said infant; and upon the payment to the general guardian

of the amount ascertained by the chancellor to be due to the infant in the hands of the special guardian, and the assignment of the securities held by him in case the money has been invested by order of the court, the special guardian may by an order of the chancellor, be discharged from further duties and liabilities in relation to his office; and the receipt of the general guardian for the moneys and securities so ordered to be paid and transferred shall be a sufficient release and discharge of such special guardian from his trust."

Smith's petition for sale of this real estate being presented to the court of chancery, the matter was referred to a special master to investigate and report. The master, after investigation, reported in favor of a sale; also, that:

"George Condit Smith, the father of the infants, is the sole executor of the will of his first wife, under which will the said infants became entitled to their interest in said lands, and that he is by said will appointed trustee to hold the said lands in trust for the said infants during their minority; that he is * * * a suitable * * * person to be appointed special guardian of the said infants to sell the said lands."

Upon this report and a "consent waiver" of Smith annexed thereto, whereby he agreed to release his curtesy in said premises, and to unite in the sale and conveyance of the same individually, and as trustee under the will of his late wife, and also as individual beneficiary of one-half of the property under the will, the court of chancery appointed Smith special guardian, and ordered a sale of the infants' right and title to such real estate for the sum of \$13,750. It was further ordered that the net proceeds be put at interest by said guardian under direction of the chancellor, on good security, by bond and mortgage, for the benefit of said infants, and that the guardian make a report. Before this order was made, a conditional agreement of sale had been made with one Crossley, for \$5,000 cash, and the rest of the sum of \$27,500 to be paid in half-yearly installments of \$5,000 each, all unpaid balance to be secured by purchase-money mortgage. This agreement was approved by the court of chancery, and sale ordered in conformity thereto. On April 8, 1893, Smith, as special guardian, reported that he had sold the premises for \$27,500, of which one-half (\$13,750) belonged to the infants; that the costs and expenses of the proceeding amounted to \$393.13, and that he had "invested the balance of said money belonging to the infants in the purchase-money mortgage executed by Rena P. Crossley and husband on the premises sold, giving to myself, as special guardian of the said minors, a prior lien in said mortgage to the extent of the sum of \$13,356.87, the balance of the said money due to the said minors. The said mortgage bears 5 per cent. interest, and is payable in two years from the date thereof." What the amount of this mortgage was, the report of the special guardian does not disclose. It appears from the record on this appeal that the Crossleys paid \$10,000 in cash, and that the purchase-money mortgage secured a bond to Smith, "personally and as such special guardian," in the sum of \$17,500; \$5,000 to be paid March 20, 1894, \$5,000 on September 20, 1894, and the balance on March 20, 1895. At the time of making his report as special guardian, Smith filed a declaration of trust (duly recorded), by which he declared that, as special

guardian in chancery of the said infants, he held the said mortgage as such special guardian to the extent of \$13,356.87; and he further covenanted as follows:

"Said sum belongs to me as such guardian as a prior lien on said mortgage, and that my individual right in said mortgage money and interest is subject to said amount due to me as special guardian as aforesaid, with interest, I having individually received all the net proceeds of cash that came from the sale of said lands: my intention being to invest all my children's shares in the proceeds of sale in said mortgage as a prior lien, the balance only belonging to me individually."

Subsequent to the filing of Smith's report as special guardian, no further steps appear to have been taken in the court of chancery touching this proceeding during his lifetime. There is nothing to show that this account was approved by the chancellor; and no order was ever made directing him to pay the net proceeds to the general guardian of the infants. He died still special guardian, under this act, and with the trust such act imposed undischarged. That act undoubtedly required the special guardian to hold the proceeds in trust for the infants until they came of age or died, or until the court of chancery, under the ninth section of the act, might relieve the special guardian from further duty; and none of these contingencies had happened when Smith died.

On October 16, 1894, upon a petition of the infants "by J. Condit Smith, their next friend," the complainant, William Pennington, a resident of New Jersey, was appointed by the court of chancery of that state trustee for the infants severally, "in the room and stead of George Condit Smith, deceased, to execute the trusts mentioned and declared in and by the last will and testament of Sallie L. B. Smith, deceased, * * * with all the rights, powers, duties, and privileges incident to the appointment." Pennington was required to give bonds in the amount of \$60,000, as trustee for each child, and has so done. On October 17, 1894, the same court of chancery, on a like petition in the matter of the sale of the infants' lands, appointed complainant "special guardian in the place and stead of George Condit Smith, special guardian, deceased, for [said infants] severally, with all the rights, duties, and privileges incident to the appointment."

On October 18, 1894, this suit was brought. Before going into any statement of the facts constituting the alleged cause of action, it will perhaps be not inappropriate to state that, from an examination of the record, we are satisfied that both parties, the complainant, Pennington, and the defendant Emma Condit Smith, are sincerely solicitous to protect the interests of these little children. Those interests would, we doubt not, be conscientiously looked after whether the legal obligation to do so rested upon the complainant, at one time their father's legal adviser, and apparently for many years their dead mother's friend, or upon the defendant, their stepmother, who, receiving them in their infancy, has tenderly cared for and nurtured them, and been to them the only mother that they have ever known. This circumstance makes it most unfortunate that the parties could not have come together before suit was brought, and, appreciating the situation which had been

brought about by George Condit Smith's careless methods of doing business, have reached some agreement, which would have fully protected the interests of the infants, without the harassment and expense of this suit. From letters put in evidence, it appears that defendant declined to meet the plaintiff, and discuss the situation, being led to believe that he had asked for an interview, not as a friend of the children, which she knew him to be, but as the representative of certain of her husband's relations, whom she seems to have had good reason to dislike. In declining to meet him, she states that her family would under no circumstances permit her to confer with him. In this particular they proved to be reckless and incompetent advisers, and it is to be regretted that defendant did not follow her first impulse, and confer with the plaintiff. Such conference could not have proved otherwise than helpful. The facts out of which this cause of action arose will next be set forth.

At the time of Smith's marriage to his second wife, he was practically without means. The money he had received from his first wife had been spent and lost, much of it, no doubt, in improvident investments, into which he appears to have been led by a brother, J. Condit Smith. About a year afterwards, he met with an accident, which injured his hand, so that he could not write; and thereafter he kept no bank account, but, whenever he had occasion to avail of bank facilities for deposit or check, used the bank account which the defendant Mrs. Emma Smith kept, in her own name, with the Fifth Avenue Bank. There remained to him, however, as we have seen, the balance of the Crossley mortgage over and above the \$13,356.87 prior lien which he held as special guardian for his children. He seems, moreover, to have believed that he was entitled to appropriate to his own use the \$13,356.87, as an offset to a supposed "overpayment" by him, as executor, to the trust funds of the infants, which he had lodged in the Central Trust Company. This question of alleged overpayment will be examined critically hereafter. For the present it is sufficient to say that the accountant who prepared his account for the orphans' court called his attention to the fact that the aggregate of all the schedules of executor's credits exceeded the total amount realized from the estate in the amount of \$13,826.89. Thereupon he charged himself with this amount, so as to make his account balance, and said to the accountant that, "as the only piece of property belonging to the trust estate was the house in East Orange, he would apply any overpayment that he had made to the children in the trust, together with any expenditures or payments that he might make for the trust estate, as an offset to their interest in the East Orange property." Inasmuch as he subsequently stated to another witness that his children "practically had no interest in the mortgage, as he had already deposited in the Central Trust Company the equivalents of what their share would be," it is evident that he supposed that this overpayment by him as executor had been made, not only solely on "Schedule F, Payment of Legacies,"

but also solely on the items of that schedule which represented the payments to his children. Upon what theory he based his supposition the record does not disclose, and we are at a loss to conceive. Of course, it is not material to the issues raised in this case to ascertain what might be George Condit Smith's conception of his rights, but it has seemed proper to state it in order to avoid any inference that in his subsequent transactions he had any intent to despoil his children of anything which might belong to them.

On March 20, 1894, the mortgagor under the Crossley mortgage paid off \$5,000 of the principal of the mortgage, by check to the order of George Condit Smith, who gave receipt therefor "personally and as guardian of Louise Condit Smith and Sallie Barnes Smith." No one here disputes the proposition that, out of this \$5,000, Smith was entitled to retain his individual share in the mortgage, \$4,143.13. The balance only—\$856.87—is claimed to be infants' property. This check was indorsed by George Condit Smith individually, was transferred to Mrs. Emma Smith, and by her deposited in the Fifth Avenue Bank. On September 25, 1894, the mortgagor made another payment of \$5,000, by check, to the order of George Condit Smith, guardian. This was indorsed, "George Condit Smith, Guardian," was transferred to Mrs. Emma Smith, and by her deposited in the Fifth Avenue Bank. Twelve days later, George Condit Smith died. The complainant, suing as trustee, contended that \$5,856.87 (the infants' share of the \$10,000 paid in) was to be considered as real estate belonging to the testamentary trust created by Sallie Smith's will; that this money was received by Emma Smith with knowledge; and that complainant was entitled to follow and reclaim that sum. Subsequently, by an amended complaint, the appointment of Pennington as special guardian was set up. Prior to the commencement of the action, Mrs. Emma Smith's account in the Fifth Avenue Bank had been drawn down to a balance of \$4,110.50. A preliminary injunction preserved the status quo until final hearing.

The case came up for hearing upon bill, answer, and proofs in June, 1895. The opinion of the circuit court will be found in 69 Fed. 188. That court held that plaintiff was properly appointed trustee, and was entitled to sue as such. There seems to have been no contention that the will of Sallie Smith did not create a trust, and no pretense was made that either of the defendants had any title to the trust fund, in which respect the subsequent appointment of Mrs. Emma Smith as guardian of the children under her husband's will works no change. "That appointment," in the language of the circuit court, "would not give her the right to hold funds which his will could not touch, and which he held only as trustee." That court also states that "no defense on the merits is urged, but the attempt is made to defeat the complainant by defenses in the nature of demurrers." Finding these defenses to be unsound, it held that of the first payment of \$5,000, March 20, 1894, all but \$856.87 was properly applied by George Smith to the extinguishment of his individual interest in the mortgage, and that, as

there was nothing upon the check to indicate that it related to trust funds, Mrs. Smith could not be required to account for this \$856.87, if she had checked it out in good faith. It further held that as to the \$5,000 check of September 25, 1894, Mrs. Smith must be charged with notice that it was trust funds, but that she was not to be charged with so much of it as she may have paid to the deceased trustee, or disbursed by his direction for the purposes of the trust. And the case was sent to a master to ascertain and report what balance of the \$5,856.87 there was in the bank, and how the rest of it had been disbursed. Much testimony was taken before the master, who reported that the balance in bank was \$4,110.51; that the \$10,000 represented by the two checks was deposited to the credit of defendant Emma Smith, who regarded said deposit as belonging to her husband, and drew her checks thereon as requested by him, and expended portions thereof under his supervision and direction; that she withdrew by checks on said deposit, and returned to her husband the sum of \$3,220.75; that, with his approval, she paid and expended for his infant children interested in the estate a sum of, at least, \$1,589.80; that, under like approval and authority, the sum of \$1,078.94 was used to defray household, medical, traveling, and incidental expenses of said George Condit Smith and his family, leaving a balance on deposit, as hereinbefore found, of \$4,110.51. The master further reported that defendant Emma Smith did not treat said moneys as her own, to do with as she pleased, but as moneys subject to the order and direction of her said husband, and that she did not use any portion for her individual use and benefit, save as a member of the family of her husband, for which a portion was expended. And the master further reported his conclusions from these facts. Complainant filed exceptions to the master's report. Defendant filed no exceptions, apparently relying on certain testimony as to the "overpayment," which had been taken before the master by stipulation. The opinion of the circuit court upon final hearing on these exceptions and this evidence will be found in 75 Fed. 157. The result of final hearing was a dismissal of the bill. The reason for thus disposing of the case is succinctly stated in the opinion, as follows:

"With the sanction of the orphans' court of Essex county, New Jersey, there was deposited with the Central Trust Company of New York the sum of \$88,900, in trust for the benefit of the minor children of George Condit Smith. This was in 1890 and 1891. The balance of the Crossley bond and mortgage—\$7,500—is still in the hands of the trustee for the benefit of the infants, making a total of \$96,400. It further appears that the entire trust fund due the infants under the will of their mother, including both real and personal property, was \$95,338.43. In other words, the trust estate had already received \$1,061.57 more than it was entitled to receive under the will creating it. That being so, it is hard to discover any principle of equity which will justify the court in taking \$5,000 more from the estate of the deceased trustee, and adding it to the fund of the infants."

From other remarks in the opinion, it may be inferred that the judge supposed that complainant practically conceded that the defendant Smith was equitably entitled to the relief she asked for, and that the only grounds of objection to her obtaining it in this

action were wholly technical. The judge evidently assumed that it was not disputed that the entire trust fund due the infants under their mother's will was only \$95,338.43. We do not, of course, know how the case was presented on argument below; but in this court the appellant vigorously disputes these conclusions, and the soundness of his contention can be determined only from the record presented here.

This statement of the facts is unusually long, but it is thought that a complete presentation of the facts will render unnecessary the discussion of many of the points of law which have been argued upon this appeal. Inasmuch as the judgment at final hearing was wholly in favor of defendants, the assignment of errors does not present the questions which were decided adversely to defendants on the interlocutory hearing, and which the circuit court did not thereafter reconsider. In order, however, to finally dispose of the whole case, all the points presented upon argument by both sides will be considered.

As to the So-Called "Overpayment."

By the account filed in the orphans' court it appears that George Condit Smith, as executor, paid to himself, as trustee, for his children, \$88,900. No one disputes this, but complainant suggests that whereas it appears by the receipts of the Central Trust Company that he deposited with that company for the infants, at one time, 60 \$1,000 bonds of various railroads, and, at another time, 30 similar bonds, it does not appear what, as trustee, he paid for these bonds, or whether they were then worth \$88,900. Complainant therefore contends that if the filed account is not to be treated as a finality, if it is to be opened to allow defendant, as George Smith's executrix, to make claim for an overpayment, the facts upon which such overpayment is asserted should be proved by competent evidence de hors the filed account. The infants' share of the real estate is, concededly, \$13,356.87. If, therefore, it should be found that the infants' share of residuary personal property was \$88,900, then they would be entitled to \$102,256.87, but have only received \$88,900 (assuming the bonds were bought for that sum) plus \$7,500, the balance of the Crossley mortgage, making in all \$96,400 only.

What, then, are we to take as the infants' share of the personal property? We begin with a finding of the orphans' court that it was \$88,900, for that court found Smith's executor's account "to be correct in all particulars," and "allowed [the same] as reported," and certain items of Schedule F of that account are of payments to the infants' trustee, aggregating that sum. If such payments were found by the orphans' court "to be correct," that court must have held that the infants' trust fund was entitled to receive \$88,900. Defendants' contention, however, is that such finding is not correct, and that all parties being now before the circuit court, sitting in equity, the proper correction can be made, such correction being properly inferable from the account itself. That complainant's opposition to this attempt collaterally to review the decision of

the orphans' court is by no means wholly technical will be apparent when the account itself is examined. Its summary is as follows:

Debtor.

This executor charges himself as follows:

To amount of inventory.....	\$184,392 77
" " " interest received as per Schedule A.....	6,496 00
" " " increases in value over inventories, as per Schedule B.....	22,425 00
" " " one pair horses omitted from inventory, appraised value	400 00
" " " schedule of balance, being amount overpaid by the executor	13,826 89
	<hr/>
	\$227,550 66

Credits.

This executor prays allowance as follows:

By amount paid for funeral and medical expenses, as per Schedule C. \$	2,582 68
" amount of claims of creditors allowed and paid, as per Schedule D.....	5,143 26
" amount of general expenses of the estate and family since the decease of testator, as per Schedule E.....	12,619 72
" amount of moneys paid to legatees, as per Schedule F.....	206,505 00
" amount of errors in inventory, as per Schedule G.....	700 00
	<hr/>
	\$227,550 66

It thus appeared that the total amount realized by the executor from every source was \$213,023.77. This sum is ascertained by adding together the first four items on the debtor side, and deducting the \$700 for errors in inventory, as per schedule G. The executor, however, had paid out \$226,850.66, which is the aggregate of all the credit items except the \$700 for errors in inventory. Manifestly, he had "overpaid" \$13,826.89; but on which schedules did he overpay it? That was a question to be decided by the orphans' court, and certainly that court never would have passed the account while there remained such an unanswered question. The answer would have been found by a careful examination into all the items of the account, and, when found, the proper corrections would have been ordered before final approval of the account would be adjudged. The executor, however, withdrew such question from the consideration of the court, by charging himself with the overpayment; and, there being no longer any such question, the executor thus, in open court, withdrawing all claim to reimbursement for overpayment, his account was allowed as filed. He now asks, or, rather, his executrix on behalf of his estate asks to be allowed to charge that overpayment against one only of the schedules, and against the items on that schedule representing payments of residuary legacies, contending that the residuary personal estate should be taken as \$163,963.11 only, and the infants' one-half as \$81,981.56; thus seeking to go behind the decree of the orphans' court, but at the same time insisting that such decree is to stand as an approval of the other schedules, C, D, and E. There seems to us to be no equity in such a contention. Either the decree of the orphans' court must be accepted as final, or else the executor's representative must allow a re-examination of all the questions settled by the court. This court cannot go back of that decree only

so far as may help him, and come to an abrupt stop as soon as a revision of the account may hurt him. The orphans' court had jurisdiction to make this decree, and its decision should not be reviewed collaterally here; for this court is wholly without the evidence which that court might have had, had this question been raised there. Certainly, this court cannot assume that, if the executor had not of his own motion charged himself with his improvident overpayment of \$13,826.89, the orphans' court would have approved all the items which make up Schedules C, D, and E. From what is shown of George Condit Smith's generous, free-hearted disposition and loose business methods, it is reasonable to suppose that part, at least, of his improvident overpayment, will be found in these schedules. It appears that, under the practice in New Jersey, it is customary and proper to charge the estate of a deceased person with the general household and family expenses for a year after death; but surely the amounts charged for such expenses must be reasonable, and not extravagant. As shown above, the executor charges \$12,619.72 for such expenses, and the items of the schedule include \$635 for a carriage, \$335.95 for harness, and nearly \$700 for livery-stable bills. These charges may be right and proper under the New Jersey practice, but that is a question for the New Jersey court to determine. This court certainly cannot pass upon it without any proof. Again, it will be noted that the total income of the estate during the year is given, in Schedule A, as \$6,496. This includes an item of \$1,102 for discount on a cash payment of specific legacy of \$23,000, so that the actual income was \$5,394 only. It is certainly inconceivable that an orphans' court would approve of charges for household and family expenses during the year after death, which would use up the whole income, and over \$7,000 of the principal besides. Of course, so long as the executor stood before the court, charging himself with a sum greater than the whole amount of these general family and household expenses, there was no necessity for reviewing any of these items; but it would be clearly inequitable to allow his representative now to alter his account by striking out any part of the charge against himself without again presenting his claim of credits under Schedules C, D, and E for examination and revision.

For these reasons, we are of the opinion that the wholesome rule which accepts the adjudication of a competent court as a settlement of the questions before it should not be departed from or qualified in this case.

As to the Estate Created by the Will.

Defendants contend that no trust was created by the will of Sallie Smith. It would seem reasonably plain from the clause of the will cited at the beginning of this opinion that the testatrix intended to create a trust, and used words apt for the purpose when she wrote: "I give and bequeath [this estate] absolutely to my children, but direct that my husband shall hold the same in trust for them during minority." But there need be no extended discussion on this point. What form of words may be required to create a

testamentary trust in New Jersey is a question of local law. The court of chancery in that state, by its appointment of complainant as trustee, has indicated that, in its opinion, there is a trust to be administered. No reason is shown for declining to follow that ruling in the federal courts.

As to Complainant's Right to Sue in a Federal Court.

Diversity of citizenship between the parties is set up in the amended bill, and proved. Whether complainant be regarded as a testamentary trustee under the will, or as a special guardian under the New Jersey statute for the sale of infants' real estate, he is certainly not a mere guardian ad litem or next friend, as in the cases cited by appellees; and it is on his citizenship, not on that of those he represents, that the jurisdiction of the federal courts must stand. *Coal Co. v. Blatchford*, 11 Wall. 172. That complainant, as trustee or special guardian, may sue without ancillary appointment; that there was nothing in the case to justify the circuit court in declaring the action of the court of chancery in appointing him to be improper; that the New Jersey court did not lose jurisdiction because George Condit Smith moved to New York, and died here,—were the conclusions of the circuit court, and it is sufficient on these points to refer to its opinion on the interlocutory hearing.

And the same may be said of the contention that the action is one for money had and received, and should have been brought on the law side of the court.

To the proposition that the proceeding under the New Jersey statute to sell infants' land can only be maintained when the title to the real estate is in the infants, not when it is in a trustee, it is sufficient to say that the court of chancery of New Jersey, apprised of the fact that title to this real estate was in a trustee, nevertheless ordered its sale under that statute. It may fairly be assumed that the court of chancery correctly interpreted the statute of its own state.

The Amount for which Defendant Emma C. Smith should Respond.

We are clearly of the opinion that upon the evidence as to the first \$5,000 check, of March 20, 1894, she is not chargeable with knowledge that any part of the same was trust funds, and not money to which her husband was himself entitled. She had been informed by Pennington that the interest of her husband in the Crossley mortgage was \$4,143.13 only, and by her husband that he was entitled to the whole amount of that mortgage. When he brought her for deposit a check for \$5,000, drawn by Crossley to himself personally, she might with reason believe that her husband's statement was correct, or, at least, that \$5,000 of the mortgage belonged to him individually. Inasmuch as, long before this suit was brought, she returned part of this money to him, and spent the residue in accordance with his directions or with his assent, she cannot be held responsible for it, and it is wholly immaterial to inquire for what she spent it. Even if she spent it on herself, or used it to repay some of the many loans she had theretofore made to her husband, she is under no obligation to account for it to the complainant,

who does not represent George Condit Smith individually, from whom, as an individual, she received the money.

The second \$5,000 check, of September 25, 1894, however, was drawn to her husband's order, as "guardian," and indorsed in like manner. While we find no evidence in the case which will warrant the finding that she was a fraudulent transferee, we are satisfied that she must have known that these were trust funds, a part of the infants' estate, which had formerly been invested in this Crossley mortgage, and that she is to be treated as a banker who is chargeable with knowledge that, in the general account of his customer, there have been deposited moneys which such customer holds in trust for another.

We do not understand that defendants dispute the finding of the master that, out of the moneys so received from George Condit Smith, there remained in the Fifth Avenue Bank, on the day Emma Condit Smith's balance was impounded by preliminary injunction, the sum of \$4,110.50; nor that, if the other points raised (as to noncreation of trust, incompetency of complainant to sue, overpayment by Smith, notice to defendant that the \$5,000 check represented trust money, etc.) be decided adversely to defendant, that sum belongs to the trust, and the trustee is entitled to recover it. The only question remaining is as to \$889.50, the amount disposed of by her out of the second \$5,000, before injunction. Of this it appears that on October 3d she returned to her husband \$75.75. This she had a right to do. From him, as trustee, she received it; against his demand for its return, so long as he remained trustee, she could not hold it; and, returning it to him, she was entitled to rely on his disposing of it as the trust required. As to the balance of \$813.75, she shows the payment by her, under her husband's direction, or with his assent, of considerable sums for clothing and support of the children. Whether the sums applied by George Condit Smith from the income of the trust fund to the "support, maintenance, and education" of the infants were extravagant or not, is a question with which the court has no concern. By her will, Sallie Smith left that matter to her husband, declaring that his determination thereon should be "final and without appeal or question." He was given an equally large discretion as to managing and investing the principal, but that gave him no authority to divert such principal, and apply any part of it to the "support, maintenance, and education" of the infants. The judge who heard the case in the circuit court has forcibly expressed this distinction:

"Undoubtedly, the will * * * gave him a large discretion. He might have wasted the entire fund by bad investments, and the complainant would be remediless. It is even possible that had he invested the fund with the defendant, taking nothing but her unsecured note in return, the transaction could not be questioned. But there is no pretense of anything of this kind. A trustee cannot despoil the trust by turning the property into money, and handing the money to his wife. Putting the property out of his hands is not investing it."

The second \$5,000, received on the Crossley mortgage, was principal; and George Smith had no right to use it himself, or to

direct his wife, as his banker, to pay it out for "maintenance or support" of the infants. Mrs. Emma Smith is chargeable with knowledge that this particular sum belonged to the infants' principal, and no payments for such purposes made from it, even under her husband's directions, are properly chargeable against the fund thus held by her with notice of its character. The trustee is therefore entitled to the \$4,110.50 still in the bank, and to the \$813.75 which she has paid out,—a total of \$4,924.25.

The facts warrant a finding that when George Condit Smith deposited the second sum of \$5,000 with the defendant, to be held by her subject to his future directions, the deposit was made and received upon an understanding that the bailee was not to pay interest. When, however, George Smith having died, and a new trustee having been appointed in his place, demand was made by such new trustee for the return of the money, the defendant was in default for failure to do so, and interest would begin to run. Nor is it any ground for refusing to allow interest that part of the proceeds was impounded in the Fifth Avenue Bank by the injunction order. Defendant could have released it at any time by withdrawing any further opposition to the claim of the new trustee. If, however, it be made to appear to the circuit court that the Fifth Avenue Bank pays interest at some agreed rate upon daily balances, the amount thus earned from the bank by the fund should be deducted from the interest to which, as against the defendant Emma C. Smith, the complainant is entitled, viz. at legal rates on \$4,925, from October 18, 1894, the date of commencement of this suit.

The decree of the circuit court is reversed, with costs, and cause remitted to that court, with instructions to enter a decree in accordance with this opinion.

ROBERTS v. BROOKS.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

1. CONSTITUTIONAL LAW—TITLES OF ACTS.

The legislature of New Jersey, in 1861, by an act entitled "An act to authorize the construction of a dock or wharf on Toms River," authorized H. & D. to "erect and maintain" a dock or wharf in front of their lands on Toms river, to collect wharfage for the use thereof, and to hold and enjoy the same, to themselves, their heirs and assigns. *Held*, that the object of the act was sufficiently expressed in its title, under article 4, § 7, cl. 4, of the constitution of New Jersey.

2. LEGISLATIVE GRANTS—TRANSFER OF TITLE—WHARVES.

Held, further, that it was unnecessary that such legislative grant should be supplemented by a formal instrument under the seal of the state, in order to convey title.

3. SAME—ADVERSE POSSESSION.

Held, further, that the fact that when the act was passed the title to the upland was in H. alone, and not in H. and D., could not affect the title of a grantee from H. and D. after 35 years' possession of the wharf by them and their heirs and assigns.

4. **SAME—PRIVATE AND PUBLIC WHARVES.**

Held, further, that the words of the act were sufficient, under the law of New Jersey, to convey a fee in the wharf to the grantees, and the wharf did not become a public wharf, subject to the use of the public on payment of wharfage. *O'Neill v. Annett*, 27 N. J. Law, 290, followed.

5. **SAME—CERTAINTY OF GRANT.**

Held, further, that the grant was not void for uncertainty, exactness of location having been supplied when the dock was built.

6. **SAME—ACCRETIONS.**

Held, further, that, absolute ownership of the dock and the shore being shown, a small piece of land, formed by accretion, in the angle between the dock and the shore, belonged to the shore owners. 71 Fed. 914, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the circuit court, Southern district of New York, which directed the specific performance by the defendant of a contract between the parties for the sale and purchase of a tract of land, comprising about 15 acres, situate at Toms River, Ocean county, in the state of New Jersey. The making of the contract, and refusal by defendant to perform it, are admitted. The answer denies that complainant is seised in fee of the premises, or, rather, of certain substantial parts thereof, and avers that she is unable to give a good title thereto. The opinion of the circuit court is reported in 71 Fed. 914, and may be consulted for a full statement of the case. Some of the points urged upon that court, and decided adversely to defendant, have not been argued here, and will not be discussed in this opinion.

Henry E. Parsons, for appellant.

Enos N. Taft, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. A substantial part of the property bought by defendant is known as the "Dock Lot." It contains $\frac{50}{100}$ of an acre, more or less, and is described by metes and bounds in the contract of sale. The evidence shows this lot to be partly original shore and partly made land, a dock of solid filling having been built out from the shore. No objection is raised to the title to so much of this plot as was originally natural shore, except that it is claimed to be subject to a right of way. It is insisted, however, that complainant has no title "in fee simple, free from all incumbrance," to the made land. The original source of title to this made land is found in an act of the legislature of the state of New Jersey passed February 28, 1861, entitled "An act to authorize the construction of a dock or wharf on Toms river, in the county of Ocean," and which provides as follows:

"Section 1. Be it enacted by the senate and general assembly of the state of New Jersey. That John B. Horton and Charles L. Davis be and they are hereby authorized and empowered to erect and maintain a dock or wharf in front of their lands on Toms river in the township of Dover, Ocean county, said dock or wharf to be built six hundred feet or more, at the option of the proprietors, along the channel of said river, and extending inland twenty-five rods, or as far as may be necessary for the improvement of the property of said proprietors or the benefit of commerce.

"Sec. 2. And be it enacted, that said John B. Horton and Charles L. Davis may be and they are hereby authorized and empowered to collect wharfage for the use of said dock or wharf, and shall be entitled to all the benefits accruing from the same, and to hold and enjoy the same to themselves, their heirs and assigns; pro-

vided however, that no such dock or wharf shall be constructed on said river by virtue of this act as may interfere with or obstruct the navigation of said river.

"Sec. 3. And be it enacted that this act shall take effect immediately.

"Approved Feby. 28, 1861."

Conceding that the title to the land under water was in the state of New Jersey, defendant contends that this act was ineffectual to convey the fee, for various reasons, which will be separately considered.

1. The constitution of the state of New Jersey (article 4, § 7, cl. 4), in force when the grant was made, provides that every law shall embrace but one object, and that shall be expressed in the title. Manifestly, the act is not obnoxious to this provision. The sole object of the act is to authorize the construction of the dock, and that object is expressed in the title. That object is accomplished by granting to the individuals the authority and power to erect and maintain the dock; to collect wharfage for its use, with title to all the benefits accruing from such structure; to hold and enjoy the same, to themselves, their heirs, and assigns. What sort of a title, under the laws of New Jersey, this form of words gives to the grantees, who are thus authorized to erect and maintain the dock, and to hold and enjoy, to themselves, their heirs and assigns, all the benefits accruing from such erection and maintenance, is a different question. Whether docks constructed by private persons under authority by the state shall be temporary or permanent structures is a question of state policy. If such construction gives to the grantee under the law of the state a permanent right to the exclusive enjoyment of the dock thus built, with absolute dominion over it, the title of an act which indicates the intention of the legislature to give to some one the right to build such a structure sufficiently expresses the object of the act.

2. The objection that the legislative grant was not supplemented by a formal instrument bearing the seal of the state, etc., is frivolous. See *Rutherford v. Greene's Heirs*, 2 Wheat. 196.

3. It is next objected that the grantees, Horton and Davis, are by the act authorized and empowered to erect and maintain the dock in front of *their* lands on Toms river, whereas the records show that at the time the act was passed the fee of the upland was in Horton alone. Whether Davis then had or had not any interest in the upland does not appear. The dock was built by the grantees, and subsequently Horton conveyed the fee of the upland to Davis, and the grantees, their heirs and assigns, have held and enjoyed the dock for 35 years. It is difficult to see upon what principle, in view of the presumptions thus arising, it can be contended that the act of the legislature was inoperative, and the title of the grantees defective. This objection seems not to be included in the assignment of errors.

4. It is next objected that the language of the act does not convey a fee; that the dock or wharf erected under it became a public dock or wharf, which the public would have the right to use upon the payment of wharfage. There might be much force in this objection, were it not that the property in question is located in

the state of New Jersey. What form of words shall be sufficient, either between private parties or between the state and individuals, to convey a fee simple absolute of real estate, is a matter of local law, where the federal courts will follow the rulings of the state tribunals. In the case of *O'Neill v. Annett*, 27 N. J. Law, 290, it appeared that defendant, who owned a piece of upland on the Hudson river, had built two wharves in front of the property, extending out into the river about thirty feet below low-water mark. This he did without any grant or permit, but subsequently, in 1844, the legislature passed an act declaring "that it shall and may be lawful for the said Robert Annett, his heirs and assigns, to keep up and maintain his said wharves * * * in the same manner as fully to all intents and purposes as if an act of the legislature had been first passed authorizing and making it lawful for him or them to build and erect the same." The act, in similar language, authorized the extension of said wharves, and the building and erection of others in front of the said upland, provided such wharves "shall not obstruct the navigation of said river." It further provided that it "shall and may be lawful for said Annett his heirs and assigns to demand receive and collect compensation from any person or persons using said wharves for any purpose whatever." It will be observed that the phraseology of this act is substantially the same as that of the one now under consideration. A subsequent statute made it unlawful for the owner or captain of any steamboat to land, etc., at Annett's wharf, after notification not to do so. The plaintiff owned a vessel,—apparently not a steamboat,—and had been refused permission to discharge a cargo of coal at the wharf. There being no evidence of a dedication of the wharf to the public, the court of errors held that, upon the facts above set forth, the plaintiff should be nonsuited. The following excerpt from the opinion seems controlling of the question raised here by appellant's objection:

"The right to the exclusive use of the wharf by an individual cannot depend upon the question whether the wharf is constructed above or below low-water mark, or whether the shore is or is not publici juris, but solely upon the question whether, in fact and in law, the title to the wharf is vested in the individual, no matter how that title may have been acquired. By the common law of this state, wharves erected by the shore owner below tide, and within the limits of the *jus publicum*, vest in the shore owner. It was so held by all the court in *Gough v. Bell*, 22 N. J. Law, 441. The judges, it is true, differed as to the foundation and nature of the right of the shore owner, but all agreed that when the land was reclaimed, or the wharf erected, by the tacit or express consent of the legislature, it became private property, and divested of its public character. And the owner has the same absolute dominion over it, the same absolute right of enjoyment in it, that he has in and over other private property."

Appellant, in his supplemental brief, reiterates the assertion that in *O'Neill v. Annett*, 27 N. J. Law, 290, the words "private property" were used simply to distinguish dock property held by private persons from public property, which was untaxable, and that *O'Neill v. Annett* "in no way determined that such docks are not public docks that may be used by the public on paying dockage." Inasmuch as the single issue in *O'Neill v. Annett* was whether the owner of a coal barge was entitled to land and discharge cargo at

the dock on paying dockage, it is difficult to explain the assertion in the brief.

5. The objection that the grant was void for uncertainty is without merit. The circuit court correctly held that exactness of location was supplied when the dock was built.

6. Absolute ownership of the dock and the contiguous shore being shown, the small piece of land which has formed by accretion in the angle made by the easterly line of the dock and the shore line of the large parcel goes with the land to which it has accrued.

Appellant further objected to the title on the ground that part of the property was incumbered by an easement in the form of a right of way. The circuit court held that the evidence showed the right of way to be outside of the premises. Why appellant, in the face of this evidence, still insists on this objection, it is difficult to understand. It is not easy, without a map, to indicate the situation, but the following description may be sufficient: The original shore line of high-water mark runs about east and west, and the made wharf projects therefrom southerly into the river about 150 feet. About 50 feet to the north of this original shore line is Water street, laid out 30 feet wide, and running parallel to the shore from the westward until it meets Dock street. Dock street runs northerly inland from Water street. It is laid out 40 feet wide, and, if prolonged southerly from Water street, it would strike the original line of high-water mark a little westerly of the eastern line of the wharf. Originally Horton owned all the land on both sides of Water street, and on both sides of Dock street. He conveyed by a deed (undated in the record here, but which counsel agree should be dated October 4, 1867) to one Hadley a plot of about $8\frac{1}{4}$ acres, lying west of the middle line of Dock street, and north of the middle line of Water street. It contains the reservation of a right of way as follows:

"Reserving to ourselves, our heirs," etc., "in common with said Hadley, his heirs," etc., "a right of way twenty feet in width to and from the dock, on the eastern side of said lot [herein conveyed]. Also reserving another right in common as aforesaid fifteen feet in width across the dock on the south side thereof."

It is unnecessary to quote the language of the contract in suit. Suffice it to say that, in warranting the title to be free from incumbrances, it excepts "the easement of Dock street."

Appellant seems to have formed the impression that the language in the deed to Hadley created some right of way beyond the southerly end of Dock street across the 50-foot strip of original shore lying south of Dock street. The only apparent ground for this contention is that the reservation uses the words "to and from the dock." A careful examination of the deed itself, however, shows that the word "dock" was used, as covering the entire completed wharf, which, of course, was part original bank and part filled-in land. This would be a most natural use of the word after the dock was built, and it was built years before. That it was used in this sense in the Hadley deed is apparent from the description. The second course runs along the middle of Dock street to a stone, which the distance given shows must have been in Wa-

ter street. The third course is given from this stone N., 83° W., which is the course of Water street, "to a stake." Manifestly, this stake must be in Water street, but it is described as "a stake in said dock line." Moreover, the second right of way of 15 feet on the south side of the lot conveyed is proved by the description to be the northerly half of Water street, but it is described as "fifteen feet in width *across the dock.*" It may be added that the contract in suit uses the word "dock" in the same sense, for the plot set out by metes and bounds—its northerly boundary being given as "along Hadley's southerly line," which, as we have seen, is in the middle of Water street—is described as being "a part of what is known as 'Horton's Coal Dock.'" Finally,—and no further answer to appellant's point is needed,—the right of way in the Hadley deed is one reserved out of the premises conveyed to him. There is no grant or reservation of anything in the property not conveyed by the grantor.

There is nothing to add to the opinion of the circuit court as to the sufficiency of the deed of John and Mary Falkinburgh (husband and wife) to convey the title to property, the fee of which belonged to the wife. The brief asserts that "by the laws of New Jersey it did not operate to convey the wife's interest," but neither statute, authority, nor argument is presented to support this assertion. The indenture which is executed by both John and Mary recites that it is made "between John Falkinburgh and Mary, his wife, of the village of Toms River," etc., "of the first part, and Charles L. Davis," etc., "of the second part," and proceeds as follows: "Witnesseth, that the said party of the first part, for and in consideration of one thousand dollars, lawful money of the United States, to them in hand well and truly paid by the said party of the second part at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the party of the first part therewith fully satisfied, contented, and paid, hath given, granted, bargained, sold," etc., "and by these presents do give, grant, bargain, sell," etc., "to the said party of the second part, and to his heirs and assigns forever," the land therein described. The covenants are made by John Falkinburgh alone. More than a century and a half ago the colony of New Jersey expressly provided by statute that "all deeds or conveyances made or to be made by a man and his wife of the estate of the wife [when properly acknowledged] shall be good and sufficient to convey the lands, estate or rights thereby intended to be conveyed." 22 Geo. II. (A. D. 1743) c. 87, § 3. As the defendant refers to no later statute or decision in any way qualifying this plain and explicit provision, his objection is frivolous.

As to the alleged defects in the title to so much of the premises as were the subject of the foreclosure suit of McKean v. Horton, and of the subsequent suit to quiet the title brought by Sophia H. Davis against the widow, children, and next of kin of Horton, we deem it unnecessary to add anything to the opinion of the circuit court. The objection is unsound. The decree appealed from is affirmed, with costs.

**BURDON CENTRAL SUGAR REFINING CO. v. FERRIS SUGAR
MANUF'G CO. (PAYNE et al., Interveners).**

(Circuit Court, E. D. Louisiana. December 7, 1896.)

No. 12,355.

1. LANDLORD AND TENANT—LIEN ON FUTURE PROPERTY.

An equitable lien in favor of the lessor of a sugar house, on future bounties paid to the lessee for sugar there manufactured, may be created by stipulation in the lease.

2. SAME—LESSOR'S STATUTORY LIEN—OBLIGATIONS OF LEASE.

The lessor's privilege given by Rev. Civ. Code La. art. 2705, as security for the rent and "other obligations of the lease," secures an unpaid balance due the lessor of a sugar house for crops of cane sold to the lessee, under a stipulation in the lease that the lessor shall sell, and the lessee buy, such crops, on conditions specified.

3. SAME—DEFAULT OF LESSEE—DAMAGES.

The lessor cannot recover for losses caused by the lessee's default, where he might have protected himself against such losses by due diligence.

The original bill in this case was filed by the Burdon Central Sugar Refining Company against the Ferris Sugar Manufacturing Company, praying that a receiver be appointed for the latter company. After the appointment of the receiver, J. U. Payne & Co. filed a petition of intervention, setting up a contract between them and the defendant, by which they had leased to defendant a certain sugar house, with the machinery, etc., for a period of 10 years, at an annual rental of \$2,000. The lease contained a stipulation that the lessee should buy, and the lessors sell, on specified conditions, all the cane grown on the lessors' plantations, a certain part of the purchase money to be paid weekly, the balance to constitute "a lien and privilege, to the full extent of such balance, on the first bounty money received" by the lessee on sugar produced from cane ground on the leased premises; the lessee agreeing "to consecrate solely to the payment of such balance all bounty payments so received until the whole of the said balance shall have been paid." Interveners alleged various breaches of the contract by the defendant, claimed, among other debts due them from defendant, certain balances for cane delivered under the contract and for bounty due thereon, and also a large sum for cane alleged to have been lost by reason of defendant's failure to receive it according to the contract, for all of which they claimed a lessor's privilege on property of the defendant found on the leased premises.

Thos. J. Semmes, for Receiver of Ferris Sugar Manufacturing Co.
Rouse & Grant, for Burdon Central Sugar Refining Co.
Fenner, Henderson & Fenner, for interveners.

PARLANGE, District Judge. Three main questions are presented in this matter, to wit: (1) Have the interveners an equitable lien on the sugar bounty? (2) Is the unpaid balance of the price of sugar cane sold to the Ferris Sugar Manufacturing Company secured by interveners' lessor's privilege? (3) Are interveners entitled to damages for the loss of part of their crops?

1. The learned counsel for the receiver admits in his brief that future property may be assigned, but he insists that an equitable lien on future property can only be created by assignment or mortgage. While further admitting that there are many cases in which a fund or property in futuro is susceptible of assignment in equity, he states that he can find no case which extends the principle to the establishment of a lien on incorporeal rights to be acquired in the future, by a mere contract that the creditor shall have a lien. He concedes, however, that in such a case the lien could be created by assignment or mortgage. He urges that:

"A mere agreement to appropriate a fund when it comes into existence, or to give a lien thereon, does not operate as a lien, but an assignment or mortgage of such prospective fund is effectual, so as to give the assignee or mortgagee an equitable right in the fund, when it comes into existence."

It may well be that an equitable lien will not result from a mere promise to pay a debt out of a fund not then in esse. The legal mind is fully satisfied with the result reached in the typical case of *Trist v. Child*, 21 Wall. 441. In that case, Justice Swayne, as the organ of the court, said:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. * * * But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order, or by transferring it otherwise, in such a manner that the holder is authorized to pay the amount directly to the creditor, without the further intervention of the debtor."

It is clear that no equitable lien is created when one does nothing to set aside a fund in futuro for the payment of his debt, nor to dispose of his rights in the fund, nor to incumber it, but merely promises to pay the debt from the fund, should it ever come into existence. Such a case rests entirely upon the personal obligation of the promisor. But a wholly different case is presented when one clearly and irrevocably divests himself of his rights in a thing to be acquired in the future, or pledges or assigns the property as a security for his debt. He thus consummates an agreement by which, from the moment the agreement is made, the creditor is invested with a right of which he cannot be deprived if the property is ever created. It is true that the right remains dormant until the property comes into being, but the right, though dormant, exists in the meantime.

Even an agreement to give a mortgage has been held to create a lien (1 *Jones, Liens*, § 77, and cases there cited); also, a promise to give any other security (*Id.* § 78, and cases there cited). "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated," etc. 13 *Am. & Eng. Enc. Law*, verbo "*Liens*," p. 608, and cases there cited. These cases, arising from promises to give security, come under the maxim

that "equity regards as done what ought to be done," and they do not in any manner conflict with the doctrine of *Trist v. Child*, *supra*. The agreement to give the property as security for the debt (taken in equity, as if the agreement were executed) is a sufficient appropriation to meet the requirements of the case just cited.

The case at bar may be said to be stronger than a case based upon a promise to give security. The contract in the instant case provided that a lien should exist, and did not merely promise to give a lien in the future. When it is admitted, as in this case, that property in futuro may be assigned or mortgaged, I am unable to understand how it can be contended, consistently with the admission, that a lien upon future property cannot be created by an express stipulation that a lien shall exist. There is nothing sacramental in the words "to assign" or "to mortgage." In all cases of assignments to secure debts, the whole object sought to be attained is not the assignment *per se*, but the creation of a right to be paid out of the property, or fund,—in other words, a lien. While, in an assignment, the parties may make no mention of the lien, a court of equity will say that the equitable result of the assignment is a lien. Equity jurisprudence would be in an irrational condition if it were true that an assignment of property in futuro creates a lien, though no lien is expressly stipulated by the parties, but that if the parties, premitting the assignment, expressly stipulate for a lien, then no lien shall be created. The case at bar presents a question of express, not of implied, lien. In plain and unambiguous words, the parties created a lien by express terms. The contract now before the court (article 13) distinctly provides that the unpaid balance of the price of the sugar cane "shall operate as a lien and privilege on the bounty," and also that "the parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them until the whole of such balance shall be paid." The matter is therefore entirely free from the difficulties which sometimes attend questions of implied liens. It is perfectly plain to me that the parties agreed that a lien upon the bounty, to secure any unpaid balance of the purchase price of sugar cane, should exist from the instant the sugar bounty was paid, and that no further act on the part of the Ferris Sugar Manufacturing Company, with regard to the creation of the lien, was necessary or contemplated by the contract. The matter reduces itself to the question whether parties can, by clear and express terms, create a lien upon future property. That question almost answers itself.

"An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. Equitable liens by contract of the parties are as various as are the contracts which parties may make." 1 Jones, *Liens*, § 27.

"Whenever a positive lien or charge is intended to be created upon real or personal property not in existence or not owned by the person who grants the lien, the contract attaches in equity as a lien

or charge upon the particular property as soon as he acquires title or possession of the same. An equitable lien upon future property may be even more effectual than such a lien upon property in existence, for the registration laws apply to liens upon property in existence, but not to liens upon future property. Therefore it happens that while, as against creditors, a lien cannot be created by consent upon a personal chattel in existence at the time of such contract without registration, yet, as this rule does not apply to a contract in regard to future property, a lien effectual as against creditors may be created by agreement upon future property, such, for instance, as the products of a farm or the profits of a farm not then in existence." 1 Jones, Liens, § 42, and authorities there cited.

"By agreement, a lien may be given on any property not in existence or owned by a person at the time of the agreement, to take effect when the property comes into existence or is obtained." 8 Am. & Eng. Enc. Law, verbiis "Future Acquired Property," p. 987, and cases there cited.

Justice Clifford, at the circuit, said in *Barnard v. Railroad Co.*, 4 Cliff. 351, Fed. Cas. No. 1,007:

"Argument to show that the parties intended to create a lien or charge upon property of the kind enumerated, subsequently acquired, as well as upon property in existence and in possession, is hardly necessary, as the affirmative of the proposition is supported by the express words of the indenture of mortgage; the rule being that, when parties intend to create a lien upon property not then in actual existence, it attaches in equity as soon as the person who grants the lien acquires the possession and title of the same. *Mitchell v. Winslow*, Fed. Cas. No. 9,673; *Pennock v. Coe*, 23 How. 117. * * * Many other authorities support the proposition that, whenever parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether owned by the assignor or contractor or not, or, if personal property, whether it is then in being or not, the contract attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto."

Seymour v. Railroad Co., 25 Barb. 284; *Curtis v. Auber*, 1 Jac. & W. 531; *Langton v. Horton*, 1 Hare, 556; *Field v. Mayor*, etc., 6 N. Y. 185.

Justice Matthews said in *Peugh v. Porter*, 112 U. S. 742, 5 Sup. Ct. 361, in answering the contention that the case came within the doctrine of *Trist v. Child*, supra:

"Here, as between Musser and Porter, on the one hand, and Peugh, on the other, there were words in the agreement of express transfer and assignment of the very fund now in dispute, though not then in existence, which, in contemplation of equity, is not material."

Justice Story, at the circuit, in *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864, said:

"In equity there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge in rem not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement," etc.

In *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490, the circuit court of appeals for the Eighth circuit maintained an express verbal agreement that Hudgins & Bro. should have a lien on certain cattle. The court said:

"Upon the evidence in the case, it is indisputable that the intestate Nichols, at the time of his death, owed the plaintiffs the amount stated in the master's report, and that, by an express agreement between the plaintiffs and Nichols, they had a lien on the cattle and other property mentioned in the bill to secure the payment of the indebtedness. The lien, which was created by agreement of the parties in this case, is called an 'equitable lien' or an 'equitable mortgage.' It is said equitable liens by contract of the parties are as various as are the contracts which the parties may make. 1 Jones, Liens, § 27. Such liens do not depend upon the possession of the property by the creditor, as do liens at law. Nor do they depend upon any statute for their force and efficacy, and they are not affected by the registration laws. They are founded upon the contract of the parties, which may be either verbal or in writing, and they will be enforced in equity," etc. (See cases there cited.)

That such a contract as the one now under consideration is valid, that it does not come under the operation of the statute forbidding the assignment or transfer of claims against the United States, and that such a contract creates a lien enforceable in chancery, are questions which have been settled for this circuit by the court of appeals in *Barrow v. Milliken*, 20 C. C. A. 559, 74 Fed. 612, on appeal from this court,—65 Fed. 888. I need hardly say that the fact that the law of the state would give no lien in such a case as this can in no manner affect the question of equitable liens. *Barrow v. Milliken*, supra, involved the question of the enforcement of an equitable lien when the state law gives no lien. The doctrine of equitable liens would never have come into existence if it were true that one who claims such a lien must first show a lien at law. Equitable liens became necessary precisely on account of the absence of similar remedies at law. "An equitable lien is a right, not recognized at law, to have a fund or specific property, or the proceeds, applied in whole or in part to the payment of a particular debt or class of debts." 13 Am. & Eng. Enc. Law, verbo "Liens," p. 608, and cases there cited. "As equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious of doing justice to the parties interested." *Id.* p. 613, and cases there cited. The equity jurisdiction of federal courts is derived from the constitution and laws of the United States, and their power and rules of decision are the same in all the states. *Noonan v. Lee*, 2 Black, 499. The equity jurisdiction of the federal courts is independent of the local laws of any state. Justice Story in *Gordon v. Hobart*, 2 Sumn. 401, Fed. Cas. No. 5,609. Equitable liens may be enforced in the federal courts, although no remedy is provided for the enforcement of such liens by the state jurisprudence in the state courts; and it has long been settled in the federal courts that the equity jurisdiction and equity jurisprudence administered in the courts of the United States are co-incident and co-extensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state where the court sits. Justice Story, in *Fletcher v. Morey*, supra, and cases there cited.

In *Riddle v. Hudgins*, supra, the circuit court of appeals for the Eighth circuit, passing on an express verbal agreement to give a lien, said, as already quoted:

"Nor do they [equitable liens] depend upon any statute for their force and efficacy, and they are not affected by the registration laws."

The court further said:

"The law gives no remedy by which such liens can be established and enforced. Being an equitable lien, the enforcement of it is exclusively within the province of a court of equity. 'Equity,' says the supreme judicial court of Massachusetts, 'furnishes the only means by which the property on which the charge is fastened can be reached and applied to the stipulated purpose. [Cases cited.]'"

In *Kirby v. Railroad*, 120 U. S. 130, 7 Sup. Ct. 430, Justice Harlan, as the organ of the court, said:

"While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit. In *U. S. v. Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said that as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states. The same view was expressed by Mr. Justice Curtis in his work on the Jurisdiction of the Courts of the United States (page 13), when he observed that 'the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole United States, without regard to state laws.'"

So, in *Payne v. Hook*, 7 Wall. 425, 430, it was said:

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction of the courts of the United States is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

See, specially, *Curt. Jur. U. S. Cts.*, pp. 13, 14, 212-215.

2. The second question presented is whether the lessor's privilege secures the unpaid balance of the price of the sugar cane delivered to the Ferris Manufacturing Company. Article 2705, Rev. Civ. Code La., provides that "the lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased." The counsel for the receiver contends that the words "and other obligations of the lease" are intended to cover those obligations which the Civil Code imposes on the lessee. These legal obligations are defined in section 3 of the title "Lease," from article 2710 to article 2726. They are mainly that the lessee shall pay the rent; that he shall enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease; that he shall commit no waste; and that he shall make certain minor repairs, if necessary. The contention is disposed of by unanimous decisions of the supreme court of the state. These cases are irreconcilable with the view advanced by the counsel for the receiver, and I do not remember even an attempt to meet the force of the adjudications.

The case of *Warfield v. Oliver*, 23 La. Ann. 612, was a suit brought by the lessor on a lease which provided that the lessee should repair and keep in repair the leased premises. The lessor proceeded by sequestration, and claimed the balance due him for rent, and also unliquidated damages in the sum of \$5,000 for nonexecution of the obligation to repair and keep in repair. Justice Howe, as the organ of the court, said:

"The defendant moved to dissolve the writ of sequestration, on the grounds that there was no privilege for the claim of \$5,000 for the nonperformance of the obligations of the lease (other than that to pay rent), the same being for damages unliquidated; that the claim for rent depended, by the terms of the lease, on a protestative condition, not yet fulfilled; and that the allegations in the affidavit were untrue. We think the motion was properly overruled. As to the first ground, the lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased. Rev. Civ. Code, art. 2705. The 'other obligations' of this lease involved in this discussion sprang from Oliver's agreement in that instrument to put the plantation in repair, and to keep it in repair. As will be seen by the evidence in the record, this obligation was of great importance, and we see no reason to decide that it is not secured by the right of pledge above mentioned."

Fox v. McKee, 31 La. Ann. 67, was a suit by a lessor, accompanied by sequestration. The contract of lease provided that attorneys' fees upon the whole amount of the rental for five years should be paid by the lessee "in case it should become necessary at any time to sue for the collection of the rent, or any part thereof, or to enforce the conditions of the lease." The condition that attorneys' fees should be paid on the aggregate of the rental (upon the paid as well as the unpaid portions of the rental) was harsh. But Justice Spencer, as the organ of the court, said: "This, to say the least of it, was an onerous exaction, but it is 'so nominated in the bond.'" The attorneys' fees, to the date of the decree in the case canceling the lease, were allowed as a claim secured by the lessor's privilege.

In *Henderson v. Meyers*, 45 La. Ann. 791, 13 South. 191, Justice Breaux, as the organ of the court, passing on the question of attorneys' fees provided for in a lease, said:

"In reference to the fee of the attorney, to which objection is urged, it having been stipulated in the contract of lease, as one of its conditions, the difference between the parties justified the proceedings to secure plaintiffs' rights. We think the fee is due."

It seems clear to me that the contention of the receiver, viz. that none but the legal obligations of the lessee are secured by the lessor's privilege, is wholly without force, if the cases just cited are sound. It is plain that the lessee is under no legal obligation to repair and keep in repair the leased premises (except in the minor particulars already mentioned). Nor does the law bind the lessee to pay an attorney to sue him in case he defaults on his rent or in the performance of the other obligations of the lease. It is a question of pure local law, adjudicated, without a dissent, by three successive benches of the supreme court of the state, and it is plainly sustainable on principle.

The Civil Code of Louisiana was taken almost bodily from the Code Napoleon. While there are many particulars in which the

Codes differ, their coincidence is the rule, and their divergence the exception. French jurisprudence has always been consulted by the courts of Louisiana in construing the provisions of the Louisiana Code, which are substantially the same as the corresponding provisions of the Code Napoleon. In the present case I am materially helped by reading the decisions of the French courts and the writings of authoritative commentators on the Code Napoleon. The learned counsel for the receiver admitted in argument that, if the question now under consideration were to be decided by the provisions of the Code Napoleon, the issue must go in favor of the interveners. But he contended that the Code Napoleon and the Louisiana Code differ on the point involved. The Code Napoleon (article 2102) provides that the lessor shall have a privilege for "the repairs which the tenant is bound to make [*réparations locatives*], and for everything that concerns the execution of the lease." The Louisiana Code (article 2705) provides, as already stated, that "the lessor has for the payment of his rent and other obligations of the lease a right of pledge," etc. As the Louisiana Code, and the Code Napoleon as well, specially provide that the lessee shall make the "*réparations locatives*," it is immaterial, for the present purposes, that the framers of the Code Napoleon chose to again specially mention the tenantable repairs in the provision which establishes the lessor's privileges. Under the Code Napoleon, the lessor would have had a privilege for the tenantable repairs, even if article 2102 (Code Napoleon) had not mentioned them. Therefore the question is whether the words "and other obligations of the lease," in the Louisiana Code, have a different significance from the words "everything that concerns the execution of the lease," in the Code Napoleon. I have maturely considered the matter, and am unable to find any difference in the meaning of the two provisions. I cannot perceive that any exists. The language used in the one case conveys to my mind no meaning differing from that of the language used in the other.

Mourlon (*Répétitions Ecrites sur le Code Civil*, 11th Ed., 1883, vol. 3, § 1276) says:

"As the Code desires, for a well-conceived general interest, to facilitate leasing, it was compelled to secure the owner against all losses which might result from the possession of his property by a third person. For that purpose the law grants the owner a privilege: (1) 'For all the obligations which are of the essence or of the nature of the contract of lease, such as the liability to pay rentals, to repair damages caused by the fault of the lessee, and, in a more general way, all the obligations mentioned in articles 1728, '29, '32, '33, '35, '60, '64, '66, '68, '77, '78.' (2) 'For all the obligations which have been added as conditions of the contract,' such as the obligation to manure the land, to return advances of funds or live stock made by the owner to the farmer; in brief, in the words of the text, 'for everything that concerns the execution of the lease.'"

Aubry and Rau (*Cours de Droit Français*, 4th Ed., 1869, vol. 3, p. 144) say:

"The object of the lessor's privilege is to secure the complete execution of the lease. It applies not only to the rentals, but also to the other obligations of the lessee, such as the tenantable repairs, indemnification for deterioration occurring through his fault, legal charges which the lessor has paid for his discharge, and advances made to him under the clauses of the lease."

In support of their text, Aubry and Rau cite such authoritative commentators as Duranton, Troplong, Grenier, Zachariæ, and also a decision of the court of appeals of Douai, of April 18, 1850. Sirey 51, 2, 77.

Laurent (*Droit Civil Francais*, 4th Ed., 1887, vol. 29, §§ 407, 408) says:

"By execution of the lease, we understand all the obligations which the law or the contract imposes on the lessee. Those which the law establishes are considered as agreed between the parties. All, therefore, concern the execution of the contract. * * * Are advances which the lessor makes under the contract of lease to the lessees secured by his privilege? The affirmative is adopted by jurisprudence. It is incontestable when the advances concern the lease; that is to say, the rights and obligations which result from it. In this case, both the letter and spirit of the law are applicable. But if a loan of money were made to the lessee, in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance. It would be an ordinary loan, and the law gives no privilege for a loan. Jurisprudence adopts this view; for, if it grants a privilege to the lessor for the advance which he makes, it is because these advances concern the lease. The owner of an iron furnace stipulates to furnish to the lessee of his furnace the wood necessary to operate it. It has been adjudged that such an advance is privileged. Such is also the case when the lessor furnishes beets to the lessee of a sugar factory. The lessor furnishes 10,000 francs to the lessee of a mill as a fund to be used in operating it. The advances being intended to operate the mill, therefore its object was the execution of the lease, and the claim is privileged."

Laurent also cites the decision of the court of appeals of Douai of April 18, 1850, referred to above. I quote from that decision as follows:

"Considering that, as regards the claim of 6,800 francs for rentals, the privilege of Decocq is not contested by the defendant, and is, besides, expressly established by article 2102 of the Civil Code; that, according to paragraph 1 of that article, the same privilege takes effect for repairs chargeable to the tenant, and for everything that concerns the execution of the lease; that it is by virtue of a clause of the lease, and for the execution of that clause, and in order to insure the operation of the factory leased, that the Decocq have delivered and furnished to Blanquart beets to value of 8,086 francs; that article 9 and following of said lease required them to plant beets on 53 hectares and 19 acres, and to furnish and deliver to the factory the entire product of the crop at the price of 16 francs per 1,000 kilos. of beets, and under a penalty of 150 francs damages for each 35 acres of beets not delivered; that all the authors and jurisprudence grant the privilege of article 2102 to the lessor, who has made advances and furnished commodities, as in this case, by virtue of a clause of the lease, and for the execution of the lease,—it is held that, under the terms of article 2102, the claim of Decocq is privileged, as well for the beets furnished as for the rentals."

It is useless to pursue further the examination of the French authorities, for they abundantly show that, under French law, the point at issue would be decided for the interveners; and the admission of the learned counsel for the receiver had fully satisfied me, before I had investigated the question, that, under the Code Napoleon, the privilege here claimed by the lessors would be sustained. Finding, as I do, that there is no difference in the effect and meaning of the textual provisions of the two Codes, all the reasons stated and considerations advanced by the French commentators apply with great force to the point in question. It is true, as Laurent states, that the loan of a sum of money for a purpose foreign to the lease would

not be secured by the lessor's privilege, although the loan might be stipulated in the lease. The mere fact that a stipulation is inserted in the contract of lease does not make it one of the "other obligations of the lease," within the meaning of article 2705 of the Civil Code of Louisiana. In each case presenting the question, it is for the courts to say whether the stipulation is one which is closely connected with the lease, and whether the object of the stipulation was a cause which operated materially in moving the lessor to consent to the lease. While cases might arise in which the application of this test would be difficult, the case at bar is not one of them. I could not readily imagine a case which would show a stipulation in a lease, beyond the payment of rental, more intimately and inseparably bound up with the lease than the stipulation in the case at bar, that the Ferris Sugar Manufacturing Company should receive, manufacture, and pay for interveners' sugar cane. The object of the interveners in leasing their sugar house was to obtain rent, and also to have greater facilities and advantages in converting their cane into sugar. The object of the Ferris Sugar Manufacturing Company in leasing was to enable the company to carry on the business of obtaining cane from the interveners and from others, and manufacturing it into sugar. Can it be said, under such circumstances, that the selling of the interveners' sugar cane to the Ferris Sugar Manufacturing Company was not a condition—an essential consideration—of the lease, both on the part of the lessors and the lessees? It seems to me the question must be answered in the negative. The counsel for the interveners called the court's attention, during the argument and in his brief, to article 25 of the contract, which declares that the parties agree that the contract is an entire one, each stipulation and obligation being a part of the consideration for every other. While this clause is very clear, I think that, even without it, the contract itself, from its nature, shows clearly that the selling of cane by the lessors to the lessees was an integral part of the lease.

In the case of Warfield v. Oliver, *supra*, the supreme court seemed to lay stress on the consideration that the stipulation that the lessee should repair the leased premises was of great importance to the lessor. So it was, but no more so—and, in my opinion, much less so—than it was in this case that the interveners should be able to have their cane manufactured into sugar. The interveners owned and were cultivating large plantations. It is beyond all question that when they leased their sugar house for \$2,000 a year, and thus deprived themselves of all means of producing sugar from their cane, except through their lessees, a most material, essential and integral part of the contract—without which, in the very nature of things, the contract would never have been consented to—was that the lessees should take and pay for the sugar cane. It cannot be that such a stipulation, far more important to the lessors than repairs or the payment of attorneys' fees, is not an "obligation of the lease." It would be difficult to understand why the Louisiana law-maker should refuse to protect an owner of property who might wish to lease his property for a money rental and on certain condi-

tions intimately connected with the lease,—such, for instance, as the stipulations, not unusual in Louisiana, that the lessee shall leave on the leased premises, at the expiration of the lease, a certain number of acres of cane, of barrels of corn, etc.; that he shall manure the land, or fence it, or ditch it, or otherwise improve it. If Moulton is correct in stating that a well-conceived public interest requires that the leasing of property be encouraged, and that lessors be so secured that they may protect their property while in the hands of others, then it would be matter for regret if the Louisiana lawgiver had restricted lessors within the extremely narrow limits of the obligations imposed by law upon the lessee. If Moulton's statement as to public interest is correct, and if, as Aubry and Rau tell us, the object of the lessor's privilege, under the Code Napoleon, is to secure the complete execution of the lease, it would also be matter for regret if the law of Louisiana only afforded the lessor security for a partial and incomplete execution of the lease.

Interveners' counsel presented a view of the matter which may have force. He contended that it is clear that the lessee must enjoy the thing leased according to the use intended by the lease, and that if the lessee makes another use of the thing than that for which it was intended, and loss is thereby sustained by the lessor, the lessee shall be liable for the loss. Civ. Code La. arts. 2710, 2711. It was argued that, if the Ferris Sugar Manufacturing Company had refused to receive the cane of interveners, the refusal would have constituted a violation of the lessees' obligation to use the thing leased as the lease intended, and would have rendered the lessees liable for the damages; i. e. for the value of the cane to the interveners at the time appointed for its delivery. In such a case, the lessees would not have benefited from the cane, and it was urged that the interveners could not possibly be put in a worse position because the lessees received the cane, and benefited from it. After due consideration, I have come to the conclusion that I could not decide the point now under discussion adversely to the interveners without disregarding the decisions of the supreme court of the state and the persuasive authority of the highest French courts and of eminent French commentators.

3. The claim for the loss of part of interveners' crops must be rejected. A party to a contract must endeavor to minimize his loss. His claim for damages will be diminished to the extent to which he could have avoided the loss. *Wicker v. Hoppock*, 6 Wall. 99; *Warren v. Stoddart*, 105 U. S. 229; 1 Suth. Dam. (2d Ed.) § 88, and cases there cited. The question of damages involved the examination of a great mass of oral and documentary evidence. The question turns almost entirely on matters of fact. It would answer no useful purpose to go into an analysis of the evidence, but a careful consideration of it left my mind strongly impressed with the belief that, whatever may have been the omissions of contractual duties with which the Ferris Sugar Manufacturing Company may be charged, the interveners could have protected themselves from loss by the exercise of reasonable diligence. It was, of course, for the interveners to first establish the extent of their loss with reasonable certainty, and for them then to

show that the loss occurred through the fault of the Ferris Sugar Manufacturing Company. I find that the losses which the interveners established by sufficient proof, and which might be chargeable to the Ferris Sugar Manufacturing Company, could have been avoided by the interveners had they used the means at their command. A circumstance which bears strongly against the interveners is that the receiver, very soon after his appointment, telegraphed the interveners, offering to grind the cane on certain terms. Had this offer been promptly accepted, the losses would, doubtless, have been materially diminished.

The master has made a full report of the evidence on the question of damages, and has analyzed and discussed it very thoroughly. I agree with him in the conclusion that the claim must be disallowed.

**NATIONAL WATERWORKS CO. OF NEW YORK v. KANSAS CITY.
KANSAS CITY v. NATIONAL WATERWORKS CO. OF NEW
YORK. COQUARD et al. v. BANNARD et al.**

(Circuit Court, W. D. Missouri, W. D. December 1, 1896.)

Nos. 1,783, 1,868.

1. MORTGAGES TO SECURE BONDS—DUTIES OF TRUSTEE—AFTER-ACQUIRED PROPERTY.

That a mortgage by a waterworks company to a trustee to secure an issue of bonds recites a purpose to extend the plant, and that it also contains a clause covering future-acquired property, and a covenant for further assurances, does not impose on the trustee a continuing duty to the extent of requiring it to take notice of what the mortgagor does with the money, or of the property which it purchases.

2. TRUSTS—PRIOR EQUITIES—NOTICE TO TRUSTEE—RIGHTS OF BENEFICIARIES.

The doctrine that notice to the trustee is notice to the beneficiaries is of special significance only when the trustee is one of mutual selection by the grantor of the trust and the beneficiaries; and must not, when he is primarily a mere agent of the grantor, be applied so stringently as to defeat the equitable rights of the beneficiaries. Especially is this true when the beneficiaries are purchasers, from the trustee named in a mortgage, of negotiable bonds secured thereby, which were issued by the grantor to the trustee.

3. MORTGAGES TO SECURE BONDS—PRIOR EQUITIES — NOTICE TO TRUSTEE AND BOND-HOLDERS.

The N. Water Co., owning a plant in Kansas City, Mo., mortgaged the same to a trust company, to secure an issue of negotiable bonds. The mortgage recited that the purpose of the loan was to extend the plant; and it contained a clause covering future-acquired property, and also a covenant for further assurances. The N. Co. bought all the stock of another water company (which subsequently became the K. Co.), having a plant in Kansas City, Kan., and, by connecting the same with the Kansas City, Mo., plant, reached a new source of supply. Thereafter the N. Co. caused the K. Co. to execute a mortgage to the same trust company on its plant in Kansas, to secure a new issue of negotiable bonds. *Held*, that innocent purchasers of these bonds were entitled to rely upon the fact that the record title to the plant in Kansas was in the K. Co., and were not chargeable with the knowledge which their trustee had, or might have had, that the property was equitably within the after-acquired clause of the mortgage given by the N. Co.

4. NOTICE FROM ADVERSE POSSESSION—JOINT POSSESSION.

Before one can be deprived of rights based on the record evidence of title, on the ground of notice from adverse possession, it must appear that such possession was open, notorious, and unequivocal; and no joint and indefinite

possession, such as that of two corporations, one of which owns all the stock of the other, through officers, who are officers of both, is sufficient to give notice of the equitable rights of one as against the record title of the other.

Scammon, Crosby & Stubenrauch and H. A. Clover, for intervenor.

George Hoadley, Karnes, Holmes & Krauthoff, and E. S. Hosmer, for Bannard committee.

BREWER, Circuit Justice. This matter comes before me on exceptions to the report of the master on the intervening petition of L. A. Coquard and others. The original suits were in equity, between Kansas City and the National Waterworks Company, in reference to the sale of the plant of the latter to the former. This litigation was protracted through several years, and the facts concerning it may be found fully stated in prior opinions. See 10 C. C. A. 653, 62 Fed. 853; 65 Fed. 691. By the terms of the final decree, entered on November 28, 1894, the city was ordered to pay \$3,000,000 for the plant, and the company to convey a full and unincumbered title to the property. Both parties complied with the terms of the decree, and this intervention was an application of the interveners for a portion of the money paid by the city. It is unnecessary to repeat the whole story of the case; yet, in order to a clear understanding of the present question, some facts must be stated.

The contract, in 1873, between the city and the company, by which the latter constructed the plant, was made under express legislative sanction, so that all parties dealing with the company dealt with notice of the limits of power and right. At first the company drew its supply of water from the Kaw river, but, as the years passed, this became objectionable, and the company was constrained to look elsewhere. After examination, it determined to obtain it from the Missouri river, at Quindaro, on the Kansas side. In order to accomplish this, it was necessary to establish a reservoir and supply works at Quindaro, and carry the water by a flow line through the then Kansas towns of Wyandotte and Kansas City, Kan. There was in existence a Kansas corporation, known as the Wyandotte-Armourdale Water Company, with authority to supply the former place, among others, with water, which had constructed a system of waterworks, with a limited supply station, at the mouth of Jersey creek. The National Waterworks Company bought up the entire stock of this corporation, whose name was subsequently changed to that of the Kansas City Water Company. After this, it constructed a reservoir and supply station at Quindaro. About this time, Wyandotte, Kansas City, Kansas, and Armourdale were consolidated into one city, under the name of Kansas City, Kan. Through the streets of this city the National Waterworks Company carried the water to its distributing system in Kansas City, Mo., and at the same time, and from the same supply station, supplied water to Kansas City, Kan., in pursuance of the contract between the Kansas company and the town of Wyandotte. The land at Quindaro upon which the works were placed was purchased in

the name of **B. F. Jones**, the superintendent of the National Waterworks Company, who, on November 11, 1887, conveyed the property to the Kansas corporation, at the request and by the direction of the National Waterworks Company.

At the date of the decree, the property in Missouri and in Kansas belonging to the National Waterworks Company and the Kansas corporation was incumbered as follows: A mortgage on the Missouri property, executed by the National Waterworks Company, August 1, 1883, for \$1,500,000; a mortgage, dated June 1, 1885, by the same grantor to the Central Trust Company, securing a like sum of \$1,500,000; and a third mortgage, dated November 11, 1887, executed by the Kansas corporation to the Central Trust Company (the trustee in the second of the foregoing mortgages), for the sum of \$900,000; or a total of \$3,900,000. The decree required the conveyance of the Quindaro property and the flow line to the distributing system in Kansas City, Mo., as a part of the plant, within the terms of the original contract between the city of Kansas City, Mo., and the waterworks company, but it provided that the city should only pay \$3,000,000 therefor. No question arose as to the necessity of paying the mortgage of August 1, 1883, and it was so done, which left a balance of \$1,500,000 to be used in satisfying the two mortgages of June 1, 1885, and November 11, 1887, amounting to \$2,400,000. The mortgage of November 11, 1887, was subsequent in date to that of June 1, 1885, but the property it covered was outside of Missouri, the legal title to which was not standing in the name of the National Waterworks Company, but which the decree required should be conveyed to Kansas City free of incumbrance. Negotiations were entered into with a view of effecting some arrangement by which, with the use of the \$1,500,000, the two latter mortgages could be canceled. Messrs. Bannard and others, the defendants to this intervening petition, acting as a committee for and in behalf of the holders of 1,368 bonds of the mortgage of June 1, 1885, agreed that the \$900,000 mortgage of November 11, 1887, should be paid in full, and the \$600,000 remaining distributed among the 1,500 bonds of the mortgage of June 1, 1885, the balance due on such bonds to be secured by a mortgage on all of the property belonging to the Kansas corporation not conveyed under the terms of the decree to the city. The holders of the remaining 132 bonds, secured by that mortgage, declined to enter into this arrangement; and the petitioners, representing 101 of the bonds, intervened, as legally authorized by the terms of the decree, and claimed payment in full. In accordance with this arrangement, the \$900,000 mortgage was paid in full, an amount retained in the registry of the court sufficient to pay the bonds of interveners in full, and the balance distributed among the holders of the 1,368 bonds; and the question is whether the holders of these 101 bonds are entitled to be paid in full, or must be content with the pro rata of the \$600,000 reserved by the arrangement for the payment of the mortgage of June 1, 1885.

The master held that the mortgage of June 1, 1885, covered property secured by the mortgage of November 11, 1887, and, being prior

in time, gave priority of right, and that the holders of the 101 bonds were entitled to payment in full. It will be borne in mind that the legal title to the property in Kansas was in the Kansas corporation, and that the legal title to the property in Missouri was in the Missouri corporation, the National Waterworks Company. Did this mortgage of 1885 include the property in Kansas, and did the holders of bonds secured by the mortgage of November 11, 1887, take with notice of that fact? At the time of the execution of the mortgage of June 1, 1885, the National Waterworks Company owned none of the Kansas property. The mortgage recited that:

"The said party of the first part is desirous of obtaining the means of increasing and improving its supply of water, and extending and enlarging its works in the states of Kansas and Missouri, and for such purpose has resolved to issue its bonds, numbered consecutively from 1 to 1,500, both inclusive, amounting in the aggregate to the sum of \$1,500,000."

And the property assigned and conveyed is described as follows:

"All the rights, powers, privileges, and franchises granted to and conferred upon the said party hereto of the first part under and by virtue of the act of the general assembly of the state of Missouri and the ordinances of the common council of the city of Kansas hereinbefore recited, or which may hereafter be granted or conferred by said state or city; and also all rights, powers, privileges, and franchises which may have been granted and conferred upon said parties of the first part by the laws of the state of Kansas, or by the city of Kansas City, in said state, or which may hereafter be so granted and conferred, together with all the real estate and property, personal and mixed, now owned or which may hereafter be acquired by the said party of the first part situated in the said city of Kansas and Kansas City: and all erections and buildings and machinery, engines, reservoirs, pumps, wells, pipes, or other constructions, tools, implements, or fixtures, of every kind and nature, made, manufactured, constructed, built, laid, purchased, or in any way acquired in and about the construction, maintenance, and operation of waterworks in the cities aforesaid, or either of them; and also all the net income, rents, profits, emoluments, and money derived from the said waterworks, including any sum or sums of money which may be paid by the city of Kansas under and by virtue of the ordinances aforesaid, and including also any sum or sums of money which may be paid by Kansas City, in the state of Kansas, for water furnished to the last-mentioned city by the party of the first part; and also all the privileges, rights and franchises of the said party of the first part incident or appurtenant to or belonging to the said waterworks, or which it has acquired, holds, or owns in connection therewith, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion or reversions, rent or rents, issues or profits, thereof; and also all estate, title, and property, possession, claim, or demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances "

And the covenant for further assurance is in these words:

"The said party of the first part shall from time to time, and at all times hereafter as often as thereto requested by the said Central Trust Company, its successor or successors, execute, acknowledge, and deliver all such deeds, conveyances, and assurances in the law for the better assuring unto the said Central Trust Company, its successor or successors in the trust hereby created upon the trusts herein expressed, the waterworks and appurtenances and the premises and property hereinbefore conveyed, or intended so to be conveyed, and all other property and things whatsoever which may be hereafter acquired for use in connection with the same or any part thereof, and all franchises now held or incident or appurtenant thereto or connected therewith, as by said Central Trust Company, its successor or successors, or its or their counsel learned in the law, shall be reasonably advised."

The ruling of the master was that as the mortgage of 1885 recited that the purpose of the loan was an extension of the waterworks plant, as it contained the "future-acquired" property clause, and a covenant for further assurance, the trustee in that mortgage had a continuing duty, and was charged with constructive notice of what the mortgagor did with the money which it received, of the extensions which it made to its plant, and that the property acquired by such extensions was in fact within the grant of the mortgage; that this constructive notice implied or was equivalent to full personal knowledge; and hence that, when it accepted the trust created by the mortgage of 1887, it did so with knowledge that the property was already covered by the prior mortgage; and, further, that the knowledge of the trustee was notice to those who purchased from it the bonds secured by this subsequent mortgage. The case, therefore, in his judgment, turned upon the question of constructive notice to the trustee, the extent to which it existed, the time which it lasted, and the rights which, in consequence thereof, purchasers of the second mortgage bonds acquired. He has argued this question with his usual force and ability, and, in order that his exact thought and conclusion may be presented, I quote what he says in reference to the matter:

"Although the mortgage of 1885, executed by the National Waterworks Company, was duly recorded in the state of Kansas, still, according to the records in the register's office, the title thereto was in the Kansas corporation when it executed the mortgage of 1887, securing the \$900,000 of bonds. The mortgage of 1887 was the prior lien, unless it is shown that the holders of the bonds secured by that mortgage had or are chargeable with notice of the prior mortgage. The Central Trust Company of New York is trustee in both deeds of trust or mortgages, and accepted both trusts by signing those instruments. Being the party to the mortgage of 1885, it had, and was bound to have and take, notice of all the provisions therein contained. It had full and complete notice of the equitable rights of the holders of the bonds thereby secured when it accepted the trust of 1887.

"The question then arises whether notice to the trustee is notice to the holders of the bonds secured by the mortgage of 1887. It is said in Jones on Corporate Bonds and Mortgages, when speaking of the effect of notice to trustees in deeds of trust like the one in hand: 'Notice to the trustee is held to affect the title in their hands in reference to the incumbrances upon the trust property. Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrances.' Section 299. The case of *Miller v. Railroad Co.*, 36 Vt. 452-484, is in point. The grounds upon which that case rests are these: Though such bonds are negotiable, and pass from hand to hand, they are purchased upon the security provided in the deed of trust. The security consists of such title as is vested in the trustee. The purchasers of bonds adopt the security as it exists in the trustee, and, by their purchase, make the trustee their agent, for the purpose of administering the trust. They therefore take such title, and only such title, as the trustee has. Equities which attach to the property in the trustee's hands continue to exist as against the bondholders. In the application of this principle of law, the case of *Fidelity Ins., Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.* (W. Va.) 9 S. E. 180, is like the one in hand. It is there said: 'It is a well-settled principle of law, and especially in this state and Virginia, that notice to a trustee is notice to his cestui que trust.' This West Virginia case was decided and followed in *Peters v. Bain*, 133 U. S. 670, 696, 10 Sup. Ct. 354, but it was decided and approved as being the law in that state. The facts in the case of *Myers v. Ross*, 3 Head, 59, were to the following effect: Ross executed a deed of trust to H. M. Myers, upon lands, to secure a debt due from Ross to Caroline Myers. This deed, although acknowledged, was not

recorded until about two years after its date. In the meantime Ross executed to two trustees a deed of trust upon the same land, to secure certain indebtedness of Ross to the Branch Bank. The evidence showed that the trustee had notice of the prior deed of trust. Says the court: "The question now is whether the notice thus communicated by F. A. Ross, of the existence of the deed of Myers to John Netherland and Charles J. McKinney, was notice to the bank; and we are of opinion that it was. They were trustees in the deed for the benefit of the bank, and, as such, took the legal title to the estate. It is most manifest that the communication was made to them in relation to the very deed then about to be executed, for the benefit of the bank, and in which they were to and did become trustees; and we think both had the notice prior to the execution of the deed, but this is not material, since notice to one was effective as to both. They no doubt believed at the time, as did Ross himself, that he could in a short time adjust the debt with Myers, but this cannot impair the legal effect of the notice. It is difficult to perceive how the beneficiaries in a deed of trust can claim the equity of its provisions without being affected with a notice to the trustee of a prior incumbrance.' The case of *Commissioners v. Thayer*, 94 U. S. 631, to which I am cited as holding a contrary view, was in substance this: County bonds had been issued to a railroad company. The railroad company conveyed these county bonds and its railroad property to three trustees, to secure bonds issued by the railroad to the amount of \$5,000,000. The trustees sued the county on over-due coupons attached to the bonds. It is insisted that there was no bona fide holding of the bonds because of certain transactions between the county commissioners and the railroad company, of which one of the trustees had notice. It was held that notice to one of the trustees was not notice to the holders of the mortgage bonds in that kind of a suit; citing *Curtis v. Leavitt*, 15 N. Y. 294. The bonds here in question, secured by the mortgage of 1887, are negotiable securities; and the principle of law is well settled that the assignee in such an instrument takes the security as incident, and he takes it just as he does the note or bond,—that is to say, free of equities existing between the original parties to the note or bond. But this case presents a very different question: Here the equities in favor of the 1885 bonds attach to the property before the date of the 1887 mortgage, and they existed in favor of persons not parties to the 1887 transaction. In this respect this case differs from the case of *Commissioners v. Thayer*, supra.

"As the trustee in this 1887 mortgage had full notice of the fact that the 1885 mortgage covered, and was intended to cover, all extensions of the Missouri plant, it took the property subject to the mortgage of 1885, and the 1887 bondholders have no greater rights than their trustees had. It is earnestly insisted that the trustee received the notice of the equitable rights in a prior and different transaction, and therefore should not be chargeable with notice in making this subsequent transaction. Trustees in deeds of trust like that of 1885 stand upon a very different footing from attorneys and like agents, because the trust is a continuing one. The trust of 1885 devolved upon the trustee many active duties. Among others, it was the duty of the trustee to call for, and have executed, all conveyances necessary and proper to bring this after-acquired property under that trust. It is, in my humble judgment, a great mistake to treat trusts like this as dry trusts. It is the business of the trustee to know the situation of the property, and to protect the security, and to carry out the trust in all its details, and these are continuing duties."

The question thus presented is of importance, not merely as it determines this particular controversy, but also as affecting many interests. There are in existence certain trust companies, who are engaged in the business of acting as trustees in mortgages, especially railroad mortgages. They are often trustees in successive mortgages from the same grantor, or from different corporations, having a common interest and control. Any question as to the extent of the notice which these trustees take of the transactions of their mortgagors, and the effect of such notice upon parties purchasing bonds from them, is of vast importance. I am unable to

concur in the views of the master. I do not think the duty of this trustee was a continuing duty to the extent that it took notice of whatever its mortgagor did with the moneys which it received upon the sale of the bonds, or of the property which it purchased. If there were such continuing duty, then included in it was the obligation to see that the mortgagor expended the moneys which it received in accordance with the expressed purpose of the mortgage, and to take legal measures to compel execution thereof, a failure to do which would make itself responsible to the parties purchasing bonds for all losses occasioned thereby. There is in the mortgage no clause expressly casting such a duty upon the trustee. It contains some 13 articles providing for certifying the bonds in the first instance, the keeping of a registry for the entry of transfers, and for action in case of a default in the payment of either principal or interest. The only other article is the one containing the covenant for further assurance, heretofore quoted. Unless from it a duty of continuing supervision can be implied, the mortgage casts no such duty, although, as indicated, it specially provides for what the trustee shall do, and when it shall act. Now, I think I am warranted in saying that a mere covenant for further assurance, such as is here found, has not been generally understood as casting a special duty upon the trustee of supervising the action of the mortgagor. It must be borne in mind that the trustee was selected and the terms of the trust prescribed by the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent. It is true that, after the purchase of the bonds, the bondholders look to the trustee for the discharge of certain duties, but only such duties as it has promised to perform; and, to the extent that those duties inure to their benefit, they may properly hold it liable for any default therein. If, by the terms of a mortgage, neither the interest nor the principal is payable at the office of the trustee, or through its agency, the bondholders, after purchase, deal directly with the mortgagor, and generally only in case of default do they invoke action on the part of the trustee. While it is often said that knowledge of the trustee is the knowledge of the cestui que trust, yet that doctrine is of special significance when the trustee is one of mutual selection by the grantor and the beneficiary of the trust, and must not, when he is primarily a mere agent of the grantor of the trust, be applied so stringently as to defeat the equitable rights of the beneficiaries. Especially is this true when the beneficiaries are purchasers from the trustee of negotiable bonds issued by the grantor of the trust, for in such case the beneficiaries have a right to invoke the protection which attaches to negotiable paper. *Commissioners v. Thayer*, 94 U. S. 631-644.

But whatever may have been the duty of the trustee in the mortgage of 1885 in respect to supervising the action of the mortgagor, and whatever may have been its breach of duty to the bondholders in that mortgage, and whatever of personal liability to such bondholders may accrue therefrom, a very different question arises when those bondholders invoke such breach of duty to displace the

bondholders under the mortgage of 1887 of rights created in reliance upon the facts shown of record. Although the same party was trustee in both mortgages, it is not pretended that it had actual knowledge, when it took the mortgage of 1887 from the Kansas City Water Company, that the property upon which it was taking the mortgage was in fact the property of the National Waterworks Company, the grantor in the mortgage of 1885. The claim is simply that it ought to have known the fact, and therefore had constructive notice thereof. But it would be carrying the doctrine too far to hold that, when the bondholders purchased bonds secured by the mortgage of 1887, they were chargeable with knowledge, not only of all the facts that the trustee had knowledge of, but also of all facts which such trustee would have known if it had fully discharged its duty in a prior transaction between other parties. Surely, it cannot be successfully contended that one purchasing from a trustee under such circumstances is bound to take notice, not only of all that such trustee in fact knows, but also of all its past dealings with other parties, and whether in such dealings it performed its full duties to all the parties interested therein. It must be borne in mind that the question now presented is not whether the trustee has been guilty of such a breach of duty as to become liable to the bondholders under the mortgage of 1885, but whether the bondholders of 1885 can rely upon such breach of duty to displace the priority which the record apparently gives to the bondholders of the mortgage of 1887. I am of opinion that the bondholders under the mortgage of 1885 must look to the trustee for any loss they may have sustained by its breach of duty, if it were guilty of any breach, and that the bondholders of 1887 have a right to rely upon the record as it stood, and are not chargeable with the knowledge which its trustee, as trustee in another mortgage, might have acquired if it had discharged its full duty under the terms thereof.

Neither am I satisfied from the testimony that the National Waterworks Company had such possession of the property covered by the mortgage of 1887 as imparted notice, as against the record, of its equitable rights. There was no exclusive possession. It is true that its officers were controlling the waterworks plant, including therein the Kansas property; but its officers were officers of the Kansas corporation, and the possession of the property was as much that of the Kansas corporation as of the National Waterworks Company. Before one can be disturbed of rights based upon the record evidence of title on the ground of notice from adverse possession, it must appear that such adverse possession was open, notorious, and unequivocal. No joint and indefinite possession is sufficient to give notice of the equitable rights of one occupant as against the record title of the other. *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357; *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349.

These considerations lead me to sustain the exceptions made by the Bannard committee to the report of the master in this case. I have reached this conclusion with some hesitation. When the

matter was first presented in argument, the question seemed to me easy of solution; but the more I have studied it, the more I have examined the able opinion of the master and the full and exhaustive brief of counsel for the interveners, the more I have been perplexed and embarrassed. Hence my delay in filing this opinion. The order will be that the exceptions to the report of the master are sustained; that the interveners be allowed to share in the arrangement made by the Bannard committee; and that the costs of this intervention be paid out of the funds retained in the registry of the court. With reference to the allowance to the master, if counsel do not agree upon the amount, I will fix it, after receiving any suggestions from either side.

HOFSCHULTE v. DOE et al.

(Circuit Court, N. D. California. February 1, 1897.)

OFFICERS—PROCESS OF INFERIOR COURTS—PROTECTION.

When a court which, though of inferior and local jurisdiction, has general jurisdiction with respect to the violation of the ordinances of a town, entertains a complaint under such an ordinance, and thereupon issues process, fair on its face, to an officer, the process is a justification to the officer in doing the acts thereby required, notwithstanding the ordinance under which the court acts is invalid; and no action lies against the officer or the sureties on his bond for his acts done pursuant to such process.

Action at Law for False Imprisonment. Answer filed. General demurrer to answer. Demurrer overruled.

Geo. D. Shadburne, for plaintiff.

Denson & De Haven, for defendants.

MORROW, District Judge. This is an action for false imprisonment. The complaint declares on the official bond of the defendant Fred H. Doe as marshal of the town of Ferndale, in Humboldt county, Cal., and against the other defendants Charles A. Doe and John W. Kemp as sureties, to recover damages for a breach of the conditions of the bond. The complaint contains three counts. They all allege that at the times mentioned in the complaint the plaintiff was and is an alien, and a subject of the king of Prussia, and that the defendants were and are citizens of the state of California. The first count charges, in substance, that on the 14th day of March, 1895, plaintiff was engaged in the town of Ferndale in the business of soliciting orders for the sale of books as the agent of a New York publisher, under such conditions that books so ordered were thereafter shipped to the persons ordering the same; that this business was wholly and exclusively commerce between the state of New York and the state of California; that plaintiff was arrested by the defendant Fred H. Doe, as marshal of the town of Ferndale, and forcibly, violently, and against plaintiff's will dragged, carried, and taken before the recorder's court of the town of Ferndale, and there charged by the defendant with the crime of misdemeanor committed by the plaintiff in having

violated an ordinance of the town of Ferndale requiring the payment of a license for the privilege of pursuing plaintiff's business; that the arrest and prosecution of plaintiff by the defendant Fred H. Doe were unlawful, oppressive, and without authority, and by reason of defendant's wrongful conduct plaintiff was damaged in the sum of \$6,000. The second count repeats the charge contained in the first count, and alleges further that on the 15th day of March, 1895, to which day the hearing of the matter was continued by the recorder, the plaintiff was again arrested by the defendant, and again dragged, carried, and taken by the marshal before the recorder's court to answer concerning the charge; that plaintiff was convicted by the court of the crime of misdemeanor, in having violated an ordinance by carrying on the business of soliciting orders for the sale of books without a license, and was sentenced to pay a fine of \$20, and, in default of payment, to be imprisoned in the town jail of the town of Ferndale until the fine was satisfied, in the proportion of one day's imprisonment for every dollar of said fine not satisfied by imprisonment; that plaintiff refused to pay the fine, and thereupon he was committed to the custody of the defendant, who forcibly seized and imprisoned him for seven hours, and, in order to prevent further imprisonment, plaintiff paid the remaining portion of the fine not satisfied by the imprisonment, to wit, the sum of \$20; that the arrest and imprisonment of plaintiff by the defendant were unlawful, oppressive, and without authority; and by reason of defendant's wrongful conduct plaintiff was damaged in the sum of \$6,000. The third count charges that on the 18th day of March, 1895, while plaintiff was engaged, in the town of Ferndale, in the business of soliciting orders for the sale of books in the manner described, he was arrested by J. B. Howard, acting as deputy marshal, and as deputy of the defendant Fred H. Doe, on a charge of having again violated the ordinance of the town of Ferndale requiring the payment of a license for the privilege of pursuing plaintiff's business; that he was taken before the recorder's court, and afterwards tried and convicted, and sentenced to pay a fine of \$40, and, in default of payment, to be imprisoned until the fine was satisfied, in the proportion of one day's imprisonment for every dollar of the fine, or until lawful payment should be made of the proportion of the fine not satisfied by imprisonment; that plaintiff refused to pay the fine, and thereupon he was committed to the custody of the defendant, and imprisoned for 24 hours, and, in order to prevent further imprisonment, he paid the remaining portion of the fine, amounting to \$39; that the arrest and imprisonment of plaintiff by the defendant were unlawful, oppressive, and without authority; and by reason of defendant's conduct plaintiff was damaged in the sum of \$6,000.

The answer of the defendants sets forth in detail all the proceedings connected with the arrest, prosecution, conviction, and imprisonment of the plaintiff at the times mentioned in the complaint. From these proceedings it appears that, with the exception of the first arrest of the plaintiff by the defendant Doe, mentioned in the first count of the complaint, the defendant and his deputy acted

under and by virtue of legal process issued out of the recorder's court of the town of Ferndale. It appears, further, that the prosecution was based upon the following ordinance:

"Every person, firm or corporation, who solicits orders for and sells to the inhabitants of the town of Ferndale, at retail, any books, goods, wares or merchandise (to be delivered by those who may purchase from said person, firm or corporation, at a time subsequent to the taking of said order) shall be termed, and is hereby declared to be, a transient dealer, and shall pay a license of fifteen dollars per quarter."

It further appears from the answer that under and by virtue of the ordinances of the town of Ferndale any person transacting business in said town, for which a license is required under any ordinance of said town, without first obtaining the same, is guilty of a misdemeanor, and upon conviction thereof may be imprisoned in the jail of such town.

To this answer a general demurrer has been interposed on the ground that it does not state facts sufficient to constitute a defense to plaintiff's complaint, and the question is presented whether the ordinances of the town of Ferndale, and the warrants under which the defendant and his deputy acted, constitute, in this action, a justification for the arrest and imprisonment of the plaintiff. It is conceded that the ordinance in question is invalid, by reason of being in contravention of the provisions of the constitution of the United States, which confers upon congress the power to regulate commerce among the several states. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256. But it is contended on behalf of the defendants that the recorder's court of the town of Ferndale had the general jurisdiction to entertain the complaint in the proceedings against the plaintiff; that it had the authority to determine, in the first instance, whether the complaint was sufficient to justify the issuance of a warrant, and, after the arrest, to determine every disputed question of law and fact involved in the case, and its judgment, no matter how erroneous it may have been, is not subject to collateral attack; that the warrants under which the marshal and his deputy acted in the arrest and imprisonment of the plaintiff, as set forth in the answer, were fair on their face, and, under the circumstances, constitute a sufficient defense to this action. The constitution of the state of California provides, in article 11, § 6, that:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns; * * * and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

In accordance with this requirement, the legislature of the state, by the act approved March 13, 1883 (St. 1883, p. 93), provided a general law for the organization, incorporation, and government of municipal corporations, dividing such corporations into six classes, according to population. The sixth class embraces cities

and towns having a population of not exceeding 3,000. St. 1883, pp. 24-266. As no municipal corporation designated as a "town" appears in any other class, the town of Ferndale must belong to this class. Section 882 of the act of 1883 (St. 1883, p. 278) relates to cities and towns of the sixth class, and provides:

"A recorder's court is hereby established in such city or town. Said recorder's court shall have, * * * exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of such city or town, of all actions founded upon any obligation or liability created by any ordinance, and of all prosecutions for any violation of any ordinance."

Section 880 of the same act provides:

"The department of police of said city or town shall be under the direction and control of the marshal. * * * He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. It shall be his duty to prosecute before the recorder all breaches or violations of or non-compliance with any ordinance which shall come to his knowledge. * * * He shall have charge of the prison and prisoners. * * *"

The recorder, under the constitutional authority thus conferred by the legislative power of the state, had general and exclusive jurisdiction over all prosecutions for the violation of any ordinance of the town of Ferndale; and the marshal, under the same authority, had the power to prosecute in the recorder's court all persons violating any ordinance of the town, was authorized to execute and return all process issued and directed to him by the recorder, and to take charge of prisoners committed to his custody. The fact, therefore, that this recorder's court is, in a sense, a court of inferior jurisdiction, does not deprive it of its character as a court of general jurisdiction, under the law, with respect to the violation of town ordinances, and it is clear that under this jurisdiction the validity of the ordinance under which the proceedings were had in this case was as much a question for the recorder to determine as any other question in the case, and is not subject to collateral attack.

In *Bradley v. Fisher*, 13 Wall. 335, 351, the action was against the judge of the criminal court of the District of Columbia, to recover damages alleged to have been sustained by the plaintiff by reason of the willful, malicious, oppressive, and tyrannical acts and conduct of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court. It was alleged, not only that the proceeding of the judge was in excess of his jurisdiction, but that he acted maliciously and corruptly. The supreme court, in passing upon the question of jurisdiction (page 351) said:

"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the

subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reasons."

There was a dissenting opinion in this case, based upon the fact that the complaint charged that the judge acted maliciously and corruptly; but the prevailing opinion, noticing this feature of the case, held that the exemption of the judges from civil liability could not be affected by the motives with which their judicial acts are performed. The nature of the exemption, as thus determined by the supreme court, is, therefore, of the widest possible scope. In the present case there is no allegation in the complaint that the defendants acted maliciously, and without probable cause. There is, therefore, no claim that the facts stated constitute a cause of action for malicious prosecution. This case should, for that reason, be distinguished from those cases in which that question is involved.

In *Allec v. Reece*, 39 Fed. 341, Judge Ross, in the circuit court for the Southern district of California, followed and applied the doctrine enunciated in *Bradley v. Fisher*, cited above, to a case where a justice of the peace in San Diego county caused the arrest and imprisonment of a resident of Los Angeles county, who had failed to obey a subpoena issued by the justice of the peace, although the subpoena was insufficient to require the attendance of the person served, and the warrant of arrest was directed to the sheriff or constable, when, by the statute, it should have been directed to the sheriff only. The court held that in issuing the subpoena and warrant, and in adjudging the witness guilty of contempt of court in failing to obey the subpoena, the justice acted in his judicial capacity, and the grossness of the error of such determination, and of the judgment following it, did not render him liable in a civil action for damages.

In *Trammell v. Town of Russellville*, 34 Ark. 105, the action was for false imprisonment, and was brought against the corporation and against the mayor and the marshal and his deputy. The plaintiff had been arrested by the marshal and his deputy for violating an ordinance of the town relating to a tax on the business of a retail liquor dealer. It was conceded upon the trial, as in the case at bar, that the ordinance was void, a similar ordinance having been previously so declared by the supreme court of the

state. Referring to the action of the marshal and his deputy in making the arrest, the court said:

"It is established doctrine that process fair on its face will protect from liability the officer executing it. It is not meant that it shall in all respects be regular, but that it shall appear to have been lawfully issued, and such as the officer might lawfully serve."

The court then cites the following passage from *Cooley on Torts* (2d Ed.) p. 538:

"That process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

The court held that the marshal and his deputy were protected from liability by the warrant.

In *Hallock v. Dominy*, 69 N. Y. 238, the action was for false imprisonment, and was brought against two of the trustees of the town of Easthampton, who had prosecuted the plaintiff before a justice of the peace for the violation of an ordinance of the board of supervisors of Suffolk county relating to the catching of certain fish in the creeks, bays, or waters of the town of Easthampton. The plaintiff was arrested, and committed to the county jail. The ordinance upon which the proceedings were based appears to have been invalid. The court of appeals held that the justice of the peace had jurisdiction of the subject-matter of the action, being for the recovery of a penalty less than \$200; that he had jurisdiction, by the personal service of a summons, of the defendant therein; and no objection was taken to the form or the regularity of the proceedings. Commenting upon this jurisdiction, the court declares the doctrine in terms peculiarly applicable to the present case. The court says:

"The jurisdiction of the magistrate was not derived from, and did not depend upon, the act which is challenged, but upon the General Statutes of the state. He had jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty. The judgment, so long as it remained unreversed, was for every purpose as conclusive between the parties, and upon every question necessarily embraced in the judgment, as would have been that of the highest court of record in the state. Process regularly issued upon this judgment, as was the execution upon which the plaintiff was imprisoned, was a protection to the officer executing it, and to the parties at whose instance it was issued and served. It cannot be attacked collaterally for error of the justice, or irregularity, and in an action of false imprisonment it is a perfect shield to all persons acting under it. The plaintiff is estopped by the judgment."

In *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623, the court held that a justice of the peace who enforces an ordinance which is void for want of power in the city to enact it cannot be held liable therefor in a civil action; and a ministerial officer who acts in the enforcement of such ordinance, acting under a warrant issued by the justice, regular on its face, is protected thereby. To the same effect are *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, and *Gifford v. Wiggins* (Minn.) 52 N. W. 904.

In the case of *Baxter v. Thomas* (Okl.) 46 Pac. 479, the defendants had been arrested and convicted in the police court of the city of Guthrie of violating an ordinance similar to the one involved in this case. They petitioned the district court for a writ of habeas corpus, alleging the unlawful restraint of their liberty in violation of the constitution of the United States. Upon a hearing of the issues raised by the return, the court found that the arrest and imprisonment of the petitioners were unlawful, and directed their discharge. The case was taken to the supreme court of the territory, where the judgment of the lower court was affirmed. The law of that case, determined on a writ of habeas corpus, is clearly not applicable to the case at bar. A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation may be discharged therefrom on habeas corpus. The *Stockton Laundry Case*, 26 Fed. 611. But it does not follow that an officer executing a process of the court regular on its face is liable in a civil action for damages.

From these authorities, it appears that the answer sets up a complete defense to the cause of action alleged in the second and third counts, and, as the demurrer is general to the whole answer, it will be overruled.

EWING et al. v. GOODE.

(Circuit Court, S. D. Ohio, W. D. January 15, 1897.)

1. PHYSICIANS AND SURGEONS—MALPRACTICE.

In order to recover damages from a physician or surgeon for want of proper care and skill, the plaintiff must show, both that the defendant was unskillful or negligent, and that injury was produced by his want of skill or care.

2. SAME—DAMAGES.

Mere lack of skill or negligence without injury gives no right to recover even nominal damages.

3. SAME—WARRANTY.

A physician is not a warrantor of cures, in the absence of an express contract to that effect. His implied obligation arising from his employment is only that no injury shall result from any want of care or skill on his part.

4. EXPERT EVIDENCE—WEIGHT AND VALUE.

Expert evidence in cases where the subject of discussion is on the border line between general and expert knowledge, as in questions of value, is not conclusive upon court or jury, but the latter may draw their own inferences from the facts, and accept or reject the statements of experts; but upon questions involving a highly specialized art, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence; and, when there is no such evidence to support an allegation depending upon such a question, there is nothing to justify submitting the issue to the jury.

5. PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE.

Upon a review of the evidence in this case, *held*, that there was no evidence to justify the submission to the jury of the question whether the defendant, a physician, had been negligent in his treatment of the plaintiff.

On Motion to Direct a Verdict for Defendant at the Close of all the Evidence.

Blackburn & Rhyno, for plaintiffs.
Smith & Kuhn, for defendant.

TAFT, Circuit Judge. In this case the petition of Nellie Ewing, the plaintiff, alleges that she employed the defendant, Goode, a surgeon and oculist, to cure her of a certain malady of her eye, for a reward to be paid therefor; that defendant entered upon such employment, but did not use proper care and skill in the operating on the eye of plaintiff, and did not bestow proper attention and treatment upon the eye after the operation, causing her to suffer great pain, and to lose the right eye entirely, and to impair the sight of her left eye. The answer of the defendant denies unskillfulness or lack of attention on his part and any injury to the plaintiff caused thereby.

It is well settled that in such an employment the implied agreement of the physician or surgeon is that no injurious consequences shall result from want of proper skill, care, or diligence on his part in the execution of his employment. If there is no injury caused by lack of skill or care, then there is no breach of the physician's obligation, and there can be no recovery. *Craig v. Chambers*, 17 Ohio St. 253, 260. Mere lack of skill, or negligence, not causing injury, gives no right of action, and no right to recover even nominal damages. This was the exact point decided in the case just cited.

In *Hancke v. Hooper*, 7 Car. & P. 81, Tindal, C. J., said:

"A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice; but, in an action against him, the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred."

Before the plaintiff can recover, she must show by affirmative evidence—first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, establish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, "*Res ipsa loquitur*," were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the "ills that flesh is heir to."

The preliminary question for the court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that defendant was unskillful or negligent, and that his want of skill or care caused injury. In the courts of this and other states the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the court must submit the issue thus made to the jury, with the power to set aside the verdict if found against the weight of the evidence. In the federal courts this is not the rule. According to their practice, if the party having the burden submits only a scintilla of evidence

to sustain it, the court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant. Hence our inquiry is: Does the case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant, or injury caused thereby? *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463.

In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury. Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury. When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither. *Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co.*, 22 U. S. App. 102, 114, 9 C. C. A. 314, and 60 Fed. 993; *Ellis v. Railway Co.*, L. R. 9 C. P. 551.

These facts may be taken as undisputed in this case:

Mrs. Ewing, the plaintiff, lives with her husband in Covington, Ky. He was, during the time of the existence of the professional relation between his wife and the defendant, a printer, engaged in the office of the Commercial Gazette Printing Office, in this city. Dr. Goode is a highly-educated and experienced physician and oculist of the city, now engaged solely in treating diseases of the eye. In September, 1894, Mrs. Ewing began to feel a haziness in her right eye. It grew worse, so that in the spring of the next year she consulted Dr. Tangiman, an oculist of this city. He told her that she had cloudiness of the lens. Becoming dissatisfied with his treatment, she went, upon the recommendation of Dr. Kebler, her family physician, to consult Dr. Goode. He examined her, and told her that she had cataracts in both eyes; that an operation would soon have to be performed on the right eye. Plaintiff's own expert witness, Dr. Buckner, who examined the left eye in June, 1896, confirms the statement that there is a cataract in the left eye. Cataract is

a disease of the lens of the eye, which renders it cloudy and opaque, and prevents the passage through it of the rays of light, which in its normal condition it focuses on the retina. The operation for cataract is an operation by which the whole lens is removed from the capsule covering in which it is inclosed and suspended in the eye. The removal is usually effected by cutting a passageway for it, through the cornea and the iris, both of which are situated in the eye in front of the lens. This may be done at the same time with the main operation, or long enough before to permit the healing of the wound necessary in cutting before the removal of the lens. The defendant pursued the latter course. The auxiliary operation is called the "preliminary iridectomy." It was performed on the 8th day of July, 1895. It was a smooth and successful operation. The wound healed quickly. No inflammation or formation of pus ensued. On the 25th of September following, the main operation was performed. Through the passageway in the iris, an instrument was inserted, and the covering of the lens capsule was ruptured, and then the lens was gently pressed out through this opening and through the hole cut in the iris in the preliminary operation. The operation was smooth and successful, and after a week or 10 days the wounds were nicely healed. Close attention was given by the defendant and his assistant, Dr. Hefebower, to see that no piece of the iris tissue should be caught or incarcerated in the lips of the wound. No inflammation or pus followed the operation. There was pain in the right eye on the first day, which was relieved apparently, and at least for a time, by a loosening of the bandage. The treatment pursued after each operation was that approved by the medical profession. After 10 days, three to four tenths of vision was found to be restored to the right eye by the use of the cataract glass, which is the lens needed to supply the place of the lens which was extracted. By the use of the ophthalmoscope, the whole interior of the eye was explored; the media were found to be clear; and all the parts were normal. After two or three weeks, the plaintiff was able to go about, and upon the 19th of October came from her home, in Covington, to visit the defendant, and paid him \$10 on his bill of \$100. An examination of the eye showed that it was in good condition, and the test for vision was as stated above. The treatment testified to, and not denied, up to this time, was in accord with the best approved views of the profession. During this period, the plaintiff visited Shillito's store several times, and did some of her housework at home, and on the 11th of November came again to visit the defendant, and to pay him \$10. He examined the eye, and found it in good condition, without the slightest indication in it that there was anything wrong. On the 19th of November, the plaintiff complained of pain, and another examination of the eye was had, but no cause for the pain was found in an exploration of it with the ophthalmoscope. The complaints of pain continuing, the defendant attributed it to neuralgia of the fifth nerve, because there was no other explanation of it, and applied leeches to the flesh surrounding the eye upon the 24th. The pain continued, and in the first week of December the defendant and Dr. Hefebower again carefully examined the eye at defendant's

office, and confirmed their conclusion that the pain was neuralgia. On the 8th of December, which was Sunday, in the absence of the defendant from his office, the husband of the plaintiff called Dr. Hefebower to assist the plaintiff, and relieve her from pain, of which she was complaining bitterly. He again examined the eye with the ophthalmoscope, and found no evidence of reason for the pain in the eye, and fortified his previous judgment that it was only neuralgic pain. He prescribed a drop of cocaine and powders of phenacetine and salol to relieve the neuralgia. On the next day, upon the 9th of December, which was Monday, Hefebower saw Goode, and advised him of his visit. Defendant visited plaintiff that day, and, after a thorough examination of the eye, thought he detected a slight increase in the tension of the right eye, but was doubtful of it. Although the eye had been carefully examined since July 8th for tension, never until this date had there been the slightest evidence of an increase.

Increased tension of the eyeball is the predominant symptom of the disease of the eye known as "glaucoma." This is a disease the causes of which are but little understood. It is supposed to be an abnormal increase of the secretions of the inner eye, and a consequent pressure of one part of the eye against another, so as to close and stop up the canal for the escape of the eye's secretions, known as the "filtration angle." It may appear in an eye unaffected by injury or disease, in which case it is called "simple glaucoma." It may appear in an eye diseased or injured, in which case it is called "secondary glaucoma." The name "secondary glaucoma" does not necessarily indicate that it is caused by the prior condition of the eye. In cases of simple glaucoma there are, perhaps, 50 per cent. of recoveries. In cases of secondary glaucoma, owing to the diseased or enfeebled condition of the eye when glaucoma sets in, the percentage of recovery is much reduced; and, when it sets in after an operation for cataract, the eye is almost certainly doomed. Glaucoma can rarely be diagnosed in the absence of an increased tension. It is frequently accompanied by pain, and the media of the eye become obscured or cloudy, and vision is lessened; but, in the absence of increased tension, the other symptoms do not indicate glaucoma. There are but two remedies for glaucoma. One is the use of a drug called "eserine," and the other is the cutting of a passageway through the cornea and iris, into the cavity of the eye, to open a canal for the release of the secretions. The reason why, in secondary glaucoma, after a cataract operation, hope of recovery is so slight, is that just such a passageway has already been cut for the removal of the cataract, and, if that does not serve to relieve the pressure, the chance that a second one will do so is very very small.

On the 9th of December, when the defendant visited the plaintiff, and suspected slight increased tension, he prescribed eserine. The prescription was not filled till the 11th. It directed the use of a drop a day in the eye. The phenacetine prescribed by Hefebower to relieve the pain he approved the use of. On the 10th of December, defendant visited plaintiff again, and found that

there was no increased tension, and no other evidence in the eye itself of glaucomatous conditions, though the pains continued. He confirmed his conclusion that no increased tension existed by another visit and examination, on the 11th of December. After that he remained in the city until the 18th, and received no call from the plaintiff. He then left for Pittsburg, to perform an operation, and to spend the Christmas holidays. He asked Dr. Heflebower, a competent oculist, who was familiar with the plaintiff's case, and whom plaintiff had called in before when she could not get defendant to attend to plaintiff's case should she call for him. Whether she did call Dr. Heflebower, and whether he went over or not, are matters of evidence in dispute. He says that he went twice about Christmas or later, and found the eye in good condition, with no increased tension; that she was taking the eserine, but that the pain continued; and that he attempted to relieve her by continuing the phenacetine, and by hot applications. Plaintiff denies that Heflebower was at her house in December. On the 6th of January, defendant returned, and answered a call from plaintiff, and, on examination of the eye, found increased tension, amounting to +1, and distinct symptoms of glaucoma. He requested her to come to his office, which she did, with her husband; and there both he and Heflebower examined the eye, and, finding glaucoma beyond a doubt, determined upon a second iridectomy. It was performed on January 8th. This was with the hope of relieving the pain, with the hope of retaining the eyeball in the head by preventing an inflammatory result, and making the dead eye quiescent, and with the very remote possibility of saving what sight there was left in the eye. The operation was performed. The iris was again clipped, but beneath the pupil this time, instead of above, as before; and in a short time the wound healed, without inflammation or pus. It was for the third time a smooth operation, but it did not prevent the pain. The defendant attended the plaintiff frequently until the 4th of February, when he was discharged. The plaintiff then went to Dr. Debeck, an oculist, and was treated by him for a month; then to Dr. Keeny, and was treated by him for six weeks; and finally to Dr. Buckner, who found the eye inflamed and congested, and a menace to the other eye, in that it was likely to cause sympathetic ophthalmia therein. He advised extraction, and, after consultation with Dr. Sattler, the eye was removed, late in June, 1896, and a glass eye substituted, with the result of relieving the left eye, which, though affected with peripheral cataract, still affords the plaintiff some vision.

The facts above given, except where otherwise expressly stated, are either admitted by plaintiff, or are established by uncontradicted evidence. The chief difference of fact between the plaintiff and defendant is in the time when it is said that pain was present in the right eye, and when it was in the left eye. Plaintiff said she had pain constantly in the right eye from the first to the third operation, from July 8, 1895, until January 6, 1896, and in her left eye from the time of the second operation, September 25th, until after the third operation. Defendant and Heflebower say that there was no pain, except immediately after the second operation, until November 19th,

and that at no time was there complaint of pain in the left eye. The other important difference is as to the two visits of Hefebower to plaintiff about Christmas time, during defendant's absence in Pittsburg. The plaintiff called Dr. Buckner to the stand as an expert oculist. He described in detail how the operations performed by the defendant should have been performed, and his evidence left not the slightest doubt that the course pursued by defendant in respect to the operations and subsequent treatment was in accordance with the best professional opinion. He stated with emphasis that glaucoma setting in 80 days after the second operation, and double that time after the first operation, could not be attributed to the operations as a cause. He stated, further, that though pain was a frequent accompaniment of glaucoma, and a symptom that required close examination of the interior eye to discover its seat, and a careful testing for increased tension, yet, if there was no increased tension, and the eye was clear and normal to its fundus or bottom, when seen through the ophthalmoscope, he should diagnose the pain, as defendant and Dr. Hefebower had, as due to neuralgia, requiring treatment of the nerves. It seems to me clear to a demonstration, therefore, that the evidence for plaintiff utterly fails to show that the first two operations had any causal relation to the glaucoma, or that there was the slightest want of skill or negligence in the performance or subsequent treatment of the wounded eye.

It is conceded that neuralgia is one of the most difficult diseases to control, and there is nothing to show that the failure to control it, even if it existed as constantly as plaintiff's witnesses testify, is evidence of a want of skill or attention. She concedes that she was able to go about to attend to her household duties. Her husband lost but the time immediately succeeding each operation necessary to nurse her. There is nothing to show that the treatment for neuralgia administered by the defendant was not proper, in the use of leeches, of phenacetine and salol, and hot applications.

It only remains to consider whether there is more than a scintilla of evidence upon which to base the claim that the defendant was negligent after the 9th of December, when he suspected, but doubtfully, the presence of increased tension. Hefebower, who saw the patient the night before, on the 8th, and who looked into the eye with the ophthalmoscope, and had made the other usual examination, had found no increased tension, and on the 10th and 11th the defendant could discover none. Out of abundant caution, he prescribed the eserine on the 9th, and the plaintiff took it from the 11th on (how long is not quite clear). Defendant did not see plaintiff during the next week. He thought from his full examination of the 9th, 10th, and 11th, and from Hefebower's of the 8th, that there was no ground for further fear of glaucoma, and that, if any change took place, plaintiff would call him up. It appears from the expert evidence that slight variation in tension in an eyeball, like this one of the 9th, may occur in a healthy eye. There is a suggestion in the evidence of plaintiff that defendant promised to come when it was necessary, and so the burden was on

him; but her own evidence is by no means positive or clear on this point, and the admitted fact that the telephone was put in on December 14th, just to permit her to call him when she needed him, and her statement that, as the pain increased, she did call him, show beyond a doubt that she did not regard herself as obliged to wait his coming. Now, she says the pain grew worse and worse, and that she called the defendant's office repeatedly by telephone, and could not get him. She cannot state that she called him after the 11th of December, and before the 18th of December. Nor could this have been so, because he was in the city until that time, and must have heard from her had she called. After that time he had arranged that Dr. Heflebower should answer his calls.

As to the right of Dr. Goode to leave the city on the 18th of December, when his patient had not called him for a week, and while she was presumably following the precautionary and alleviating prescriptions of eserine and phenacetine, I do not think there can be any doubt, if he made provision for the attendance of a competent oculist in case of a call. The custom of the profession, as testified to by Dr. Buckner, certainly justifies it. What the degree of liability of defendant for the act of the physician he substituted is, is an interesting question; but it is not of importance in this case, for nothing unskillful on Dr. Heflebower's part is shown. Whether Dr. Heflebower was, in fact, called and went, is in dispute, but certainly defendant made arrangements for the purpose. If his office girl failed to tell the plaintiff that defendant's patients during his absence were to apply to Dr. Heflebower, this failure would probably be chargeable to defendant; and to this extent, in the plaintiff's case, there may be some evidence to go to the jury tending to show neglect. Of course, the defendant's office girl testifies that she did tell plaintiff to call up Dr. Heflebower, and the latter says that he was called, and made two visits, and the evidence is very clear and satisfactory. But on this issue I am now deciding, I must assume no such evidence to have been introduced. Plaintiff testified herself that she learned, by calling the office of defendant's father, that defendant was out of the city. If so, under all the circumstances, it is difficult to see why she did not then call Dr. Heflebower. Moreover, if she was in increasing pain, as she says she was, in December, why did she not send her husband to learn where defendant was, and why she could not reach him? But, assuming negligence on the defendant's part because of a failure of his office girl to obey his directions, we come to the question whether this is shown to have done the plaintiff any injury thereby. If we accept Dr. Heflebower's statement, then there was no evidence of glaucoma for some time after Christmas. If we ignore his statement, there is no evidence when it appeared, between December 11th and January 6th. Taking the plaintiff's evidence, it was a matter of doubt on January 6th whether the symptoms were unmistakable. Dr. Buckner, the expert produced by the plaintiff, says that he would not make a second iridectomy on an eye already treated for cataract, in which there had been a preliminary iridectomy, until it was conclusively settled that secondary glaucoma

was present. The degrees of tension in glaucoma are +1, +2, and +3. On the 6th day of January, the tension was but +1, tending to show that the disease, which works so rapidly, had set in, in its unmistakable form, but a short time before. At any rate, there is no evidence to the contrary. But assuming, against defendant, that glaucoma was certainly present on January 6th, there is nothing to show that its symptoms were so manifest at an earlier date that there was any hurtful delay in the operation. Eserine had been prescribed as early as December 9th. A preliminary iridectomy had already been performed, and thus two remedies had been used, and there remained only that which was a dernier resort, and one from which little, in fact, could be expected. The necessity for an immediate operation is very much greater in cases of glaucoma when there has been no prior operation than in a case like the present. It is admitted that nothing can be done to prevent secondary glaucoma if it sets in, and that, after a cataract operation, the chances of recovery are almost nil. In the light of these facts, it is clear to me that the evidence that plaintiff suffered any injury from defendant's failure to supply another physician during his absence in Pittsburg, because of his office girl's neglect (if she was guilty of any), is not more than a scintilla, if that.

The subsequent history of the case the defendant is not responsible for. There is not the slightest proof of a want of skill in the third operation. The eye itself was in the possession of plaintiff at the last trial. If it had borne any evidence of an unskillful operation, it would doubtless have been offered in evidence. After defendant's discharge, the patient was in the hands of two physicians for two months and a half, and the fact that the deadly disease from which she was suffering finally led to the removal of the eye can be attributed to no lack of skill on the defendant's part. As the extraction of the eye is not an infrequent result in glaucoma, however treated, the unskillfulness and the causal connection cannot both be presumed.

The condition of the plaintiff cannot but awaken the sympathy of every one, but I must hold that there is no evidence before the court legally sufficient to support a verdict in her favor. I should deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being true, it becomes my duty to direct a verdict for the defendant.

COLORITYPE CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. January 7, 1897.)

1. REVIEW ON ERROR—VERDICT—WEIGHT OF EVIDENCE.

The circuit court of appeals cannot set aside a general verdict on the ground that it was against the weight of evidence, or upon a guess as to the mental processes by which the jury reach the conclusion expressed therein.

2. LANDLORD AND TENANT—INTERPRETATION OF LEASE—MODIFICATION.

A lease made in August demised the four upper lofts of a building then in course of erection for five years from February 1st following. In September

the parties made a further written agreement, whereby the lessor stipulated to have the premises ready for occupancy on February 1st, excepting certain minor details, and that he would give the lessees possession at as early a date before February 1st as he could have the lofts in suitable condition; the rent, however, to commence February 1st, "or as soon thereafter as the building is completed." If the premises were not ready for occupancy on that day, the lessor was to forfeit \$50 a day thereafter, etc. *Held*, that this did not so modify the lease as that the lessee would not be liable for rent, and would be entitled to the daily penalty, until the whole building was completed, but merely bound him to have the leased lofts ready on February 1st, except the minor details mentioned.

3. SAME—PAROL EVIDENCE.

Held, further, that there was no such ambiguity in the contract as would warrant the introduction of prior oral negotiations or understandings.

4. REVIEW ON ERROR—HARMLESS ERROR.

A lease of part of a building then in course of construction required "it to be fireproof." In an action for rent, etc., where defendant set up that the building was not fireproof, plaintiff, who was an architect, testifying in his own behalf, after describing the construction of the building in this respect, was allowed to state that "that mode of construction is commonly called fireproof" in his profession. *Held*, that if this was error, it was rendered harmless by the subsequent introduction of the building law containing the definition of a fireproof building, together with evidence by the plaintiff, without objection or contradiction, that the building was so constructed.

5. TESTIMONY OF PARTIES—REQUESTS TO CHARGE.

A requested charge, directing the jury to remember that plaintiff "is the most interested party in the controversy," that they are to receive his testimony with caution, and are empowered "to reject any evidence which is uncorroborated, even though it be uncontradicted," is properly refused.

6. REQUESTS TO CHARGE—ORAL MODIFICATION.

Defendant submitted a written request, marked "E," containing manifestly objectionable clauses, and after the general charge orally asked the court to give his request, marked "E," repeating it with slight verbal changes, which, however, much modified its objectionable features. *Held*, that the court was warranted in inferring that he referred to the request as written, and in refusing to give it.

This is a writ of error, brought by the plaintiff in error, who was defendant below, to review a judgment in favor of defendant in error (plaintiff below), entered in the circuit court, Southern district of New York, upon the verdict of a jury.

Williams, the plaintiff, was an architect and builder, and the owner of the premises at No. 32 Lafayette Place, in the city of New York. He constructed a building thereon, and leased the four upper floors to the defendant. The lease was made while the building was in process of erection, and Williams agreed to complete it in accordance with certain plans agreed upon between the parties. He also, at the request of defendant, and independent of the written contract, did a considerable amount of work on the floors so let in order to adapt them to the requirements of defendant's business. This action is brought for rent unpaid under the lease for the months of February and March, 1894, for the value of this special work done at defendant's request, and for services in running the steam plant in the building. This last item was disallowed by the court, and, since plaintiff below sued out no writ of error, is not before this court. The defendant did not dispute the charge for special work, except as to about \$1,460, upon which contention it prevailed at the trial. Plaintiff has not sought to review the decision as to this \$1,460, and that item is not before the court. The defendant denied that any rent for the period sued for became due under the lease as modified by a certain collateral agreement. It also set up five counterclaims. The first (\$75 for steam power furnished to plaintiff after the period sued for) was allowed, and is not here for review. The third (for damages by reason of improper construction of the skylight) was left to the jury to decide. It is conceded that the amount of this counterclaim, if allowed, was \$71.50, and

the jury were so instructed. The second counterclaim (for cost of moving radiators alleged to have been improperly placed) and the fourth (for excess of fire insurance premiums claimed to have been the consequence of a failure to make the building fireproof) were disallowed. The fifth counterclaim was for damages for delay in completing the building under a penalty clause contained in the agreement between the parties. This counterclaim also was submitted to the jury. Inasmuch as it was admitted that plaintiff was entitled to recover \$3,574.19 for the extra work, and only \$146.50 was to be deducted for the steam and the skylight, and the plaintiff conceded only \$250 to be due from him under the penalty clause, and insisted upon an additional sum for rent, it is manifest from their verdict of only \$2,548.69 that the jury found against the plaintiff both on the question of rent and on that of penalty for delay in completing.

J. Aspinwall Hodge, for plaintiff in error.

David B. Ogden, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. It will be seen from the above statement of facts that a part only of the questions which were litigated in the circuit court are presented here for review. The several objections to the judgment which have been submitted on the argument will be separately considered.

The court charged the jury that "by the terms of the contract between the parties at all times after February 1st the plaintiff was either bound to pay the stipulated penalty or was entitled to receive the stipulated rent; and the date when the penalty ceased and the rent began was the same." Such objections as have been urged to this part of the charge as not correctly construing the contract between the parties will be considered hereafter. It is quoted here as introductory to the first point of plaintiff in error, in which it is contended that the verdict cannot be sustained even if it is held that the contract was properly construed by the trial justice. Plaintiff conceded that under such construction the building was not completed ready for occupancy on February 1st, the date when rent was to begin, provided plaintiff had fulfilled his covenants, but contended that it was so completed on February 6th. Defendant contended that it was not so completed as to terminate the penalty clause, and make defendant liable for rent, until April 2d. It is urged here that the court should have instructed the jury to decide this contention in favor of the defendant. The record, however, shows that there was a conflict of testimony as to the day when the building was completed within the terms of the contract as the court construed them. It was not error, therefore, to leave that question to the jury; on the contrary, it would have been error to take it from them. The defendant, however, seeks to show by an analysis of the verdict that it is to be assumed that the jury fixed upon some day other than February 6th, or April 2d, which supposed date the evidence does not sustain. That question is not before this court. If the verdict is supposed to be against the weight of evidence, that point should be raised by motion for a new trial; and the decision of the trial judge on that point is not reviewable by writ of error in the federal courts. Upon conflicting evidence the question was submitted to

the jury—properly so submitted, since it is apparent that the evidence was conflicting—with instructions to bring in a general verdict; and their general verdict upon such conflicting evidence, not having been set aside by the court, must stand here as a finding of fact that at some date subsequent to February 6th the building was completed, the running of the penalty clause stopped, and liability for rent incurred. If defendant wished to have the jury fix that date specifically, it should have asked for a special verdict upon a question properly framed. This court cannot set aside the general verdict upon a guess as to what was the mental process by which the jury reached the conclusion which they have expressed therein. Moreover, we find no assignment of error which covers this point.

The main question in the case is whether the trial judge correctly construed the contract between the parties, and properly instructed the jury thereon. The lease was executed August 30, 1893. It demised to defendant the four upper lofts of the building known as "No. 32 Lafayette Place" for the term of five years from February 1, 1894; the lessee covenanting to pay \$15,000 a year, in equal monthly payments on the 1st day of each month. Subsequently, on September 7, 1893, the parties entered into a further written agreement, in substance as follows: It recites that defendant has executed the lease, and obligated itself, under the covenants thereof, upon the express condition that all the agreements hereinafter in the agreement contained shall be fully performed by plaintiff. Williams covenants and agrees that the building now in course of erection shall be practically completed in compliance with the plans, * * * which * * * provide for the erection of a substantial eight story and basement fireproof building, * * * and on the top loft a suitable skylight or skylights, providing the same are acceptable to * * * the building department, * * * and not objectionable to the board of fire underwriters. Also that the building is to be furnished with freight and passenger elevators, etc. Williams further stipulated that:

"He will have the premises ready for occupancy by defendant on or before February 1, 1894, excepting, however, such minor details as gas fitting, steam fittings, painting, and the various nonessential and minor details of the said buildings as cannot be completed on or before February 1, 1894.

"That he agrees to give the [defendant] possession of the premises leased to them at as early a date before the first day of February, 1894, as he can have the lofts in suitable condition ready for occupancy, or for them to place their machinery in; but the rent to commence on February 1, 1894, or as soon thereafter as the building is completed.

"That in case the building is not ready for occupancy on the first day of February, 1894, the measure of damages shall be a forfeiture of fifty dollars (\$50.00) per day during the month of February, and one hundred dollars (\$100.00) per day during the month of March and thereafter.

"But it is covenanted that, in the event of the said John T. Williams being prevented from completing the said building on the first day of February, 1894, or later, by reason of the occurrence of a strike which shall prevent the completion of the said premises on or after that date, he shall be exonerated and held blameless of and from any or all liability by reason of the delay in the completion of said building caused by said strike."

The defendant has argued at great length that this agreement so modified the original lease that, although the premises leased might be ready for occupancy as that phrase is defined in the agreement, on February 1st, or some subsequent day, there would be no liability for rent, and defendant would be entitled to exact the overtime penalty until the whole building was entirely completed. There is no force in this contention. The italicized paragraph above quoted provides for the single case where the defendant is put into possession before the beginning of the lease. It is a parenthetical clause in no wise affecting the principal part of the agreement, which provides in plain language that plaintiff will have the premises ready for occupancy, excepting the minor details, on February 1st; that, if not ready for occupancy then, the specified daily penalty shall be paid, unless the failure was due to the occurrence of a strike. The trial judge thus construed the contract between the parties as made out by the lease and agreement, and charged the jury accordingly. In this there was no error. Moreover, the contract is so plain and unambiguous upon its face that he correctly refused to admit evidence of oral conversations and negotiations prior to the making of the contract, which were offered upon the theory that they would elucidate alleged obscurities in the contract which, so far as we can see, do not exist. This disposes of most of the 46 assignments of error. They are too numerous to review in detail.

As to the second assignment of error which is referred to in the brief under this point, it is sufficient to say that the objection to the question put to the plaintiff: "Did you at any time agree with defendants that that building should be complete so that they could * * * commence * * * business there by February?"—did not state the ground now relied upon. The only point raised was that, if such agreement was in writing, the writing was the best evidence.

Upon the point that the court erred in refusing to charge the jury that they must find for the defendant on the counterclaim of \$71.50 for cost of alterations to the skylight, it is sufficient to say that, in view of the testimony of defendant's foreman of the engraving department that before alterations "the skylight was all right," there was sufficient conflict of evidence to send that question to the jury. The evidence excluded as to the capacity of the floor to sustain the weight of defendant's presses was not so restricted as to bring the charge of alleged failure in that respect within the specific terms of the contract, viz. "five hundred pounds per square foot, as calculated by the formulas in use by [plaintiff]." The exclusion was not error. The judge also correctly excluded the testimony offered as to the location of the steam radiators on the eighth floor. There was nothing in the contract about putting the radiators in any particular place, and no direction was given to the plaintiff to put them in one place rather than another.

It is contended that there was error in allowing the plaintiff, after describing how the building was constructed with reference to security against fire, to state that "that mode of construction is

commonly called "fireproof" in his profession." We are not inclined to sustain this contention; but, if it were error to admit the evidence, it was harmless error. Subsequently the building law containing the definition of a fireproof building was put in, and it was proved by the evidence of plaintiff, without contradiction and without objection, that the building was thus constructed. Upon this state of the proof, with nothing to show that the building was not in fact fireproof, any evidence as to what premiums defendant paid for insurance was wholly irrelevant and immaterial, and was properly excluded. The point is now made that the plaintiff's own testimony to the mode of construction was the only evidence on that point; that "it was not sufficient; it was improper; its introduction is reversible error." In view of the fact that the question which elicited the evidence was not objected to, nor any motion made to strike out the answer, and of the further fact that the judge charged "there was no adequate evidence that the building was not fireproof," to which there was no exception, it is a frivolous waste of time to raise such a point in the appellate court.

In defendant's replying brief there occurs this paragraph:

"It was incumbent upon the plaintiff to prove that the building was fireproof. If he did this, he did it solely by his own testimony, as pointed out by the defendant in error himself under this point. Manifestly, then, it was a question to be submitted to the jury, and not taken away from them, as it was, under the exception of the plaintiff in error."

Diligent search of the record has failed to disclose any exception to the court's action in taking this question from the jury. Since counsel should know what exceptions are preserved in a record and what are not, it is to be hoped that hereafter greater care will be exercised in citing them. It is an imposition upon the court to be constrained to go over the whole record, page by page, in hopeless search for an alleged exception which does not exist save in the exuberant statements of the brief.

The only remaining point argued upon the brief arises upon a refusal of the court to charge one of defendant's requests. Before the summing up, defendant, conformably to the practice of the circuit court, submitted written requests to charge. There were 30 of them in all. Among them was the following:

"E. In weighing the evidence the jury are to remember that the plaintiff is the most interested party in the controversy. They are to receive his evidence, therefore, with caution, as being that of a partial witness; and they are empowered to reject any evidence which is uncorroborated, even though it be uncontradicted."

Manifestly, such a charge would be improper. To instruct the jury that the plaintiff is more interested in a controversy than is the defendant, would be preposterous. The judge, naturally enough, did not embody this proposition in his colloquial charge. At the close of the charge defendant excepted to certain specified parts of it, and then the record proceeds as follows (defendant's counsel loquitur):

"I ask your honor to charge the defendant's request marked 'E': 'In weighing the evidence the jury are to remember that the plaintiff is an interested party

in the controversy. They are to receive his evidence; therefore, with caution, as being that of a partial witness; and they are empowered to reject any evidence given by him which is uncorroborated, even though it be not contradicted.' The Court: I decline to charge that whole paragraph. (Exception by defendant.)"

It will be observed that two changes, brief in verbiage, but extensive in scope, were made in the oral restatement of this written request. The words "given by him" are inserted near the close of the sentence, so that it no longer instructs the jury that they may reject "any uncorroborated evidence," but only uncorroborated evidence of the interested party. The words "the most interested" are changed to "an interested," so that the request is no longer obnoxious to the particular objection above referred to. Now, these changes, important though they are in their effect, are trifling in verbal expression, and not likely to attract attention upon an oral repetition of the modified request. When the trial judge was requested after the colloquium to charge "the defendant's request marked 'E,'" he would naturally suppose that his attention was directed to the marked request with which he had been furnished, and which he had already examined. If defendant wished a ruling upon some modification of that marked request, which he thus brought for the first time to the court's attention, he should have indicated the particulars in which he wished to modify it. Not having done so, his exception cannot avail him.

The judgment of the circuit court is affirmed.

SWIGETT v. UNITED STATES.

(District Court, D. Montana. November 9, 1896.)

REGISTER OF LAND OFFICE—OFFICE RENT—LIABILITY OF UNITED STATES.

There is an implied contract on the part of the United States to refund, to a register of the land office, office rent necessarily paid by him, in order to have and maintain an office necessary to the conduct of the land office business in his district.

Geo. M. Bourquin, for plaintiff.

P. H. Leslie, U. S. Dist. Atty.

KNOWLES, District Judge. In this action Samuel A. Swigett sues the United States to recover the sum of \$699 for moneys paid by him for the use and benefit of the United States on account of rent for the United States land office at the district of Helena, state of Montana.

I find as facts under the pleadings and evidence: First. That said Samuel A. Swigett is a resident of Helena, state of Montana. Second. That he was appointed register of the United States land office for the Helena land district of Montana in May, 1890, and served as such officer from the 3d day of July, 1890, to the 1st day of June, 1894. Third. That during the time intervening between said dates the said land office for the Helena district of Montana was established by law at the city of Helena, said state; and that, in order that the business pertaining to said office should be properly conducted, a place or office was

required, and it was required that the same should be kept open during business hours; and that it was necessary that said office should be kept not only for the transaction of the business pertaining to said office, but was also necessary as a place for the keeping of the books, records, papers, and files pertaining to said office, and the furniture used therein, the property of the United States. Fourth. That petitioner, in company with the receiver of said land office, took charge of the rooms used as and provided as an office, and of the books, records, files, and furniture therein, and that they did occupy said rooms in the discharge of their respective duties as register and receiver during the time they held said offices; and that said records, books, files, and furniture were kept in the same during that period. Fifth. That during the time said petitioner and said receiver occupied as an office said rooms, the United States failed to pay any part of the rent for the same; that petitioner during said time paid on said rent, for and on behalf of the United States, to the end that said land office might be maintained, the sum of \$699; that said expenditure was necessary in order that the said land office of said Helena district in Montana should be kept open, and the business of the United States pertaining to the sale of public lands in said district should be properly transacted; and that the sum so paid was a reasonable and proper sum for that purpose. Sixth. That the salary petitioner was to receive was to equal \$3,000 per annum, provided the salary and fees received for the discharge of the duties of said office amounted to that sum; that the earnings of the said office of register amounted to more than said sum, to wit, \$3,200 per annum, and that said sum was paid into the treasury of the United States, as required by law; that the United States paid to petitioner the said sum of \$3,000, but, although petitioner presented his account for the said sum so paid for rent, as above stated, to the proper officers of the United States, and demanded payment therefor, the United States failed and refused to pay the same.

I find as a conclusion of law that there was an implied contract on the part of the United States to refund and pay to petitioner the said sum of \$699, being the amount of said rent for rooms for said United States land offices, paid by him, said petitioner. The reasons which have induced me to come to the above conclusion are as follows: The land district of Montana was created by an act of congress dated March 2, 1867. In said act it was provided that a register and receiver of public moneys should be appointed for said district, who should reside at the place at which said office should be located, and should have the same powers, perform the same duties, and be entitled to the same compensation, as were prescribed by law in relation to land offices of the United States in other territories. The secretary of the interior, by this act, was authorized to locate the said land office. See 14 Stat. 542, 543. Subsequently the said secretary of the interior located the said land office at Helena, Mont. There are several provisions of the statutes of the United States which contemplate that there should be an office or

place of business in which the registers and receivers should transact the business pertaining to their office. Section 2235, Rev. St., provides that the register and receiver shall reside at the place where the land office for which he is appointed is directed by law to be kept. In section 2262, Rev. St., it is provided that it shall be the duty of the officer administering a certain oath to file a certificate thereof in the public land office of the district. It is undoubtedly a fact that the United States land offices in all of the Western states are kept as public offices. The records thereof are public records.

It further appeared by the evidence in the case that the register and receiver of the Helena land district did not select their office, but that a special agent of the interior department selected and designated the rooms which should be occupied as the public land office at Helena. Congress has, from time to time, made appropriations for the payment of the rent of the United States land offices. It appears from a letter of the secretary of the interior, in evidence in the case, that when these appropriations have been insufficient to pay the rent of all such offices he has designated the offices of which the office rent should be paid, and, according to his sense of justice, has designated that the office rent at places where the register and receiver were each entitled to a salary of \$3,000 per annum should not be paid. There is no law which directs such action, and there is no law that provides that such registers and receivers should pay the rent for their offices. In order that such registers and receivers should have an office in which to transact the public business, they are required to pay the rent therefor. This is understood at the interior department, to which such officers belong.

The district courts of the United States have jurisdiction to hear and determine all claims against the United States founded upon a contract, express or implied. 1 Supp. Rev. St. (2d Ed.) p. 559, §§ 1, 2, of an act to provide for the bringing of suits against the government of the United States. The question is here presented as to whether there is an implied contract on the part of the United States to repay to petitioner the amount of money he paid for rent for a United States land office as above stated. Whenever one person pays out money on account of and for the benefit of another person at his request, there is an implied contract that the last person shall repay to the former the same. Under the circumstances presented in this case, I think there was an implied request on the part of the United States that petitioner should pay that rent. "An agent is entitled to be reimbursed by his principal for all of his advances, expenses, and disbursements made in the course of his agency on account of or for the benefit of his principal, when such advances, expenses, and disbursements have been properly incurred, and reasonable and in good faith paid, without any default on the part of the agent." Mechem, Ag. § 652. The same rule applies to public officers. Mechem, Pub. Off. §§ 877-879. In this case there is no dispute but the amount of rent was reasonable, and in good faith paid. It was a proper payment, for otherwise the United

States could not have maintained a public land office at Helena, and the said register and receiver could not have properly conducted the business of such office.

In the case of *Andrews v. U. S.*, 2 Story, 202, Fed. Cas. No. 381, Justice Story said of a claim made by a collector of customs for office rent, fuel, clerk hire, and stationery against the United States:

"It appears to me very clear that these expenditures are properly to be deemed incidents to the office of the collector, and therefore that they ought to be allowed as proper charges against the United States."

This charge was made as an offset against a claim against the collector on his official bond. The supreme court, in commenting upon this case in *U. S. v. Flanders*, 112 U. S. 93, 5 Sup. Ct. 69, said:

"The view taken was that, if a claim, though not strictly of a legal nature, was *ex æquo et bono* due to the defendant for moneys expended on account of and for the benefit of the United States, he was entitled to an allowance and compensation therefor upon the footing of a quantum meruit, under section 3 of the act of March 3, 1797 (1 Stat. 514)."

In this case of *U. S. v. Flanders* the supreme court held that a collector of internal revenue, who had paid for advertising required to be done by law, was entitled to be reimbursed by the United States therefor, although there was no law that provided for such reimbursement.

In the case of *U. S. v. Stowe*, 19 Fed. 807, an Indian agent was required by an order of the commissioner of Indian affairs to have transported certain government property. It was held that the agent was entitled to reimbursement for the money expended in procuring such transportation, although there was no law providing for such repayment.

The theory upon which these cases were decided undoubtedly was that when, by law, a government officer is required to perform a certain duty which requires the expenditure of money, it should be considered as an incident to the performance of the duty.

In the case of *Gratiot v. U. S.*, 15 Pet. 336-371, the supreme court said:

"The department charged with the execution of the particular authority, business, or duty has always been deemed incidentally to possess the right to employ the proper persons to perform the same as the appropriate means of carrying into effect the required end, and also the right, when the service or duty is an extra service or duty, to allow the persons so employed a suitable compensation."

In this case it was also said that an officer required to perform extra services might show a contract, either express or implied, for the payment of such services. It would seem that this case also sustained the view that when an officer performs a required duty he would have the right to do what was necessary and incident to the performance of the same,—he can employ persons, and allow pay therefor. In applying the principles enunciated in this case to the one at bar, it would appear that they would justify the claim that when an officer is required to keep open a public office for the transaction of public business, he ought to be allowed for the necessary and proper expenses incurred in performing that duty.

In the case of *U. S. v. Lowe*, 1 Dill. 585, Fed. Cas. No. 15,635,

it was held that the claim of a receiver of a United States land office for office rent might, under circumstances, be allowed as an equitable credit, under the act of March 3, 1797. The circumstances under which it was held such an allowance should be made are not stated in the decision. In considering the allowance of a claim as an equitable offset, it should be borne in mind that at common law an independent claim or demand could not be offset against another independent claim or demand. Where some equitable ground appeared, a party might resort to equity to have one such claim offset against the other. The term "equitable claim" or "offset" may be applied to such claims. Until the passage of the act organizing the court of claims, the United States could not be sued. Now, under that act, and that of 1887, the United States can be sued upon an express or implied contract, both in the court of claims and in the district and circuit courts of the United States. *Clark v. U. S.*, 95 U. S. 539; *Salomon v. U. S.*, 19 Wall. 17; 1 Supp. Rev. St. (2d Ed.) p. 559.

The case of *Bane v. U. S.*, 19 Ct. Cl. 644, cited by the United States district attorney, would not seem to be in point in this case. In that case the only question considered by the court was as to whether the secretary of the interior should be compelled to pay office rent for a United States land office at Salt Lake, Utah. In that case it was held that he could not be so required, because there was no appropriation of congress covering such an expenditure. It was not decided that the United States was not responsible for such rent.

For the reasons assigned, it is ordered that judgment be entered against the United States for the sum of \$699.

SCULLIN v. HARPER.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1897.)

No. 253.

1. SLANDER—WORDS SPOKEN OF EMPLOYEE—ADMISSIBILITY OF EVIDENCE.

In an action for slander, where the defendant claims that the words spoken were privileged, because spoken by him in good faith, as a stockholder in a corporation, to an officer thereof, concerning one of its employes, it is competent for the defendant to testify that what he said was upon information, without malice, in the belief that it was true, to state any relevant part of the conversation in the course of which he uttered the alleged slander, including statements made by him of the nature of the information he claimed to have, and also to testify to the purport of an entry in a book, claimed to be the basis of his statements, without producing the book itself.

2. SAME—PRIVILEGED COMMUNICATIONS.

Communications, made by a stockholder of a corporation to an officer thereof, of matters concerning its employes, which, if true, are proper to be so communicated, are privileged, and, unless spoken with actual malice, the burden of proving which is on the plaintiff, do not give ground for an action for slander.

3. SAME—TRIAL—INSTRUCTIONS.

In an action for slander, based on words, some of which are actionable per se, and others not, it is error to charge the jury that, if the defendant spoke the words, or any portion of them, actionable in themselves, the plaintiff

is entitled to recover, since this leaves it to the jury to determine whether any portion of the words charged is actionable.

4. SAME—WRITING—PAROL EVIDENCE.

The rule that parol evidence of the contents of writing is not competent does not apply to a writing which is collateral only to the issue and not directly involved.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Charles W. Thomas, for plaintiff in error.

Luke H. Hite, Charles P. Wise, and George F. McNulta, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This was an action of slander. The trial resulted in a verdict and judgment for the plaintiff. Matters of inducement and innuendo omitted, the several counts of the declaration charge the utterance of the following words: "He is a dangerous man." "He is a perjurer." "He is a perjurer and a black-mailer." "He belongs to a gang that is organized in East St. Louis to extort money from our street railroad." "He went to Springfield, and swore to a lot of lies." "Another member of the gang is a relative of his, a Dr. Anthony, and between them they worked up a scheme, and got a judgment against us." These things, it is alleged, were said by Scullin, the plaintiff in error, concerning Harper, the defendant in error, in the presence and hearing of divers persons, on the 27th day of July, 1893, at East St. Louis. Error is assigned upon the rulings of the court in excluding evidence, and in giving and refusing instructions to the jury. Prior to July 27, 1893, Harper, who is a carpenter, had been in the employment of the East St. Louis Ice & Cold Storage Company as foreman of the ice gang, and shortly before that date had gone to Springfield as a witness for the plaintiff in a case in the United States circuit court against the East St. Louis Electric Street-Railroad Company, in which the plaintiff in error was interested as a stockholder, and had testified adversely to the company. The plaintiff in error, who resides in St. Louis, was also interested in the East St. Louis Ice & Cold Storage Company, owning a large amount of the stock, but was not an officer, agent, or manager of the company. W. S. Hodges, also a resident of St. Louis, was a director and the secretary and treasurer of the company, and in the absence of the president had supervision of its affairs; and it was in a conversation with him, and in the hearing of none other, on July 23, 1893, at St. Louis, that the plaintiff in error uttered concerning the defendant in error any of the obnoxious expressions complained of. Hodges, the only witness called to prove that the words were spoken, testified that between 11 and 12 o'clock on that morning Scullin came to his office in St. Louis, and requested him to go with him after dinner to the ice factory, saying "that there was a bad man there he wanted to get rid of"; that thereupon he named Harper, and used concerning him some of the expressions set out in the declaration; that two hours later he met Scullin, went with him across the river to East

St. Louis, where, after and in consequence of conferences concerning which the testimony heard and offered is to some extent conflicting, Harper was notified of his dismissal from the service of the company. Scullin, as a witness in his own behalf, testified that when he called on Hodges in St. Louis he said, "I told Hodges what I had heard, and asked him to go over to East St. Louis with me, and investigate the matter," and that on their arrival at the office of the ice plant he requested the bookkeeper to bring in Harper's time book and to refer to a certain date, and thereupon was asked to state what the time book showed "as to the time that Harper worked on the day of the accident, and where he worked." The plaintiff objected to this question, and the court sustained the objection. Being then asked what he said to Hodges about Harper, and where it was said, he answered: "It was in that office. I said, 'If this is true, then this is a dangerous man to have around here.' The gist of the conversation was in that office, after Mr. Hodges had investigated and found out what I desired to have him find out. It was after that. I made no remarks about this plaintiff until after we had found out what I desired Mr. Hodges to find out. I then said to Mr. Hodges, 'If this be true, he is a dangerous man to have around this plant.'" To the question whether he told Hodges to what facts he alluded by "if this be true," an objection was sustained, and the further question what the witness and Hodges both understood by "this being true" was not allowed to be answered. The witness was then asked, but not permitted to answer, whether at the time, from the facts that he had ascertained, he in good faith believed to be true what he said to Mr. Hodges, and whether or not at the time of his conversation with Hodges he had not been credibly informed, and did not actually believe, that his statements and representations to Hodges were true, "and made them with no ill feeling to the plaintiff, but with reference to his own interests."

The question of malice or good faith was an essential part of the issue, and it was certainly competent for the defendant, when called as a witness, to testify, if he would, that what he had said of the plaintiff was said upon information, without malice, and in the belief that it was true. If the truth of the proffered testimony was questionable, it was the province of a cross-examination into the source of the alleged information to expose the attempt at imposture. It is equally clear, because pertinent to the question of malice, that the witness should have been allowed to state any relevant part of his conversation with Hodges. If he told Hodges the source of his information, or what his information was, that was relevant and competent. It was, of course, not competent for the witness to state what Hodges understood, but the other questions were proper. The objection that what was said in the office at East St. Louis was not a part of the conversation testified to by Hodges as having occurred at St. Louis is not sound. Upon Hodges' own testimony, when the conversation began in St. Louis, it was in the contemplation of the parties to go to East St. Louis in reference to the subject of the interview, and according to Scullin it was not until after an examination of the time book at East St. Louis

that he said anything derogatory of Harper except to tell Hodges what he had heard. The talk on both sides of the river was upon one subject, was essentially one conversation, and, under the circumstances, it was error to withhold any important part of it from the jury. The significance claimed for the entry in the time book was that it showed Harper at work at a time and place which made impossible the truth of his testimony in the case at Springfield against the street-railway company. The relevancy of the entry is therefore clear, and the objection that it could be proved only by the production of the book, or by an exemplified copy of the entry, is not tenable. The entry was not directly involved in the issue. It was merely a collateral incident, and the rule that excludes parol evidence of the contents of a writing does not apply. 1 Greenl. Ev. § 89; *Carter v. Pomeroy*, 30 Ind. 438. The exact terms of the entry were not in question, and it was important only to know what Scullin understood its import to be.

The letter of Hodges, which was first admitted in evidence and afterwards excluded, was competent, brought out as it was upon the cross-examination, for the purpose of affecting the credibility of the witness. 1 Greenl. Ev. § 463, and notes.

The court was asked but refused to give a number of special instructions to the effect that as a shareholder in the East St. Louis Ice & Storage Company the plaintiff in error was privileged to speak freely with Hodges, a managing agent, concerning an employé of the company, and that his words, unless spoken with actual malice, of which the burden of proof was with the plaintiff, were not actionable. Whether these requests for special instructions were all unobjectionably worded, we have not considered. Upon the undisputed facts it is clear that the communications in question were of a privileged character. "So are all communications by members of corporate bodies, churches, and other voluntary societies, addressed to the body, or any official thereof, and stating facts which, if true, it is proper should be thus communicated." *Cooley, Torts*, 252. This doctrine the court ignored entirely in its charge, and, after stating that the "imputations" alleged "are actionable in and of themselves," told the jury "that if the defendant spoke and published the slanderous words as charged in the declaration, or any set or portion of them, actionable in themselves, then the plaintiff is entitled to recover." This expression, two or three times repeated, in substance, in the course of the charge, besides excluding the question of privilege, is objectionable because it left to the jury to determine whether any portion or any set of the words charged was actionable. See *Railroad Co. v. Meyers*, 22 C. C. A. 268, 76 Fed. 443. That the words, "he is a dangerous man," are not actionable in themselves is clear. The nearest approach to a recognition of the doctrine of privilege was in the instruction that the defendant was not prevented, by the legal presumption of malice, from showing that the words were not spoken maliciously; but this itself involves error. The words having been spoken under privileged circumstances, the presumption was that they were spoken without malice.

On a quotation from Odgers on Libel and Slander (page 173) it is contended that only necessary communications can be privileged, and that, unless "compelled to employ the very words complained of," the plaintiff in error was not at liberty to utter them. A privilege so restricted would not be a privilege. The case is not supposable in which words different from those used might not have been employed. It is a question of good faith on the part of the speaker. If the words used appear under the circumstances to have been needlessly harsh, or extravagant, or improbable, the jury for that reason may infer bad faith or malice, but it is not for the court to withhold or withdraw the question from the jury, when, on the situation as it was, the words, if uttered in good faith, were privileged. The judgment is reversed, and the cause remanded, with direction to grant a new trial.

UNITED STATES v. BRAZEAU.

(Circuit Court, D. Rhode Island. February 10, 1897.)

No. 2,467.

1. INDICTMENT—FOLLOWING STATUTE.

The rule that an indictment following the words of the statute is sufficient, is subject to the qualification that all the material facts and circumstances embraced in the definition of the offense must be stated. No essential element of the crime can be omitted without vitiating the whole pleading.

2. SAME—IMPROPER USE OF MAIL—ADDRESS OF NEWSPAPERS.

In an indictment for depositing in the mails newspapers containing an obscene article, an allegation that the newspapers were addressed, or that direction was given for mailing or delivery, is requisite, not as matter of description or identification of the unmailable article, but as an averment of an essential ingredient of the offense; and such ingredient is not supplied by the general averment that the newspapers were deposited "for mailing and delivery."

This was an indictment against John B. S. Brazeau for violation of the laws to prevent improper use of the mails.

Charles E. Gorman, U. S. Atty.

Hugh J. Carroll, for defendant.

BROWN, District Judge. This is an indictment under section 3893 of the Revised Statutes, as amended by act of September 26, 1888. Upon motion to quash, it is urged that the indictment, for depositing in a post office 100 copies of a newspaper containing an obscene article, is substantially defective, from the omission of an averment that the newspapers were addressed. No precedent for an indictment omitting this averment has been cited by counsel for the United States, or discovered upon an examination of a large number of indictments upon this statute, and upon similar statutes, set forth in reported cases and in books of precedents. The question arises therefore whether, without such usual averment, the offense is sufficiently charged.

The defendant contends that an intent to circulate the obscene

article, and to have it reach persons known or unknown to the grand jury, must appear of record; that this indictment charges merely the depositing of newspapers; and that a newspaper without an address or direction for mailing is incapable of effecting this intent. Upon behalf of the United States it is claimed that the address is a mere matter of description, and that the newspapers and the obscene article are sufficiently identified and described otherwise than by the address, and that all the essential ingredients of the offense are sufficiently set forth in the language of the statute.

The rule that an indictment following the words of the statute is sufficient is subject to the qualification that "all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading." "The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially." *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Evans v. U. S.*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 939. The statute does not make criminal the mere depositing in a post office of obscene matter, even though it be "knowingly" deposited; i. e. deposited with knowledge of its obscene character. The substance of the offense is the employment of, or attempt to employ, the mails for the transmission of obscene matter. The depositing prohibited by this statute is depositing "for mailing or delivery." There must be a purpose or intent in the act of depositing, and an adaptation, apparent at least, in the thing deposited to effect that intent. A newspaper without address or direction for delivery is not even apparently capable of effecting that intent. So long as anything remained to be done to make the newspapers a proper subject of deposit in the mail (see *U. S. v. Taylor*, 37 Fed. 200), or at least an apparently proper subject of deposit, so as to put in motion the postal operations of "mailing or delivery" (see *Goode v. U. S.*, 159 U. S. 671, 16 Sup. Ct. 136), the offense was incomplete.

The only language which by any possibility can be considered as including an allegation that the newspapers were capable of mailing is the averment that they were deposited "for mailing and delivery." But this is not a direct and certain allegation. To give it the required construction, resort must be had to inference, and to the illogical inference that, because the newspapers were deposited for a certain purpose, they were deposited under such conditions as to be capable of effecting that purpose. Such an inference is not only unsound, but a violation of the rule above quoted from *U. S. v. Hess*. Even granting the contention that the address, if added, would be simply additional description of the thing deposited, and serve merely for identification, is not such description required by the rule that there should be such reasonable particularity in the description as the nature of the case admits? The universal practice of adding such averments, and the well-known course of the operations of the post office, afford sufficient evidence of the practicability of such description. To sustain this indict-

ment is practically to establish a precedent for the total omission from indictments of this class of any reference to the envelope or address of letters and newspapers, and for relaxing the present practice of setting forth in the indictment the address.

As a chief ingredient in crimes of this class is a direction to the postal authorities to mail and deliver the article; as this direction is usually, if not invariably, contained in a written instrument, i. e. the envelope or wrapper; as the established practice of skilled criminal pleaders is to set out this instrument, or, at least, to aver that the article was addressed to persons known or unknown,—it seems unwise and unjust to persons charged with offenses against the operations of the post office to countenance indictments in the present unprecedented form. When the offense is of depositing newspapers, books, prints, etc., the allegation of an address, and, when practicable, a specification of such address, seems even more desirable than when the charge is of depositing a letter. A letter in and of itself is usually a communication between persons, and a description of the letter usually specifies the particular offense. A book or newspaper is usually one of a large number, and a description applicable to all copies does not afford a proper specification of the article charged to have been deposited. In the present case there is no description whatever which distinguishes any one of the 100 newspapers from the others, or from the remainder of the issue of the paper. The description applies to each and all alike, the title ("Le Jean-Baptiste"), the date, and the alleged obscene article being common to all. The defendant, if again indicted, should be able to plead in bar a conviction under the present indictment. So far as this record goes, he may be repeatedly indicted in the same language, and be unable by this record to prove the identity of the offenses.

The rule that parol testimony may be resorted to, to establish the defense of a prior conviction or acquittal, does not remove the requirement of reasonable and customary particularity in describing the offense. In *Durland v. U. S.*, 161 U. S. 314, 16 Sup. Ct. 508, it was contended that the names and addresses of the parties to whom letters were sent should be stated so as to inform the defendant as to what parts of his correspondence the charge is made, and also to enable him to defend himself against a subsequent indictment for the same transaction. It was held that the omission to state the names and addresses on the letters is satisfied by the allegation, if true, that such names and addresses are to the grand jury unknown. This case, though not deciding the question of the necessity of an allegation that the letters were addressed, impliedly recognizes the propriety at least of either setting forth the specific address, or of excusing the omission by an averment that it was to the grand jury unknown. In the present case it seems unnecessary to decide whether the requirements of reasonable particularity call for a description which would identify the specific copies, as well as describe the publication itself, or whether the indictment meets the objection that it could not be pleaded in bar to a subsequent indictment for the same offense,

or whether the specific name and place of an address should be set forth. It is sufficient to decide that an allegation that the newspapers were addressed, or that direction was given for mailing or delivery, is requisite, not as a matter of description or identification of the unmailable article, but as an averment of an essential ingredient in the offense, and that the ingredient is not supplied by the general averment that the newspapers were deposited "for mailing and delivery."

The other objections to the sufficiency of the indictment seem insufficient grounds for granting this motion to quash; but, as the first point urged in support of the motion is decisive, it seems unnecessary to assign reasons for the opinion as to the remaining points. Whatever a man's intent may be, he is not indictable unless there is some adaptation, real or apparent, in the thing done to accomplish the thing intended. As the mere depositing in the post office of an obscene writing, without direction for mailing or delivery, is incapable of effecting the evil against which the statute is provided, and as this indictment, departing from well-established precedents, charges nothing more, the motion to quash is granted.

DEAN LINSEED OIL CO. v. UNITED STATES.

(Circuit Court, E. D. New York. February 16, 1897.)

1. CUSTOMS DUTIES—DRAWBACK—LINSEED OIL CAKE.

Oil cake, made from linseed by the separation thereof into linseed oil and oil cake, is an article of manufacture, and, when made in the United States from imported linseed, is entitled, upon exportation, to the drawback provided by section 22 of the tariff act of 1894 (28 Stat. 551).

2. SAME—AMOUNT OF DRAWBACK.

The amount of drawback payable on the exportation of oil cake made from imported linseed is to be calculated in proportion to the amount of linseed entering into such oil cake, by weight, and not in proportion to the respective values of the oil and oil cake made from the linseed.

3. SAME.

It seems that when, by the treatment of an imported article, a valuable thing is produced, leaving a refuse of no value, no drawback would be allowable, under section 22 of the tariff act of 1894 (28 Stat. 551), upon exportation of such refuse.

Samuel B. Clarke, for plaintiff.

Robert H. Roy, Asst. U. S. Atty., and James Byrne, for the United States.

WHEELER, District Judge. This suit is brought upon section 3 of the act of 1887 (24 Stat. 505). Pursuant to that statute (section 7), the court finds that on December 3, 1894, the plaintiff imported 11,944 bushels of linseed, and between December 13, 1894, and January 12, 1895, 23,704 bushels of linseed, of 56 pounds each; that this was separated into linseed oil, of which each bushel made 19.91 pounds, and oil cake, of which each bushel made 35.87 pounds; that 448,153 pounds of this oil cake was exported to England by the ship Manitoba, January 4, 1895, and 850,262 pounds by the

Berlin, January 29, 1895; that the plaintiff complied with all the requirements of the law and the treasury regulations to become entitled to the drawback on these exportations, which were computed by the customs officials by the proportion in value of the oil to the oil cake on the exportation by the Manitoba at \$508.55, and on the Berlin at \$989.91; that these drawbacks, computed upon the proportion of weight instead of value, would be on the exportation by the Manitoba \$1,514.81, and on the Berlin \$3,006.29.

By the tariff act of 1894, under which these importations and exportations were made (paragraph 29) the duty on linseed oil is 20 cents per gallon of 7½ pounds weight. By paragraph 206, the duty on linseed is 20 cents per bushel of 56 pounds; and by paragraph 567, oil cake is free (28 Stat. 509). And the same act provides:

"Sec. 22. That where imported materials, on which duties have been paid, are used in the manufacture of articles, manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." 28 Stat. 551.

A question is made in behalf of the United States whether this oil cake is a manufacture of an article, within the meaning of this statute. As to this, however, the linseed was not oil cake, and did not contain oil cake, as such. The linseed had to be treated, and from this treatment the linseed oil was produced as one thing, and this oil cake as another thing. The oil cake was made from the linseed, and was a new article of manufacture, and so it appears to come directly within the provisions of this statute. As the duty upon the linseed was 20 cents per bushel of 56 pounds weight, the duty paid was exactly five-fourteenths of a cent per pound of the importation. The statute provides for a drawback equal in amount to the duties paid, which must mean those actually paid on the materials used, less 1 per centum of such duties. The material that went into the oil cake was 35.87 pounds to each bushel, and the duty paid on that material is readily computed by applying so much of the 20 cents per bushel of 56 pounds as belongs to this 35.87 pounds. The duty on the 19.91 pounds of oil to each bushel of 56 pounds could also be readily computed, if important, and would be but a fraction of that on the oil, if it had been manufactured in the foreign country, and imported separately. The law seems clearly to ignore values in cases of specific duty, as it provides that the drawback shall be equal in amount to the duties paid on the materials used, and does not provide for any apportionment upon the value; and, to comply with the law, plainly nothing would need to be done but to ascertain the amount of duty actually paid upon the materials used, as has been readily done in this case. The treasury regulations, as applied to this case, make an ad valorem drawback upon a specific duty, instead of a specific drawback upon a specific duty, as the law requires. Of course, if by the treatment of an imported article a valuable thing is produced which leaves a refuse of no value, so that this only valuable product was the sole object of the importation, then nothing could be allowed by drawback for duty on the refuse; but

here the article imported contains two valuable things, each of which has long been recognized in the tariff law as a proper subject of duty on importation, and of drawback on exportation; and the duty paid on the one of low value is as much a duty as that paid on the one of high value is. So, upon these several provisions of this tariff act of 1894, it seems clear that the calculation of the drawback upon the proportion of weight is the one which the importer and exporter are entitled to; and that the one on proportion of values is not legally applicable.

It is said, on behalf of the government, that such drawbacks have been provided for ever since 1860, and that the treasury department has, by regulations when those were authorized, and without them when they were not, always computed these drawbacks in proportion to values; and that the passing of new tariff acts providing such drawbacks, when such action of the treasury department was going on, was an implied approval of that method, and a warrant for the present regulations under which these drawbacks have been computed. It also appears that from 1870 to 1894 no drawback on oil cake was allowed. In all that time no treasury regulation would be applicable to this particular subject, and during all that time this article was a subject of a particular law, excluding it from drawback. The plaintiff's claims are founded, not on the regulations of the treasury department at all, but on the law which gives the right; and that the customs officers refused to follow the law and followed the regulations does not defeat the right which the law gives. *Campbell v. U. S.*, 107 U. S. 407, 2 Sup. Ct. 759. Under these circumstances the practice of the customs and treasury departments would not seem to be material. *U. S. v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582; *U. S. v. Alger*, 152 U. S. 384, 14 Sup. Ct. 635. Upon this view of the case, the plaintiff seems to be entitled to a judgment for the amount of these two sums, which is \$4,521.10. Judgment for plaintiff for \$4,521.10.

CITY OF CARLSBAD et al. v. SCHULTZ.

(Circuit Court, S. D. New York. February 1, 1897.)

TRADE-MARKS—INFRINGEMENT—"CARLSBAD" MINERAL WATER.

From the discovery of the Carlsbad spring, in 1370, to 1845, none of its waters were exported from the city, the policy of the city being to attract invalids to that place. For 24 years before the first exportation, artificial Carlsbad, made after the analysis of the genuine, was sold at many places in Europe, and became very popular. After exportation of the genuine water was begun, the sale of the artificial was continued in Europe, and has continued to the present day, without deception or confusion. Twelve years before the real Carlsbad was first imported to this country, defendant began to make and sell his artificial Carlsbad, built up a large business therein, and continued the same without protest for 34 years. His labels and bottles are radically different from those of complainants, in which the real Carlsbad is now sold here. *Held*, that defendant had a right to continue the sale of his product, but should be enjoined from using "Carlsbad" unless accompanied by some word (as "Artificial") plainly indicating that the water is not the natural spring water.

This is an action to restrain the defendant from using the name "Carlsbad" to designate artificial mineral water manufactured and sold by him, and for profits and damages. The suit was commenced on or about July 20, 1888.

Charles G. Coe, for complainants.
Arthur v. Briesen, for defendant.

COXE, District Judge. This controversy is *sui generis*. It must be determined upon its own facts. Nothing exactly like it can be found in the law. The record established, indisputably, the following main propositions:

First. From the discovery of the Carlsbad spring, about 1370, until 1845, the waters were not exported. For five centuries the policy of the city was to keep the springs as a close local monopoly for the purpose of attracting invalids. The waters are not used as a beverage. They are medicinal in character and are principally used for bathing and drinking upon the advice of a physician. During the continuance of this unenlightened policy no one in Europe could receive the benefits of these healing waters without a journey to Carlsbad. Not a drop was to be obtained elsewhere.

Second. To relieve this want and supply this demand artificial mineral water was made after the Carlsbad analysis and sold, under that name, for 24 years prior to the first exportation by the city of Carlsbad. This business was carried on in many of the principal cities of Europe upon a large scale. Pump rooms, drinking pavilions and gardens were opened where the artificial waters could be used amid environments similar to those at the natural springs. The business thus inaugurated in 1820 by Dr. Struve has been continued to the present day without molestation by the city of Carlsbad. Indeed, it is not too much to say that it was the success which attended the artificial waters which induced the complainants to begin exporting the natural waters. The enterprise, ability and capital of Struve and his successors made Carlsbad water popular in places where it was never known before. After this market was established by over 20 years of successful use the complainants took advantage of it by sending out the natural waters. There was no fraud or deception on either side. The sale of the natural and artificial water went on, and is still going on, without difficulty or confusion; some preferring the former, others the latter. No one mistook the one for the other. Each has its legitimate place in trade.

Third. The defendant, who is nearly 70 years of age, with the record of a long and honorable business career behind him, commenced manufacturing and selling Carlsbad water in New York in the year 1862. This was 5 years before a single bottle of natural Carlsbad water was seen in this country, 12 years before it was imported here for sale, except in small quantities, and 25 years before the present lessees obtained control of the sale of Carlsbad waters for the United States. In short, the defendant has been engaged in the business for 34 years without protest of any kind until the commencement of this suit. The water is manufactured by him in the most

careful and scientific manner; it is free from the bacteria found in the imported water and is by many preferred to the latter. It is also more expensive. The defendant's bottles and labels are radically different from those of the complainants and there is no evidence that any one was ever cajoled into taking the Schultz water when he wanted the imported water. The label used by the defendant until after this suit was commenced simply contained the word "Carlsbad" with the word "Sprudel" in smaller type, and in parentheses, at the right. The name of the defendant in letters equally prominent with the name Carlsbad also appeared. The label was substantially like the copy represented below, with the word "artificial" omitted. In short, the defendant was the first to occupy this ground. He was the first to make a market for Carlsbad water in the United States. For years he has been engaged in building up a perfectly honest and legitimate business which was paying him a handsome profit when the complainants entered the field.

These being the salient facts, can there be a doubt that the defendant has vested rights which a court of equity is bound to protect? Would it not be inexcusable injustice not only to destroy the defendant's business but compel him to pay over the profits thereof to the complainants? The case is devoid of any element of actual fraud. The defendant has acted in good faith throughout. Starting with the perfectly plain proposition that he had a right to sell artificial Carlsbad water in 1862, it is pertinent to inquire when he lost that right. He was not interfering with the business of the complainants then—they had no business in this country. Schultz's Carlsbad was being sold in New York precisely as Struve's Carlsbad was being sold in many of the cities of Europe. That the defendant may make and sell the water in question is hardly disputed, but it is said that he must not use the name Carlsbad in any form. This is but another way of saying that his business must cease. By what other name could the water possibly be described? How could a customer make his wants known except by using the name Carlsbad? To inform the owner of a California vineyard that he is at liberty to make Champagne and Burgundy wine but must sell it under the name of "grape juice" would not be conferring upon him a highly valuable franchise. If the business he honest those engaged in it have a right to describe the product so that the public will know what it is. What the defendant makes is artificial Carlsbad. This is what a part of the public wants, and there is no reason why they should not have it. Another part prefers the natural Carlsbad. Both parties are engaged in legitimate business. So long as neither interferes with the lawful occupation of the other neither has a right to complain. There is room enough for both.

There can be no pretense that when the defendant used the name Carlsbad alone to designate his water he intended to deceive for the reason, as before stated, that there was no other Carlsbad water in the market at that time. The subsequent introduction of the natural product of the Carlsbad springs into the same market may possibly produce confusion and induce the ignorant and unwary to purchase the defendant's water thinking that it is the imported water. At the

present time the name Carlsbad unexplained does not fairly describe the defendant's water. If, however, he associates with the name Carlsbad a qualifying adjective, such, for instance, as "artificial," and omits the name of E. Ludwig from the larger label, no one can be deceived; not even the "fools and idiots" who, in the judgment of the master of the rolls, were not entitled to extraordinary consideration in such controversies. *Manufacturing Co. v. Wilson*, 2 Ch. Div. 447.

The complainant has not made a case for an accounting. *McLean v. Fleming*, 96 U. S. 245.

In order that there may be no misunderstanding upon the settlement of the decree the court has appended a copy of a label which, it is thought, the defendant may use with impunity as truthfully representing the water sold by him.



The complainants are entitled to a decree restraining the defendant from using the word "Carlsbad" to designate the water manufactured and sold by him unless accompanied by a word, or words, printed as conspicuously as the word "Carlsbad," plainly indicating that the water is manufactured in this country and is not the product of the Bohemian spring.

It would seem that the complainants are entitled to costs.

GARRETT et al. v. T. H. GARRETT & CO.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1896.)

No. 458.

1. TRADE-MARKS—IMITATION OF LABELS—INJUNCTION.

The use by a manufacturer of imitative labels and devices, in connection with an inferior article, which is sold to retailers at a reduced price, with the purpose and result of enabling them to sell it to consumers as the goods of another, will be enjoined.

2. SAME—USE OF NAME.

Where a firm has for many years used the name of its predecessors in connection with its goods, and has built up an extensive trade thereunder, such name, even if it could not be used as a trade-mark, is to be treated as a descriptive term, to the benefit of which they are entitled.

3. SAME—IMITATIVE LABELS—WHITE PAPER.

While it is true, in the abstract, that every one has a right to use white paper, yet no one has a right to use it in such a way as to imitate another's labels, and thereby appropriate the good will of his business.

4. SAME—USE OF CORPORATE NAME.

Where a corporation organized to manufacture and sell snuff had assumed the name of an employé holding a few shares of its stock, with the evident purpose of appropriating the trade of others of the same name, who had long used the name in connection with their snuff, *held*, that such corporation would be enjoined from using the name as part of its corporate name, or in its business.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This was a suit in equity by George B. Wilson, Henry D. Moore, and John O. Gilmore, partners doing business under the firm name of W. E. Garrett & Sons, against T. H. Garrett & Co., a corporation, to restrain the alleged wrongful use of a trade name or mark and of imitative labels. The cause was heard below upon a motion for preliminary injunction, and, the court having granted an injunction in respect to the labels, but refused it in respect to the name, the complainants have appealed.

Upton W. Muir, for appellants.

Augustus E. Wilson and Shackelford Miller, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

SAGE, District Judge. The appellants are manufacturers of snuff known to the trade as "Garrett's Snuff," and were complainants in a suit brought in the United States circuit court for the district of Kentucky to restrain the appellee from using certain labels upon cans and packages of snuff, and from using the name "Garrett" on such packages and cans, and from representing the same as "Garrett's Snuff." The case came before the court upon a motion by complainants for a preliminary injunction against the defendant, according to the prayer of the original and amended bills. The motion came on to be heard upon said bills, upon exhibits of cans and packages and labels used by the defendant in preparing and putting on sale its product and manufacture, and upon affidavits in support of the averments of the bills. The defendant resisted the motion upon its answer, and upon affidavits and exhibits.

The defendant company was incorporated February 23, 1895, with the capital stock of \$2,000, in 20 shares, of the par value of \$100 each, of which 5 shares were subscribed by each of the four incorporators, of whom T. H. Garrett was one. On the 12th of December, 1895, the articles of incorporation were amended by increasing the capital stock to \$35,000, divided into 350 shares, each of the par value of \$100. T. H. Garrett subscribed for 2½ shares. There were several other subscribers each for a small number of shares. J. B. Holloway was a subscriber for 127½ shares, Henry Laub for 5 shares, E. R. Burley for 50 shares, and Hannah Laub for 121½ shares. T. H. Garrett, in his affidavit, states that the means for the increase of the capital stock to \$35,000 were furnished by Holloway, Lamb, and Burley.

The court granted the motion in part, upon the finding that the labels and devices used by the defendant company prior to its re-

organization, exhibits of which were filed with complainants' bill, so resembled the labels and devices used by complainants as to be likely to deceive and mislead an ordinary and unsuspecting customer. The defendant company was therefore enjoined to that extent, although it appeared, as the court recognized, that it had ceased the use of the labels and devices referred to before the filing of the bill, and had endeavored to recall all the snuff which had been theretofore put upon the market, which, however, was claimed to be only a few hundred dollars worth. The court in its opinion said:

"The principal question on this motion is whether the complainants, as manufacturers of Scotch snuff, are entitled to the exclusive use of the word 'Garrett' on labels and other devices for advertising their Scotch snuff. This is so important and so doubtful a question that the court is unwilling to decide it upon mere affidavits, and upon a motion for a preliminary injunction."

Complainants appeal from this ruling.

The labels and devices used by the defendant company under its original organization were, in their general design and appearance, close imitations of complainants' labels and designs. The cans, packages, labels, and wrappers of complainants were almost literally copied by the defendant company, excepting that "T. H. Garrett, Louisville, Ky.," was substituted for "W. E. Garrett, Philadelphia." The color of defendant's labels was the same as that of complainants'. The type used for the printed matter on the labels was similar in general appearance, arrangement, and general effect. That there was any intent to appropriate the good will or to deceive complainants' customers is stoutly denied by T. H. Garrett, and by the officers of the defendant corporation, and it is declared in their affidavits that the retail dealers, who were customers of, and those who were solicited by, the defendant company, were advised that the snuff was the manufacture of T. H. Garrett & Co. and not the manufacture of William E. Garrett & Sons. Whether retail dealers were advised that they could sell the snuff as "Garrett's Snuff" to their customers as and for the snuff manufactured and sold by complainants, and whether it was intended that those customers should be thus deceived is in dispute. Affidavits for complainants sustain the charge, and affidavits for the defendant deny it. But that the effect was to impose snuff manufactured by the defendants upon purchasers from retailers as "Garrett's Snuff,"—that is to say, as snuff manufactured by complainants,—is, we think, too well established to be doubted; and we are fully impressed that it was the intention of the defendant company, by the use of the name "Garrett," to appropriate the good will and interfere with the trade of the complainants.

It is denied by the defendant company that the change of labels, which was made about the time of the reorganization, was because of any apprehension of trouble with complainants, or of any feeling on the part of the officers of the company that there was the least infringement of the rights of the complainants. The defendant's version, as gathered from the affidavits of Garrett and Laub, the president of the reorganized company, and of Holloway,

one of the largest stockholders, is that the snuff sent out under the original labels was of inferior quality, that they were satisfied that it "would injure the business," that they "had heard that it was not good," and that the change in labels and devices was made, "not because of the resemblance to those of complainants, but because affiants and their associates were dissatisfied with the quality of the snuff."

T. H. Garrett, in his affidavit, says that, when the company was reorganized, Holloway brought up the question whether their brands and labels could not be mistaken for those of complainants or others, and that counsel were consulted on the subject, and that they advised certain changes, "out of abundant caution," which were made. He affirms that these measures were taken "to prevent confusion in the labels before there was any intimation of any dissatisfaction, or complaint on the part of complainants or anybody else." He also refers to and quotes from a circular put out by defendant company, December 31, 1895, in which the hope is expressed "that no one who tries our snuff will take it for theirs; that we should hate to have any one who has used our snuff, use theirs afterwards, under the impression that it was ours, because it would hurt his opinion of our goods; and that we trust that everybody who tries our snuff will notice and remember that it is made by us, and not by them." If all this be true, why did defendant company, upon reorganization, cling to the name "T. H. Garrett & Co."? If that name had been attached to goods of inferior quality, why, in the reorganization, was it not dropped, and another substituted which would have relieved the company from the odium resulting, as they now claim, from the inferior quality of the snuff sold under that name? T. H. Garrett was the owner of only $2\frac{1}{2}$ shares of the capital stock, the entire number of shares being 350. He was not made an officer of the new company, and had only a subordinate position as an employé. There was no apparent reason why his name should be adopted as the corporate name, unless it was that "Garrett's Snuff" had a reputation, and was in demand by the users of snuff all over the South,—the territory sought to be occupied by the defendant company.

The statement, made by Holloway in his affidavit, that the only reason for retaining the name of T. H. Garrett in the name of the corporation was that he was its original projector and promoter, and that it would have been an unnecessary and unfair reflection on him to have changed the name, is mere pretense and sham, too bald to be even plausible. If it be said that it was to preserve the good will of the company as first organized, the answer is that by Garrett's own affidavit it is shown that, by reason of the poor quality of the snuff put on the market by that company, its good will, if it ever had any, was all turned to ill will. Taking his own showing, it is apparent that the best thing for the company to do, if it was actuated by any honest purpose, would have been to get rid of the name as quickly as possible. The sending out of circulars and advertising matter, which might be suggested as another reason, was, almost exclusively, after the reorganization.

If the defendant company was and is, as it claims, solicitous to avoid confusion of labels, and desirous to build up a good will of its own, which it would be able to protect against the complainants as well as all others, it ought to hail with satisfaction anything that the court below could have done, or that this court can do for it, in that behalf.

It is quite significant, with reference to the denials of intent to imitate complainants' labels or devices which are made by all the defendant's affiants who have anything to say on that subject, that the imitations were invariably of complainants' labels and devices, and never of any one of the several other manufacturers whose names are mentioned. It is not to be credited that the imitations were unintentional or accidental. It is not claimed that the packages of snuff on which they were placed were put on the market with the intent to deceive the retail dealers who were supplied by defendant. That would have been impracticable. The claim is that the snuff was of inferior quality, and sold at prices below complainants' prices, with the expectation that the retail dealers, who knew what they were buying, would sell it to their customers as "Garrett's Snuff," and at the price of the genuine article, thereby reaping a larger profit. That was the lure, and it was of the sort to be successful in the great majority of instances. As for the purchasers from the retailers, they were mostly "snuff rubbers,"—that is to say, those who use snuff for "rubbing," as it is termed, which is a substitute for chewing,—and, being generally of the lower classes, they would not be likely to discover that they were cheated by fraudulent labels and an inferior article. But the injury to complainants was and is twofold, for they not only lose trade, but reputation, or good will, also.

It is noticeable, also, that T. H. Garrett completely impeaches his own testimony by his own affidavit in two very important particulars. He affirms that he had for several years given great attention to the subject of the manufacture of snuff, and that he was experienced in that manufacture. In another part of the same affidavit he affirms that the snuff manufactured before the defendant company was organized—and that was when the manufacture was under his supervision—was so inferior in quality that the defendant took back and withdrew from sale every package that could be found or got hold of anywhere, being not less than one-half the total amount that had been sold. Then, again, he affirms that the change of labels and devices by defendant, before this suit was brought, was made, not because of their resemblance to those of the complainants, but because affiant and his associates were dissatisfied with the quality of the snuff. In another part of the affidavit he affirms that the question with reference to the changing of the brands and labels was whether they could be mistaken for those of complainants, or those of any of the several manufacturers named; and counsel were consulted, and changes made on their suggestion. Such conflicts of statement are not badges of truth or sincerity.

Without entering further into detail, it is enough to say that we are convinced, by the admitted facts and the facts appearing in the affidavits offered on behalf of the defendant, that the charge, made in the bill, of an attempt to take advantage of the complainants and interfere with the good will of their business by the use of the name "Garrett," is abundantly sustained. The district judge in effect decided that defendant was trespassing on complainants' good will, by directing that the injunction which he allowed should issue. That injunction, however, fell far short of affording substantial relief or protection to complainants. It related only to labels and devices which he found had been abandoned by the defendant. The only additional feature covered by the injunction was the ground color of defendant's labels. The defendant was enjoined from using either a white color or a murky white color. But these were matters of detail, and of minor importance, as compared with the use of the name "Garrett." Without the use of that name the fraudulent scheme of the defendant would never have materialized. The court, while recognizing that the defendant was guilty of the fraud charged, declined to make the injunction effectual against it, and applied it only to what was really a matter incidental to the use of the name. The rule of this court not to disturb the action of the court below, unless the discretion of the judge was improvidently exercised, was recognized by the circuit court of appeals of this circuit in *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 252. The granting and withholding of a preliminary injunction is largely within the discretion of the judge who passes upon the application for it, and there are many considerations which may be even controlling without reference to the merits of the question at issue. But here the judge gave specifically his reason, which related, not to a matter of mere discretion, but directly to the merits of the question involved, which was whether the complainants were entitled to the exclusive use of the word "Garrett" on the labels and other devices for advertising their Scotch snuff. This, he held, was so important and so doubtful a question as not to be decided upon mere affidavits, and upon a motion for a preliminary injunction. That the complainants were entitled to the use of the word "Garrett," on their labels, as a trade-mark or as a descriptive word, is, in our opinion, beyond question, upon the undisputed facts of the case. They and their predecessors had enjoyed such use for many years and had built up an extensive trade based upon it. Even if it could not be used as a trade-mark, it is to be treated as a descriptive term, to the benefit of which they are entitled. It was so held by the court of appeals of this circuit in *California Fig Syrup Co. v. Frederick Stearns & Co.*, 20 C. C. A. 22, 73 Fed. 812, and in *Salt Co. v. Burnap*, also decided by the court of appeals of the Sixth circuit, and reported 20 C. C. A. 27, 73 Fed. 818.

It was contended for the defendant, upon the hearing, that every man has a right to the use of his own name in business, and, as to the order of injunction below restraining defendant from using

white paper for its labels, that every person has a constitutional right to use white paper. These propositions, in the abstract, are undeniably true, but counsel for the time overlooked the fact that, wherever there is an organic law, wherever a constitution is to be found as the basis of the rights of the people, and as the foundation and limit of the legislation and jurisprudence of a government, there the mutual rights of individuals are held in highest regard, and are most jealously protected. Always, in law, a greater right is closely related to a greater obligation. While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it is also true that he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman, that, because the constitution secures to every man the right to bear arms, he had a constitutional right to rob his victim at the muzzle of a rifle or revolver. It has been held, with reference to trade-marks, that a man has not the right to use even his own name so as to deceive the public, and make them believe that he is selling the goods of another of the same name. *Holloway v. Holloway*, 13 Beav. 209. In *William Rogers Manuf'g Co. v. Rogers & Spurr Manuf'g Co.*, 11 Fed. 495, it was held that, while "any one has a right to the use of his own name in business, he may be restrained from its use if he uses it in such a way as to appropriate the good will of a business already established by others of that name; nor can he, by the use of his own name, appropriate the reputation of another by fraud, either actual or constructive." The same ruling was made in *Rogers Co. v. Wm. Rogers Manuf'g Co.*, by the court of appeals of the Second circuit, as reported in 17 C. C. A. 576, 70 Fed. 1017. In these last two cases the name was used as a part of the name of a corporation. In the last case the court cites *Manufacturing Co. v. Simpson*, 54 Conn. 527, 9 Atl. 395, and *Rogers v. Rogers*, 53 Conn. 121, 1 Atl. 807, and 5 Atl. 675, where a large number of reported cases upon this portion of the law of trade-marks is collected. See, also, *Landreth v. Landreth*, 22 Fed. 41, where the court held that, "while a party cannot be enjoined from honestly using his own name in advertising his goods and putting them on the market, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person."

It is to be noted that, in *Landreth v. Landreth*, and in *Holloway v. Holloway*, the defendant was restrained from the fraudulent use

of the name by a preliminary injunction, and it will appear, upon investigation, that in a large number of cases upon this subject a preliminary injunction was allowed. In such a case as this, where the manifest intent was and is to appropriate the good will of the complainants by the fraudulent use of the name "Garrett," if the complainants be not protected by preliminary injunction against such use,—if, in other words, that question be postponed to the final hearing,—there is every inducement to the defendant to delay and prolong the litigation, continuing, meanwhile, the assaults upon the good will of the complainants, so that, even if final decree be at last rendered in favor of complainants, the good will will have been so seriously and irreparably injured, if not in great measure destroyed, as to leave the complainants practically without remedy. It is, therefore, peculiarly a case in which, if the court is satisfied that the use of the name is fraudulent, as this court is satisfied in this case, an injunction should at once be issued.

Entertaining these views the order of the judge below for an injunction as to the use of the labels will be affirmed, and the order refusing an injunction against the use of the name of "T. H. Garrett," or "T. H. Garrett & Co.," will be reversed, with costs. The cause will be remanded, with instructions to continue the injunction granted, and to grant an injunction, in accordance with this opinion, against the use of the name of the defendant "T. H. Garrett," or of the name "Garrett," as a part of the corporate name of the defendant, or in its business.

AMBERG FILE & INDEX CO. v. SHEA SMITH & CO.

(Circuit Court, N. D. Illinois. December 21, 1896.)

1. COPYRIGHT—INFRINGEMENT—PLEADING—MULTIFARIOUSNESS.

A bill declaring on 30 different copyrights, each for an index covering a letter or portion of a letter of the alphabet, and all constituting one complete index system, is not multifarious.

2. SAME—SUBJECTS OF COPYRIGHT—LETTER FILES.

A system of indexes, constituting a letter file, is not a proper subject of copyright.

This was a bill alleging infringement of 30 different copyrights relating to, or covering parts of, Amberg's Directory System of Indexing. Each copyright was for an index covering a letter or portion of a letter of the alphabet, so that in the complete system 30 indexes were employed, which had been severally copyrighted. Each index was provided with leaves arranged loosely, so that they could be separated, and letters indexed or temporarily filed in their proper places. The defendant demurred on the ground (1) that the bill was multifarious, in declaring on several copyrights in one bill; and (2) on the ground that the indexes were not the proper subject of a copyright, under the federal statute.

Bond, Adams, Pickard & Jackson, for complainant.
Banning & Banning, for defendant.

SHOWALTER, Circuit Judge. I should say in this case that the point of multifariousness is not well taken. All the parts of the copyrighted matter, taken together, constitute, in use, a single implement. The subject-matter of litigation is, in a sense, single. It is rather one controversy than a combination of controversies. But upon the main point it seems to me that, in getting up the contrivance here copyrighted, Mr. Amberg was not an "author," as that word is used in the federal constitution, nor is what he produced a "book," as that word is used in the federal statute. This contrivance, as made and sold by the complainant, does not have the purpose or function of conveying information. It is a mechanism or device for the storage of letters so that they can be preserved and conveniently found afterward. Until the purchaser of a set of these "indexes" commences to use the same, by putting written documents between the leaves, such indexes signify nothing. Until then (that is to say, as copyrighted) they are not a medium of information or intelligence, and hence, in my judgment, not a book, within the meaning of the copyright laws. A monopoly might, perhaps, have been secured under the patent laws, but I think not under the copyright laws. The bill is therefore dismissed for want of equity.

BLAKESLEY NOVELTY CO. v. CONNECTICUT WEB CO. et al.

(Circuit Court, D. Connecticut. January 12, 1897.)

1. PATENTS—INVENTION—PROCESSES.

The origination of a process employing well-known instrumentalities upon old objects to accomplish a better result, without any change or adaptation, except by skillful manipulations, is not patentable invention.

2. SAME—METHOD OF MAKING ARMLETS.

The Blakesley patent, No. 411,416, for a method of making armlets, is void, as applying an old process to an old material, already used for analogous purposes.

This was a suit in equity by the Blakesley Novelty Company against the Connecticut Web Company and Louis Neuberger for alleged infringement of a patent.

John J. Jennings, for complainant.

Knight Brothers, for defendants.

TOWNSEND, District Judge. The complainant herein, aggrieved by alleged unfair competition, through simulation of its packages, and manufacture of inferior imitations of its armlets, has sought redress by this bill, alleging infringement of the first claim of patent No. 411,416, for a "method of making armlets," granted September 24, 1889, to its assignor, Gilbert H. Blakesley. Said claim is as follows:

"A method of working up elastic stock, composed of rubber strands and a fibrous envelope therefor, into short sections, bound at each end; consisting in binding the free ends of the rubber and fiber together, then stretching the stock, then binding the stretched rubber and fiber together again at two closely-adjacent points, and then cutting the stock between such points, substantially as set forth."

The patentee, in his specification, describes the kind of braid-covered rubber core best adapted for making armlets, and, in his drawings, illustrates his method of clamping, then stretching it over a pin, and, while it is thus under tension, of applying the other arm of said clamp or ferrule to it at a point suited to the purpose for which said material is to be adapted, and of then applying one arm of another clamp or ferrule, adjacent to the first clamp or ferrule, in the mode originally employed for said first clamp or ferrule. The defenses are invalidity, because the method described represents an uncompleted act, and because the patent fails to disclose any such method or process as is the proper subject of a patent, because of anticipation, or lack of patentable novelty in view of the prior art, and noninfringement. It is unnecessary to consider all these defenses. It is claimed that the patent is void as covering "operations which consist entirely of mechanical transactions involving a mere process or method of making an article, by ordinary manipulations." *Travers v. Fly-Net Co.*, 75 O. G. 678, 78 Fed. 638. The patent is not for a mere function of a machine, within the rule laid down in *Corning v. Burden*, 15 How. 252, and affirmed in *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745. The patentee has not invented a machine for the more perfect manufacture of his product. But he has applied a series of manipulations to a braid-covered rubber core, and by means thereof has produced a better armlet than was previously made. In what classes of cases, if any, such mere mechanical transactions may be the subject of a valid patent, is not definitely determined by the decisions. *Walk. Pat. (3d Ed.) § 3a*. In this circuit, Judge Wallace, in *Brainard v. Cramme*, 12 Fed. 621, in *Excelsior Needle Co. v. Union-Needle Co.*, 32 Fed. 221, Judge Wheeler, in *McKay v. Jackman*, 12 Fed. 615, and Judge Coxe, in *Gage v. Kellogg*, 23 Fed. 891, have adjudged processes of this character void, and their decisions are cited and approved by the supreme court in *Locomotive Works v. Medart*, *supra*. It is well settled that a prior patent for a machine whose operation necessarily involves the production of, or is identical with, a process, will invalidate a subsequent patent for said process. *Fermentation Co. v. Koch*, 21 Fed. 580; *Excelsior Needle Co. v. Union Needle Co.*, *supra*; *Rob. Pat. p. 257*. But here the process only is patented, and it involves something more than the operation of a machine. It is a compound process, whose individual operations are old, individually, and in relation to the other operations. In such a case I understand that there may be invention, if there is such a change in the method or arrangement of operations as involves invention, and produces a new and useful result. Thus, in *Schwarzwalder v. Filter Co.*, 13 C. C. A. 380, 66 Fed. 157, the patentee described a method for the purification of water by the application of previously known processes simultaneously, instead of successively, and thereby secured a result which was both new and useful, and his patent was sustained. In so doing, however, he discovered what no one had previously known, namely, that the desired result could be produced in this way. In the case at bar, had the patentee first discovered that the

requisite grip on rubber, in order to insure a firm hold, could be secured by stretching it, he might, perhaps, have brought himself within the rule. But this fact had long been well known and applied in the general field of practical arts. The steps in the process of the patent consist first in fastening the ends of the rubber and fiber together by a clamp so that the one when stretched should not retreat from the other. This operation, accomplished by the defendants by a knot, is merely a well-known mechanical operation. The same may be said of the second operation, of stretching the material at a suitable point; and of the third, of applying the clamp. I have not overlooked the arguments based upon the manifest utility and commercial success of the completed article. But utility and commercial success only turn the scale when the question of invention is doubtful. The patentee has applied these old processes to an old material, already actually used for analogous purposes, and has therefore produced a better armlet. That the various steps in the process are old is practically admitted by the patentee, is matter of common knowledge, and, in the light of said admissions and of common knowledge, is sufficiently proved by the testimony and exhibits introduced by defendants. Inasmuch as the process involves merely the use of well-known instrumentalities upon old objects to accomplish the better result, without any change or adaptation except by means of skillful manipulations, I conclude that the claim is void. It is therefore immaterial that defendants deny infringement, and that complainant has failed to satisfactorily meet defendants' evidence in their proofs, and, from their practical operations on final hearing, that the stretching process is not necessary, and is not used, in the manufacture of their product. Let the bill be dismissed.

SESSLER et al. v. BORCHARDT.

(Circuit Court, S. D. New York. May 1, 1896.)

PATENTS—INFRINGEMENT—SLIPPER SOLES.

The Sessler patent, No. 525,746, for an insole for slippers, made of leather, paper, and wool, used as an outsole for knit slippers by turning the thickness of leather over the thickness of paper, and uniting it to the braid to which the knit upper is to be attached, is not, in view of prior devices, infringed by the slipper of the Borchardt patent, No. 539,337, which has a cord running under stitches in the turned-over edge of the leather, for attachment to the knit upper by stitches under it.

This was a suit in equity by Arnold Sessler and Arnold Sessler & Co. against Samuel Borchardt for infringement of the Sessler patent, No. 525,746, for an "improvement in insoles for slippers, etc." The alleged infringing slipper was made according to letters patent No. 539,337, issued May 14, 1895, to the defendant.

Daniel H. Driscoll, for plaintiffs.

J. J. Kennedy and Phillipp, Munson & Phelps, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 525,746, dated September 11, 1894, and granted to Arnold Sessler, for an insole for slippers, used as an outsole for knit slippers, and made of leather, paper, and wool, "by turning the thickness of leather at its edge over the thickness of paper, and uniting to the turned-over portion of the leather the braid to which the knitted portion of the slipper is to be attached; the paper portion of the insole serving, as in the prior insoles, to carry the lamb's wool." The claims in question are for:

"(1) The combination, in an insole, of a thickness of leather, a thickness of another material, as paper, and a tape; said thickness of leather being turned over the thickness of paper, and the tape being attached to said inturned portion of leather,—substantially as set forth. (3) The combination, with a slipper upper, of an insole provided with a thickness of leather having a turned-over edge, a tape attached to said overturned edge, said knitted upper being attached to the tape, substantially as set forth."

The alleged infringement has a cord running under stitches on the turned-over edge of the leather, for attachment to the knit upper by stitches under it. The defenses are prior patents and structures. The tape answers the purpose here of the welt in a hand-sewed shoe, which is first sewed to the upper, and then to the flat, thick outsole of the shoe, instead of to the turned-over edge of the flexible outsole of the slipper, as the tape is. A prior patent shows such a turned-over, flexible outsole, with an upper sewed to it, in a bathing slipper; and prior scuffs show such a one with a straw welt sewed to it, and a straw upper sewed to that. So a turned-over sole was not new. Neither was connecting such a sole by a welt to the upper new, and the tape is the same as a welt. In the scuffs seems to be the precise combination of the third claim. These soles are, however, sold without the uppers; and these scuffs are said, as exhibited whole, in argument, not to show these separate soles of the first claim. But the construction of the soles and welt is as well shown with the uppers attached as without them. If this would not be an anticipation, the defendant's sole would not seem to be an infringement. Bill dismissed.

DEWEY ELECTRIC HEATING CO. V. ALBANY RAILWAY.

(Circuit Court, N. D. New York. February 15, 1897.)

PATENTS—INVENTION AND INFRINGEMENT—ELECTRIC HEATERS.

The Dewey patent, No. 464,247, for improvements in electric heating apparatus, discloses invention as to the ninth claim, in its combination of heating conductors adapted to be connected in different ways with the supply conductors, a switch for controlling said connections, and an indicator operated by the switch to show how the connections stand. This claim is not limited to the particular form described, and is infringed by a heater employing the same combination, with mere difference of form and location.

This was a suit in equity by the Dewey Electric Heating Company against the Albany Railway for alleged infringement of a patent.

This is an equity suit for infringement based upon letters patent, No. 464,247, granted to Mark W. Dewey, December 1, 1891, for improvements in electric-

heating apparatus. The patentee says in the specification: "The objects of my invention are to provide an electric heater that will produce a great amount of heat, expose a large radiating surface, and yet not occupy much floor space. Also, to provide a heater having its resistance divided into sections, and so arranged that if any one of the sections becomes injured it may be repaired without cutting off the current from the entire heater or the other sections of resistance. Also, to provide the heater with an adjustable switch or current controller, so that the heat may be regulated as desired. The switch may be provided with an indicator to show the amount of current flowing through the heater or the number of sections of the resistance in circuit. To this end my invention consists in the combination of a plurality of cases, an electric heat-developing conductor within each of said cases, and a frame to hold or support said cases. Also, in the combination of supply conductors, a plurality of cases, an electric heat-developing conductor within each of said cases and connected with the supply conductor in parallel, suitable means to hold said cases apart and a switch to cut out of circuit one or more of the heat-developing conductors." The ninth claim, the only one involved, is as follows: "(9) In an electric heating apparatus having heating conductors or sections adapted to be connected in different ways with the supply conductors, a switch for controlling said connections, and an indicator operated by the movement of the switch to indicate how the connections stand." The defenses are anticipation, lack of novelty, and invention and noninfringement.

C. H. Duell, for complainant.

R. A. Parker, for defendant.

COXE, District Judge. The claim in controversy contains three elements, as follows: First. Heating conductors adapted to be connected in different ways with the supply conductors. Second. A switch for controlling said connections. Third. An indicator operated by the movement of the switch to indicate how the connections stand. Each of these elements considered separately is old, but, on the other hand, the combination is new. Dewey conceived the invention February 18, 1890, and there is no pretense that the combination of the claim, as applied to electric heaters, had been used prior to that date. A study of the record, extending over several days, has convinced the court, notwithstanding the ingenious and able argument of the defendant's counsel to the contrary, that it required an exercise of the inventive faculties to produce this combination. The mechanic could not have done it. Even though there were doubt on the subject the doubt should be resolved in favor of the patent. In cases of uncertainty the effort should be to sustain the patent, not to destroy it. The anxiety manifested by the defendant to use the Dewey heater seems inconsistent with the theory that it is no more efficient than the heaters of the prior art. The defendant has only to drop one element of the combination and it will be absolutely safe from attack.

But it is said, conceding invention, that, in view of what had been done before, the claim must be restricted to the exact structures shown in the drawings, and, if so construed, the defendant does not infringe. The invention consists in combining any desired number of distinct heating sections, each complete in itself, adapted to be connected with the supply conductors in series, in multiple arc or in multiple series, with a switch for controlling these connections and an indicator operated by the movement of the switch to show how the connections stand. The novelty is in the combination, not in

the separate elements of the combination, each of which is frankly admitted to be old. If the claim is to be confined to a particular form of heater, switch or indicator, it could be avoided in as many ways as there are patents in the record. It would, of course, be absolutely worthless. There is nothing in the specification or in the record requiring the claim to be so limited.

The defendant's apparatus as applied to the heating of a street car is made up of a number of sections each in a separate case adapted to be connected in different ways with the supply conductor. The defendant employs a switch for controlling the connection of the heaters and an indicator to show how the connections stand. There is no frame like that shown in the drawings of the patent for holding the heaters. They are supported by the woodwork of the car body. The switch is not fixed to the frame, but is placed in any convenient place in the car, and the indicator is of a different type from that shown in the patent. All such differences are immaterial. Matters relating merely to form and location are not of the essence of the invention. The specification expressly states that the principle upon which regulating devices operate is well known and that almost any form can be used. It is thought that the defendant's combination operates in substantially the same manner and accomplishes the same result as the combination of the claim. The complainant is entitled to the usual decree.

EWART MANUF'G CO. v. MITCHELL.

(Circuit Court, E. D. Pennsylvania. January 2, 1897.)

No. 46.

PATENTS—CONSTRUCTION AND INFRINGEMENT—CHAIN CABLES.

The Dodge patent, No. 264,139, for an improvement in cabin cables intended to operate with sprocket wheels, as driving chains, construed as covering a novel and useful invention, which should be protected to its full extent, as disclosed by a fair and unconstrained reading of the patent, and *held* infringed by a chain varying therefrom in matters of form and construction, but performing the same functions in substantially the same way.

This was a suit in equity by the Ewart Manufacturing Company against James H. Mitchell for alleged infringement of a patent for an improvement in chain cables.

Howson & Howson, for complainant.

Francis T. Chambers, Arthur M. Pierce, and Walter E. Rex, for defendant.

DALLAS, Circuit Judge. This is a suit upon patent No. 264,139, dated September 12, 1882, issued to James M. Dodge, for an improvement in chain cables, having, as the specification states, "for its main object to adapt this sort of cable to more successfully operate, in connection with sprocket wheels, as a drive chain, and for elevator and conveyor purposes." The employment of chain cables as drive chains, though in other respects advantageous, was subject to three objec-

tions, which Dodge proposed to, and did, overcome. The specification states and explains these objections, and the means which the patentee had invented to obviate them; and it describes the three beneficial functions of the bearing blocks which he designed for use in combination with the chain, as being (1) that they afford "proper bearing surfaces for the sprockets or other projections of the chain wheel to work against"; (2) that they afford "a pintle-like bearing surface about equal in diameter to the width or the opening or space between the side bars of a link for each link to articulate or turn on"; and (3) that by their use "the chain with its block is necessarily retained in a given and proper relationship with the peripheral devices of the wheel on which it is run." The applicant, desiring to secure any combination of a chain cable with these blocks by which either or any of these useful objects would be attained, presented three claims, which were allowed, as follows:

"(1) In a chain cable, the combination with the links of blocks interposed between the adjacent end portions of the links, the said blocks being adapted to afford bearing or working surfaces for the actions of the engaging devices of a chain wheel, substantially as set forth.

"(2) In combination with the links of a chain cable, blocks interposed between the adjacent ends of the links, and provided with grooves which afford pintle-like bearings for the said link ends, substantially as set forth.

"(3) In combination with two enchained links, a block having grooves arranged transversely to each other, and operating to prevent any twisting movement of said links relatively, substantially as set forth."

Respecting the question of infringement, which is the only one presented by the defense as urged upon the argument, the respective experts, of course, differ; but my own examination of the exhibits, in the light of all the testimony, leaves me in no doubt about it. The defendant insists that, in view of the prior art, the claims should be so narrowed by construction as not to cover his device; but I cannot assent to this. The evidence plainly shows that Dodge was the first person who ever devised any means whatever which successfully accomplished the object he had in view; and I cannot but regard him as a meritorious patentee, who, having made to the art a contribution of absolute novelty and much value, is entitled to protection to the full extent of his actual invention, as upon, at least, a fair and unconstrained reading of his patent, he appears to have conceived and claimed it.

The gist of the invention consists, of course, in the combination of the peculiar block of the patent (which in itself was new) with a chain cable, for the purposes and with the results stated; and the contention of the defendant that his chain is not a chain cable, and that his "crossbars" are not the complainant's blocks, is, in my opinion, clearly erroneous. His chain, though not wholly composed of the ordinary oblong links with rounded ends of the typical chain cable, embodies its characteristics in so far as is requisite for its use in the combination of the patent in suit. And his "crossbars," though structurally different, are, in principle, identical with the Dodge blocks. The differences consist in immaterial variations of form and construction merely. They perform precisely the same functions, and in substantially the same way. It may be conceded

that, in the chain of the defendant, an incidental useful capacity of the complainant's chain is relinquished, and also that some separate advantage is attained; but this is of no consequence, inasmuch as the Dodge invention, as covered by each and every of the claims of the patent in suit, has, nevertheless, been wrongfully appropriated. Decree for complainant.

BUCK v. TIMOMY.

(Circuit Court, S. D. New York. February 6, 1897.)

1. **PATENTS—AGREEMENT TO ASSIGN.**

An agreement to assign future patents, in consideration of the assignee's paying the expenses of taking them out, is broken by his refusal to pay for and take out in his own name, as assignee, a particular patent, when so requested by the inventor; and a subsequent assignment to another conveys a perfect title.

2. **SAME—VALIDITY AND CONSTRUCTION—BRICK-MOLD SANDING MACHINES.**

The Buck patent, No. 499,206, for improvements in brick-mold sanding machines, was not anticipated by a prior patent to the same inventor, and is for a new, valuable, and patentable combination, whereby, by means of a yielding mold-feeding rack, the molds are fed automatically to the revolving drum.

3. **SAME—INVENTION.**

There is no invention in providing an iron plate with elongated bolt holes where the parts must be moved slightly to effect a proper adjustment.

This was a suit in equity by Frances C. Buck against Frank Timomy for alleged infringement of a patent for an improvement in brick-mold sanding machines.

George A. Mosher, for complainant.

Walter E. Ward, for defendant.

COXE, District Judge. This is an equity suit for the infringement of letters patent, No. 499,206, granted June 13, 1893, to James A. Buck, assignor to the complainant, for improvements in brick-mold sanding machines. The object of these machines is to sand the molds prior to their introduction into the brick machine, so as to prevent the adherence of clay to the molds. This is accomplished by a hollow drum having openings over which the molds are placed. When the drum is rotated, the sand which it contains falls into the molds as they descend and out of them as they rise again, thus sanding every part. Machines of this general character had previously been used, and several patents therefor had been granted to this inventor. The improvement of the present patent has relation to the mechanism by which the molds are fed automatically to the drum. At first this work was done by hand. Afterwards it was done, imperfectly, by machinery. It was never done in a satisfactory manner prior to the present invention. In practice, the molds, after being used for a time, became sticky from the adhesion of the plastic clay. This often prevented them from moving into place. In the old machines they would adhere to the rack, become wedged between the stop on the drum and the pulleys, and thus would clog and break the machine and seriously delay the

operation of brickmaking. The invention obviates all these difficulties by providing a safe and reliable feed. The new and really valuable features of the patent are the yielding mold-feeding rack, pivoted at its lower end upon a fixed support, and bearings for the pulley shaft secured to and movable with the feed rack. By this means the shaft carrying the pulleys recedes with the rack, and the pulleys are enabled to continue their feeding action in circumstances which would block the prior machines.

The patent contains two claims, both of which are involved. They are as follows:

"(1) In a brick-mold sanding machine, the combination with a rotary mold-carrying cylinder; mold-engaging stops secured to such cylinder; of a yielding mold-feeding rack pivoted at its lower end upon a fixed support; a mold-supporting belt; a belt-supporting pulley and shaft; and bearings for the shaft secured to and movable with such rack, substantially as described.

"(2) In a brick-mold sanding machine, the combination with a rotary mold-carrying cylinder of an adjustable mold-engaging stop, substantially as described."

The defenses are defect of title, anticipation, lack of novelty and noninfringement.

The complainant has a valid title. It is assailed for the reason that by a contract made March 6, 1889, the inventor agreed to assign to A. H. Newton & Bros. all patents (or a joint interest therein) thereafter to be secured by him. It is said that the title is in the Newtons and not in the complainant. The court cannot accept this view. As a consideration for the proposed assignment the Newtons promised to pay all expenses of obtaining future patents. Before the assignment to the complainant, Buck demanded of A. H. Newton that he pay the expenses of taking out the patent, and requested him to take it out in his (Newton's) name as assignee. Newton refused to pay the expenses and declined to have anything to do with the patent. Buck then assigned the patent to the complainant and it was issued as before stated. Newton's action in refusing to perform his part of the agreement was, of course, the end of any pretense of ownership. *Kittle v. Frost*, 9 Blatchf. 214, 225, 14 Fed. Cas. 694. It seems too plain for discussion that when a party has agreed to pay a certain price for a patent, if he does not pay the price he does not get the patent. When Buck offered to assign to Newton upon the agreed terms and Newton positively declined to pay, the transaction ended. Buck did not for this reason lose his right to the invention. After he offered the patent to Newton and Newton refused to receive it, he had a right to take it in his own name or assign it as his option; his duty towards Newton was discharged. He was not under the slightest obligation to renew the offer which had thus been almost contemptuously declined.

The first claim contains six elements but those which make the combination new and valuable are the yielding mold-feeding rack pivoted at its lower end upon a fixed support, and the belt-supporting pulley and shaft and bearings for the shaft secured to and movable with such rack. These features were entirely new with Buck; no prior structure shows a yielding rack and feeding pulley. The advantages of this construction are obvious, and are illustrated by the

fact that after the machine of the patent came into use it supplanted the old methods and occupies the market, substantially, alone. The general appearance and operation of the new and old machines are so similar that unless care is taken the clearly meritorious features of the present invention may be lost sight of. There can be no doubt that this addition to the art was a valuable one. So far as feeding the molds to the drum is concerned, the machine is entirely automatic and is a perfectly working device. Prior to 1882 brick molds were sanded by hand. Buck was the first to make a machine for doing this work. He is the father of this art. The record shows five patents granted to him for the machines and improvements thereon.

The principal attack upon the patent at bar is based upon Buck's prior patent of July 1, 1884, which, it is argued, is a complete anticipation. So far as this complainant is concerned, the defendant is at liberty to use the 1884 patent. It was to remedy the defects of that patent that the present invention was made. In the prior machine there was, practically, no movement of the rack and pulleys to and from the drum. The pulley shaft was mounted upon standards bolted to the main frame. The standards could not move a hair's breadth. The shaft could move a small fraction of an inch by reason of the fact that the holes in the standards were made slightly larger than the diameter of the shaft, but this only took place when the set screws were not used which were designed to hold the shaft tightly in the bearings. For all practical purposes the shaft was immovable. The feed rack was fulcrumed upon the same shaft. It is true that the slight vibration of the rack in the prior machine was sufficient for ordinary emergencies, but when a mold caught, something had to give way. The rack would yield to the limited extent referred to, and when that point was reached it was rigid as if bolted to the frame. All of the difficulties incident to this construction were obviated by the ingenious expedient of making the rack and the entire feeding apparatus movable back and forth in such manner that they will operate to feed the molds as perfectly "when the stops force a mold against the wheel" as when the molds drop into place in the normal manner. To do this required invention. The defendant's machine is clearly an infringement of this claim. The only difference pointed out is that in the patented machine the spring is extended and in defendant's machine it is compressed. This difference is wholly immaterial. The complainant is not restricted to any particular form of spring.

For the reasons stated at the argument a decree upon the second claim cannot be sustained. In order to find infringement the court must hold that it involves invention to provide an iron plate with elongated bolt holes. It is one of the obvious expedients of the mechanic to place such holes in parts which must be moved slightly in order to adjust them properly. It is not possible to uphold the claim if construed to cover the defendant's construction.

It follows that the complainant is entitled to a decree for an injunction and an accounting based upon the first claim of the patent.

FAIRBANKS WOOD RIM CO. v. MOORE.

(Circuit Court, N. D. New York. February 12, 1897.)

1. PATENTS—INVENTION—BICYCLE RIMS.

The substitution, for a bicycle rim made of a single piece of metal, of a rim composed of a series of plies of wood of varying course or direction of grain, cemented together, each section breaking joints with each of the other sections, and the whole forming a compact, durable, symmetrical, and highly efficient structure, involves the use of inventive faculty.

2. SAME.

The Fairbanks and Berlo patent, No. 496,971, for improvements in bicycle rims, discloses patentable invention.

This was a suit in equity by the Fairbanks Wood Rim Company against Edward S. Moore for alleged infringement of a patent relating to bicycle rims.

The patent in controversy, No. 496,971, was granted to Fairbanks and Berlo, May 9, 1893, for improvements in rims for bicycle wheels. The invention consists in providing a wood rim for bicycle wheels in place of the metal rims theretofore used. The rim of the patent is composed of a series of plies of wood of varying course or direction of grain, bent into circular form, and cemented together, each section breaking joint with each of the other sections. A bicycle wheel constructed with this laminated rim is said to be lighter, stiffer, more durable and more buoyant than the rims of the prior art. The claim is as follows: "A rim for bicycle wheels comprising in its construction a series of sections or plies of wood of varying course or direction of grain, cemented together, the ends of each section breaking joints with the ends of adjacent sections, and the inner surface, *f*, being of convex form, and the outer surface, *g*, of concave form, as set forth."

Edward S. Beach, Nathaniel L. Frothingham, and Emmett J. Ball, for complainant.

William O. Campbell, for defendant.

COXE, District Judge. There is but one question to decide,—the question of invention. The court is convinced that the introduction into the art of the marked, and, at the present day, universally recognized, improvement of the patent, required an exercise of the inventive faculties. It was not the mere substitution of wood for iron. It was the substitution for a rim made of a single piece of metal of a laminated rim made of a series of sections so constructed as to form a compact, durable, symmetrical and highly efficient structure. After the idea that wood could be used instead of metal was conceived, the real work of invention began. How could wood be utilized? How could a rim be made that would not crack and warp without being so cumbersome as to be useless? Even after a practical rim had been constructed, the bicycle community was still incredulous as to the use of wood. It was only after its superiority to metallic rims had been fully demonstrated that it was accepted by the trade. Fairbanks and Berlo were the first to make a wooden bicycle rim. There was nothing in the prior art to show them how to do this and very little in analogous arts to assist them. Carriage wheels with the ordinary compression spokes, and reinforced with iron tires, had been made with laminated felloes, but there is no pretense that the break joint and varying grain features of the patent are to be found in any of these structures

which are not adapted for use in a wheel provided with suspension spokes and pneumatic tires.

Two significant facts stand unchallenged: First, that the patentees were the first in an art which has attracted a multitude of ingenious inventors, to employ a wooden rim; and, second, that to-day this rim is the only one used, all others, in the construction of first-class machines, having been driven from the market. They certainly have done much to make the modern bicycle a perfect machine.

It follows that the complainant is entitled to the usual decree.

THOMASSON v. BUMPASS et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 182.

PATENTS—INFRINGEMENT—POULTRY CRATES.

The Thomasson patent, No. 444,561, for an improved poultry crate for shipping live poultry, construed, and held not infringed. 74 Fed. 243, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This is a bill in equity, in usual form, by Robert G. Thomasson, appellant, against Charles W. Bumpass and William McCandlish, appellees, praying an injunction and other relief for the infringement of appellant's patent, No. 444,561, dated January 13, 1891, for an improved poultry crate to be used in shipping live poultry. The defenses principally relied upon by the appellees are noninfringement and want of patentable invention. The court below (Judge Hughes), upon final hearing, held that the crate made by the appellees did not have the wicker bottom of the appellant's patent, and did not infringe. 74 Fed. 243. The complainant appealed.

F. W. Sims and John G. May, for appellant.

B. B. Munford, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge. The appellant, in the specification of his patent, states that his invention consists in the novel construction and combination of the parts of a poultry coop for shipping purposes, which, he states, combines strength and durability, and is easily and cheaply made. He gives a minute description of the details of the construction, nearly all the elements of which are obviously old, but he does not indicate what it is that he has invented or considers new, otherwise than by his two specific claims. In his testimony, in describing what it was that he invented, he does state that it was new, and resulted in a great saving of time and material, to adopt his method of weaving the splits in the wicker bottom, using broader and stouter splits, as contrasted with the old wicker bottoms, woven as a basket is, and also he claims, in his testimony, that it was new to put on the wire netting in the manner in which he did; but neither of these things is pointed out in

his specifications, nor in his claims. A patent grants no exclusive right except to what is distinctly covered by the claims. *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699; *Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447, 5 Sup. Ct. 941; *Ashton Valve Co. v. Coale Muffler & Safety-Valve Co.*, 3 C. C. A. 98, 52 Fed. 318; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76.

The first claim of the patent is as follows:

"(1) The chicken coop, or crate, comprising the bottom, having the side and end projecting portions forming the normally upturned portions, or sides and ends, of the coop, connected together by the short tucked-in corner pieces or strips, and the inner and outer opposite strips, or pieces, lapping and secured to the top edge strips of the sides, and suitably reinforced thereat, substantially as and for the purpose set forth."

It is obvious, from the proof and the exhibits, that the appellee does not infringe this claim. He uses a wicker bottom, which, perhaps, is woven and fastened together in a manner similar to that used by the appellant, but he does not use a bottom having the sides and ends upturned and connected together by strips secured to the top edge strips of the sides. He uses a flat wicker bottom, without sides or ends, and for the sides and ends of the coop bottom he uses boards nailed to the bottom, and made secure by long pieces of hoop iron nailed across the bottom, and turned up and fastened on the sides.

The second claim of the patent is as follows:

"(2) The chicken coop, consisting of the bottom wickerwork portion, having side and end portions held together as described, and having upper and lower bottom reinforcing pieces or strips, also reinforcing metallic pieces or strips near their corner edges, the wire netting covered bows with their braces or stays, said bows being secured to the said bottom portion, the upright stays or braces secured to said bottom portion, and the end bows and the reinforcing metal pieces secured to said upright stays and to said bottom portion, and to the central top brace of said bows and the central underneath strip or brace of said bottom portion, substantially as set forth."

If this claim is for the appellant's wicker bottom, with its sides and ends made as described in the first claim, in combination with the other parts of the chicken coop, it may, possibly, be sustainable; but, as appellees do not use appellant's special wicker bottom with the sides and ends, they do not infringe the combination. If, however, it be contended that this claim covers any equivalent for appellant's wicker bottom, then, we think, it is manifestly invalid. Discarding appellant's peculiar bottom, with its sides and ends, and substituting any well-known tray made of boards or tin or other material, there is nothing left that is patentable. It is a cage made by erecting on the tray a rectangular frame, made of four bent bows of wood, stayed by three wood crosspieces, strengthened by hoop iron where additional strength is needed, and the whole covered with wire netting. There is no novelty in any means used or result obtained. Every element is old in itself, and has been used in coops and cages.

It is testified that appellant's coop, by reason of its rectangular shape, is more convenient for railroad transportation than the old dome-shaped chicken coop; but to adopt that form did not require

invention, and it is not suggested in the specification as new. It is said that appellant's coop, by reason of its being stayed by hoop iron or metallic pieces, better withstands transportation; but that is mere improvement in manufacture. The only feature which is not obviously mere mechanical improvement in the construction of what was well known in making crates, coops, and cages is appellant's method of weaving the wicker bottoms, and forming the sides and ends by bending up the bottom strips and securing them; and, as the appellees do not use this feature, there is no infringement. The court below so held, and its decree is affirmed.

READ HOLLIDAY & SONS, Limited, v. SCHULZE-BERGE et al.

(Circuit Court, S. D. New York. July 1, 1896.)

1. PATENTS—CHEMICAL COMPOUNDS—TESTS OF IDENTITY.

In a patent for a chemical product, where the tests of identity prescribed by the patent have been previously adjudged sufficient to identify the product, proof that defendant's compound answers to these tests makes out a *prima facie* case of infringement; and defendants must be *held* to infringe, unless they show that they used different starting materials.

2. SAME—EQUIVALENT INGREDIENTS.

The discoverer or inventor of a compound is protected against equivalent ingredients known at the date of the patent. And if a new ingredient is such as would have been known to or employed by the ordinary skilled practical chemist, or is such as would naturally have been developed in the growth of the art, and the substitution thereof involves no alteration or new operation or result, it is covered by the patent, provided the specifications and claims are broad enough. But if the development of the new ingredient required the exercise of inventive faculty, and if its introduction causes some novelty in function or result, it is not an equivalent. *Matheson v. Campbell*, 69 Fed. 597, distinguished.

3. SAME.

A patent for a compound may cover a discovered, described, existing element, at the date of the patent, though it had not yet been isolated as a chemical individual.

4. SAME—"ACID MAGENTA."

The Holliday patent, No. 250,247, for a coloring compound, construed, and *held* infringed as to the first claim, which is for "the sulpho-conjugated compound of rosaniline," possessing the properties specified, as a new article of manufacture.

This was a suit in equity by Read Holliday & Sons, Limited, against Paul Schulze-Berge, Victor Koechl, and August Movius, for alleged infringement of a patent.

Dickerson & Brown, for complainant.

Goepel & Raeger, for defendants.

TOWNSEND, District Judge. The patent in suit, No. 250,247, as to which infringement is alleged, was granted November 29, 1881, to John Holliday, and duly assigned to complainant. The claim in controversy is the first, which is as follows: "The sulpho-conjugated compound of rosaniline, possessing the properties specified, as a new article of manufacture." The patent was considered by Judge Blatchford, on motion for a preliminary injunction, in *Holliday v. Pickhardt*, 12 Fed. 147, and on final hearing by Judge

Wallace, who sustained the validity of the patent after protracted litigation and thorough examination. 29 Fed. 853. In view of these facts, it is unnecessary to discuss the defense of invalidity, not set up in the answer, but claimed in the brief and argument of defendants' counsel. The new evidence introduced on this hearing does not affect the validity of the patent in suit. That it may limit the scope of the patent is immaterial, in view of the conclusions reached. The following statements have been agreed to by counsel:

"It is agreed that the Holliday patent includes those homologues—as, for instance, C₁₉, C₂₀, or C₂₁—which were known at the date of the Holliday patent. It is agreed that the body C₂₂ is such homologue, and, if known at the date of the Holliday patent, would have been included therein. It is agreed that the Epting patent process is the process of Holliday applied to the rosaniline known as C₂₂, without any change in said process or in the result."

It was found by Judge Wallace on the former hearing that the claim in suit "is a valid claim for the real invention of Holliday"; that "it can be recognized aside from the description of the process for making it," and "the product can be identified by the characteristics specified" in the patent. Defendants' body, so far as appears from said characteristics, and by certain other tests used in the art, is an exact technical equivalent of the patented body. Defendants' body is commercially known as "New Acid Magenta," and is sold as the equivalent of the complainant's acid magenta. These facts show at least a *prima facie* case of infringement. *Matheson v. Campbell*, 69 Fed. 597, and cases cited. "It was not shown by the complainants that the defendants' coloring matter was made by the process described in the patent, nor was any evidence to the contrary produced by the defendants. The proofs show satisfactorily, however, that the defendants' coloring matter possesses the peculiar characteristics of the patented article. Sufficient appears to establish the chemical identity of the defendants' coloring matter with the complainants' by the evidence of the results produced by each in experimental tests. As these results were new until Caro's process was employed, a sufficient *prima facie* case is shown upon the question of infringement." *Pickhardt v. Packard*, 22 Fed. 530, 532.

Infringement is denied for the following reasons: First, defendants' body, called C₂₂, was neither described nor isolated as a chemical individual until after the date of the patent in suit; second, certain tests, not specified in the patent, show different results when applied to the two bodies. But Judge Wallace has found that these tests of this patent are sufficient to identify the patented product. The application of these tests to the defendants' body is sufficient to show what the supreme court, in the *Badische Case*, 4 Sup. Ct. 462, calls "the identity, in the sense of the patent law, between them." The defendants must therefore be held to infringe, at least unless they can show that the bodies were produced from different starting materials.

The first question is whether defendants' product is C₂₂, or only a mere mixture. The alleged infringing product, commercially

known as "New Acid Magenta," is produced from triamido triortho tolyl carbinol, which is known as C₂₂, or the fourth body of the following series of rosanilines, namely: "C₁₉, para rosaniline; C₂₀, methyl para rosaniline; C₂₁, dimethyl para rosaniline; and C₂₂, trimethyl para rosaniline." These bodies will hereafter be referred to as C₁₉, C₂₀, C₂₁, and C₂₂, respectively. The complainant claims that defendants' color is not C₂₂, but is a mixture of probably C₂₀, C₂₁, and C₂₂. I shall assume that it is C₂₂.

The next question is whether defendants' product, C₂₂, is identical with, or the equivalent of, the patented products, which include C₁₉, C₂₀, and C₂₁. By the stipulation already referred to, it is agreed that it is a homologue of the patented products, and would have been included in the patent if known at the date thereof. The briefs of counsel are largely devoted to a discussion of the doctrine of unknown equivalents. Counsel for defendants contend that the claim for the patented product does not cover a body having substantially the same qualities, but produced from a subsequently discovered starting material. Whatever questions may arise in other cases, there does not seem to be any difficulty in the application of the law to the facts of this case. That a patentee must clearly conceive and accurately state his invention or discovery, and that he cannot claim a monopoly of the whole art, nor by speculation include unknown elements within the limitations of his claim, is well settled. The primary or secondary character of the patent determines the scope of such claim, and the range of equivalents. The Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75; American Sulphite Pulp Co. v. Howland Falls Pulp Co., 70 Fed. 988; Edison Electric Light Co. v. Boston Incandescent Lamp Co., 62 Fed. 397. In the case at bar, Holliday discovered a process of converting rosanilines into bodies capable of dyeing in an acid bath in admixture with other colors, and patented the product. The defendants use the same process, and obtain the same product from a body belonging to the same class,—a homologue of complainant's bodies. If the doctrine of unknown equivalents is to be applied, the patentee cannot embrace this body among the rosanilines of his patent unless it was either so commercially known as to be included under said term, or so chemically known that no experiment was necessary to discover its equivalency. But the admissions of defendants' experts, Woltereck, Homolka, Laubenheimer, and Chandler, shows that C₂₂ was known and used before the date of the patent in suit. The French patent of Coupier, of 1866, and his published researches, give processes for producing it; and the C₂₂ produced by following the Coupier process was the same as that of defendants. Furthermore, a French patent, No. 71,114, granted to John Holliday in 1866, indicates that he was familiar with the properties and actions of this whole class of rosaniline colors. The utmost which defendants can claim, in view of this testimony, is that, while C₂₂ was known, it had not been isolated as a chemical individual. It is admitted that the substitution of C₂₂ for the other rosanilines does not involve any alteration or inventive skill.

Various questions concerning the doctrine of unknown equivalents have been forcibly pressed upon the attention of this court in this case and in *Matheson v. Campbell*, supra. It seems to be the duty of the court to state its views on this subject. That the discoverer is protected against equivalent ingredients known at the date of his patent is settled. *Gill v. Wells*, 22 Wall. 1; *American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, supra; *Edison Electric Light Co. v. Boston Incandescent Lamp Co.*, supra. Subject to this rule, there is some conflict of authority as to whether the first discoverer is protected against subsequently known equivalents. Most of the earlier cases hold that he is not. The later cases hold otherwise, or state the rule with qualifications. In *Walk. Pat.* (3d Ed.) § 354, the author has collected the cases, and states the rule as follows:

"Whether a device, in order to be equivalent of another, must have been known at the time of the invention of the machine which contains the latter, is a question which was elaborately investigated and discussed in sections 354 to 358 of the former editions of this book, because it then appeared to be not only very important, but also unsettled. But the weight of reason was always much on the side of the negative of that question, and the weight of authority has now accumulated so preponderatingly upon the same side that the question may now be held to be settled in the negative. It is therefore safe to define an equivalent as a thing which performs the same function, and performs that function in substantially the same manner, as the thing of which it is alleged to be an equivalent."

The apparent conflict in the decisions arises from the distinction between the application of the doctrine of equivalents to primary and to secondary invention, and from the difference between the old and the new rules as to what constitutes invention. In the light of the later decisions on this subject, I think the law must be that where the new ingredient is such as would have been known to or employed by the ordinary skilled practical chemist, or is such as would naturally have been developed in the growth of the art, and the substitution thereof involves no alteration or new operation or result, it is covered by the patent, provided the specifications and claims are sufficiently broad to include it. If, on the other hand, the development of the new ingredient required the exercise of the creative or inventive faculty, and certainly if its introduction causes some novelty in function or result, it would not be an equivalent. The conclusions reached by Judge Robinson support these views. *Rob. Pat.* p. 351, § 257, note. In the case at bar the defendants' body is a mere substitute. C₂₂ is the next succeeding homologue of C₁₉, C₂₀, C₂₁. It existed in the arts; was referred to in the literature; the patented process of Coupier was capable of producing it. The defense is supported solely by the fact that the description of the body, with all its properties, and the process of preparing it in a chemically pure state, was not known until the year succeeding the grant of the patent in suit. The defendants have discovered nothing. They have taken the C₂₂, existing prior to the patent, but first isolated and described by Rosenstiel and Gerber in 1882, subjected it to the process described in the patent, and obtained the patented product. Whatever may be the scope of the doctrine of unknown equivalents, it should have

no application to this case. Counsel for defendants lay stress upon certain statements in the opinion of this court in *Matheson v. Campbell*, as supporting this claim. But there the facts were very different. The patent contained a general formula, covering at least a hundred different bodies. It was shown that very many of these bodies would not produce the patented product. The patent also contained a special description of the newly-discovered process to obtain the patented product. Counsel for complainant, having sought to expand the claim so as to appropriate the bodies of the general formula, the court held that could not be done, and that the patent must be limited to the bodies of the special process. Here the body C²², if known, would be properly included in the claim. It does not appear that, at the date of the patent, experiment or discovery was necessary in order to determine its reactions. In the *Matheson Case* the questions were whether the whole patent was invalid by reason of the uncertain general formula, and whether the claim was limited to the special example. Here the question involved is whether a patentee may protect, or an infringer appropriate, a discovered, described, existing element, not isolated at the date of the patent. Let a decree be entered for an injunction and an accounting.

BRAMBLE et al. v. CULMER et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 186.

1. PILOTS—OWNERS AND CHARTERERS—RESPONSIBILITY FOR NEGLIGENCE, ETC.

A pilot is so far the agent of the vessel that whoever is responsible for her navigation is responsible for his acts or omissions in the line of his duty; and unless there is some express contract, or some facts warranting implications or understandings contrary to uniform usage, the pilot must be considered the servant of the owner.

2. SHIPPING—CHARTERS—DEMISE OF VESSEL.

When, by a charter, the shipowner undertakes to act as a carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests on him; but when the ship is completely transferred for a period of time, and the owner has nothing to do with the appointment of officers and crew, then the charterer becomes responsible for her navigation.

3. SAME—FURNISHING PILOT.

When the charterers are to pay a lump sum to the owners, and defray port and pilotage charges, and the owners select and pay the master and crew, the mere fact that the charterers, at a port where no compulsory pilotage laws are in force, furnish a pilot, whose services are accepted by the master, does not make them responsible for the loss of the vessel through his incompetence or negligence.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel in personam by Barzillia Bramble and Henry W. Elliott, owners of the schooner *William Farren*, and Calvin A. Murphy, her master, against James W. Culmer and Thomas B. Schall, to recover for the loss of said schooner, while under charter to the defendants. The district court dismissed the libel on the merits, and the libelants have appealed.

Beverly W. Mister, for appellants.

Robert H. Smith, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The primary and fundamental question in this case upon which the decision turns is whether, under the agreement between the parties, there was a demise of the ship, or whether it was a contract of affreightment. If the owners parted with the whole possession and control of the ship, and gave to the charterers power and right to do what they pleased with regard to the captain and crew and the management of the ship, such charterers would become *pro hac vice* the owners, and would be responsible for its navigation and all the incidents flowing from that relation. If, on the other hand, the agreement between the parties was nothing more than a contract whereby the owners agreed for a fixed sum to send their ship for a cargo to be obtained at such points as the charterers might direct for transportation to its port of destination, and did nothing more to divest themselves of its ownership and control, then the responsibility for its proper navigation rests upon them, and they cannot hold the charterers to account.

The proper determination of the precise relations of the parties is not free from difficulty, owing to the informal nature of the agreement, there being no written charter party. The contract was indefinite and verbal, and, so far as we can gather from the testimony, the facts were substantially these: The owners of the William Farren, a small schooner, habitually employed in and about the Chesapeake Bay, some time in the spring of 1894, applied to one Schall, in Baltimore, for a charter. Schall was engaged in the shipping of pineapples on joint account with one Culmer, who lived on Eleuthera Island, one of the Bahamas, and was in the habit of sending out a number of vessels every spring, and once before had chartered the Farren for that purpose. Very little was said as to the terms of the charter, but it was understood that the owners were to receive the amount usually paid for schooners of like tonnage, and there is no dispute as to what that was. The owners were told to get ready, and after employing as mate one Fehring, who was somewhat familiar with the West Indies, though he had never before been in the waters where occurred the incidents hereafter related, the master reported to Schall, and, receiving from him a letter to Culmer, set sail, arriving without accident or incident at Tarpum Bay, in Eleuthera Island, where he delivered to Culmer the letter intrusted to him. It appears further from the testimony of Murphy, the master, that out of the gross sum to be paid by the charterers, the owners were to receive 40 per cent., and that the master was to receive 60 per cent., and "pay the expenses of the hands, wages, and grub bill." It further appears, though there is no testimony showing any positive agreement on the point at the time that the charter was made, that it was understood that all pilot and port charges incurred in the Bahamas were to be paid by the charterers. After reporting to Culmer, the master was informed that he was to get his cargo of pineap-

ples at Great Harbor, on Long Island, about 180 miles distant, and, taking aboard a pilot, set sail for that point, and while on the way, while off Conception Island, was run upon a reef, and the schooner became a total loss. It is for the loss of the vessel, caused, as alleged, by the incompetency of the pilot, that the libel is filed by the owners against Schall and Culmer, the charterers, the allegation being that the pilot was their agent; that "the reef was plainly indicated on charts for that part of the Atlantic Ocean"; and that loss of the vessel was solely due to the incompetency, unfitness, and ignorance of the pilot furnished by the charterers.

There are no licensed pilots at Tarpum Bay or in the waters thereabout, and no laws of compulsory pilotage, and the testimony relating to the taking of the pilot is brief. Murphy, the master, relates that, on the night after his arrival at Tarpum Bay, he was at Culmer's house, and, after some desultory conversation with him, he called out to a man he did not see in the dark, saying: "Peter, I want you to take the Farren to Great Harbor. You will sail Saturday morning." Culmer relates that Murphy asked "if I intended sending a pilot with him," and that he told him he would send Peter Allen, and it appears that he was to pay Peter Allen for this service. Peter Allen was a colored man, about 54 years of age, living on Eleuthera Island, who seems to have been engaged sometimes as a seaman in command of small vessels, sometimes as a pilot, and sometimes in cultivating pineapples on shares for Culmer and others. He was not a licensed pilot. He could read a little, but could not write. A great deal of testimony was offered to show his competency as a pilot, and it sufficiently established the fact that he had acted successfully as a pilot in conducting vessels safely through the waters where this untimely mishap befell. The testimony further shows that no great skill was needed at the point where the vessel went on the reef, and that any capable navigator could have sailed her safely there, special skill and local knowledge being required only at and about the entrance to the harbors. In the view we take of this case, it is not necessary that we should determine critically the competency of Peter Allen as a pilot. We are satisfied that he was believed to be competent; that he had frequently been employed in such undertakings, and that he was one of the most competent men available for such service in those islands; that Culmer had frequently intrusted him with the management of his own vessels; and that his previous success left him no room to doubt that he had the skill and knowledge required to pilot the vessel safely from Tarpum Bay to Great Harbor.

Nor is it necessary to consider in detail the circumstances attending the wrecking of the vessel. Whether it was solely due to the carelessness and ignorance of the pilot, which the preponderance of evidence tends to establish, or whether the master and mate contributed to bring it about by their refusal to keep the vessel on the course given to them by the pilot, as his unsupported testimony declares to have been the case, is not material to the determination of the main question, which is this: Was it the

duty of the owners or of the charterers to navigate the vessel? If it was the duty of the owners, the taking of the pilot was optional with them, and there being no law of compulsory pilotage in those waters, and the employment of the pilot being their voluntary act, and subsidiary and subservient to their use, they could not relieve themselves of responsibility by turning over the entire control of the vessel to him; and, by so much as he was ignorant and unacquainted with charts and the higher arts of navigation, to that degree did an increased duty of vigilance and care devolve upon the master and mate, who were in possession of charts, which, as their libel states, plainly indicated the reef upon which the vessel was wrecked. In any view of the case, the pilot would be considered as so far the agent of the vessel that whoever is responsible for its navigation would be responsible for his acts or omissions in the line of that duty; and, unless there is some express contract or some proof of facts which warrant implications or understandings at variance with uniform usage, the pilot must be held to be the servant of the owners.

It is the general and unvarying incident of all charter parties that the owners of vessels are charged with the duty of navigating them, and parties must, in reason, be understood to contract with reference to such obligation, unless it is excluded by special contract or necessary implication. It is not contended here that there was any express contract at the time the vessel was chartered in which the charterers undertook to navigate the vessel. The master, mate, and crew were selected by the owners, and paid by them. The charterers undertook to pay a lump sum for the voyage, which sum was divided between the owners and the crew in the proportion before stated. This was but an ordinary contract of affreightment, and, if the schooner had been lost on the way out to Tarpum Bay, there could have been no pretense that the charterers were liable. Did anything occur at Tarpum Bay to alter the original contract? If so, by whom was it done, and by whose authority? The owners were not there. It is not necessary to consider that class of cases where the master, away from the home port, has authority to make contracts binding the ship, as they have no relevancy. The reporting to Culmer at that place, and the sending of the vessel to Great Harbor for her cargo, was in accordance with the original agreement; and the taking of a pilot was incident and subservient to the purpose of the voyage, and did not change the relation of the parties; nor is the fact that the pilot was to be paid by the charterers inconsistent with the original agreement, for there was an understanding from the beginning that all pilotage and port charges were to be paid by them. The services of the pilot were for the benefit of the owners, to enable them to make the voyage by which they were to earn the charter money. They could have taken him or not, as they chose. In taking him, he became their servant. It is their misfortune that he proved incompetent. There was nothing in the act of taking the pilot which so far changed the relation of parties as to convert a contract of affreightment into a demise or letting of the ship. A short review

of the cases will make plain the distinction between these two classes of contracts.

When a shipowner agrees to carry goods by water, or to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid to him, such contract is called a "contract of affreightment." The charterer thereby acquires the right to the temporary use of the vessel for the carriage of his goods, but the control and possession of the vessel remain in the owner, through the master and crew, who continue to be his servants. When a ship is let to another for a period of time, and the owner during that time has nothing whatever to do with the appointment of her officers and crew, or with the working or management of her, that is called a "demise" or "letting" of the ship. Scrutton, *Charter Parties*, pp. 1, 3; *Carv. Carr. by Sea*, p. 118 et seq.

Lord Esher, in *Baumvoll v. Gilchrest* (decided in 1891) [1892] 1 Q. B. 258, thus discusses the question:

"When is the captain the owner's captain? He is the owner's captain if the owner appoints him, and exercises authority over him, or has a right as between themselves to exercise that authority over him which an owner has ordinarily to exercise over his captain. * * * It seems to me, after listening to all the cases that have been cited, from the time of Lord Ellenborough downward, that through all the cases it has been assumed that the question depends, where other things are not in the way, upon this: Whether the owner has by charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him, to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a 'letting' or 'demise' of the ship. The right expression is that it is a parting with the whole possession and control of the ship, and in such case the captain is not the captain of the owner."

In this case, affirmed by the house of lords ([1893] 1 App. Cas. 8), the owners of the ship chartered her for four months to the charterers, who concurrently agreed to purchase her on certain terms at the expiration of the charter party. The charterers appointed and paid the wages of the captain and crew. The action was for damages for the loss of cotton upon bills of lading signed by the captain, caused by the alleged unseaworthiness of the ship. It was held that the captain was not the captain of the owners, and that they were therefore not responsible, having parted, under the terms of the charter party, with the possession and control of the vessel.

In *Master of Trinity House v. Clark*, 4 Maule & S. 288, when the vessel was chartered to the government for transport purposes at a certain rate per registered tonnage for each calendar month during the service, although the master and crew were paid by the owners, it was held by Lord Ellenborough that such possession by the owners was consistent with the entire ownership and possession of the vessel on the part of the crown, to enable it fully and beneficially to enjoy the same, the services of those best qualified to navigate it under the direction of the crown being hired together with the vessel itself. Stress was laid upon the object to be served, and upon the terms of the charter party, which were held to be proper words of lease. It was therefore decided that

the effect of the charter party was to transfer possession of the vessel to the crown during the term of service, and that the owners were not liable for certain light dues. This case, decided in 1815, has been so much distinguished and doubted since that it cannot be considered of much authority.

Meiklereid v. West, 1 Q. B. Div. 428, was held to be clearly a demise of the ship. In that case the ship was to be under the direction of the charterers to be employed within certain limits as ordered by them, for three or more calendar months, at their option; the charterers to pay for coals and all wages and expenses of the crew, and to deliver up the ship to the owners at the termination of the charter in as good order and condition as when delivered.

These are the leading English cases on the demise or hiring of ships.

In *U. S. v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519, the owners of the steamer *Bowen* agreed with the deputy quarter master general of the United States to furnish a vessel for a specified service in the harbor of New York, to provide an engineer and fireman, the remainder of the crew to be supplied by the United States, which also was to furnish fuel. The government was to pay \$67 per diem for the use of the vessel, and the same was to be under its control and management. The *Bowen*, while so employed, was injured in a collision in New York harbor, and the claim was for reimbursement of expenses incurred. It was held that the contract was one of hiring, and not for service, and that the government, during its possession of the vessel, was a special owner. The court cites *Reed v. U. S.*, 11 Wall. 591, where Justice Clifford uses this language:

"But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, per example, to carry a cargo from one port to another, the arrangement, in contemplation of law, is a mere affreightment, sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership."

And in *Leary v. U. S.*, 14 Wall. 607, Justice Field, speaking for the court, says:

"All the cases agree that the entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

The older cases of *Hooe v. Groverman*, 1 Cranch, 214, and *Marcardier v. Insurance Co.*, 8 Cranch, 39, are to the same effect.

In *Iron Co. v. Huntley*, 2 C. P. Div. 464, a steamer was let to the sole use of the charterers, and for their benefit, for the space of six months, with option to take her longer. Freight for the hire of steamer was to be £410 per month. The charterers were to have the whole reach of the vessel, and were to pay for coals, port charges, pilotage, and extra labor, but the owner was to pay the crew, and find all ships' stores and other necessities. In the course of

a voyage under this charter, the vessel was wrecked, owing to negligence of the master and crew; and the question was whether the owner was liable to the charterer for that negligence. It was held that he was, because, so far as concerned the navigation of the vessel, the owner had control for the purpose of carrying out his contract; that though the charterers might direct where the vessel was to go, and with what she was to be laden, the owner remained in all respects accountable for the manner in which she might be navigated.

In *Fenton v. Packet Co.*, 8 Adol. & E. 835, the steamer was chartered to one Dails for six months, at the rate of £20 per week, he to pay all disbursements, including pilotages, seamen's and captain's wages. For damages caused by a collision owing to the improper navigation of the vessel, it was held that the owners were responsible, they having the appointment and power of dismissal of the officers and crew, the possession and care of the vessel being thus left in their hands.

The result of all the cases seems to be this: Wherever the shipowner undertakes to act as carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests upon him; but wherever the ship is completely transferred to the hirer for a period of time, and the shipowner has nothing whatever to do with the appointment of her officers and crew, then the charterer becomes responsible for her navigation. No case has been cited, and our researches have not disclosed any, where the mere appointment of a pilot has been held to operate so as to change legal ownership and responsibility. The pilot is considered as the servant or agent of the owner. The fact that he was selected and paid by the charterers cannot alter his relations to the ship.

Says the court in *Bussy v. Donaldson*, 4 Dall. 207:

"The mere right of choice, indeed, is one, but not the only, reason why the law in general makes the master liable for the acts of her servants; and, in many cases where the responsibility is allowed to exist, the servant may not, in fact, be the choice of the master."

Wherever the law of compulsory pilotage prevails, the master, in point of fact, does not choose his pilot; but that is never held in this country, at least, to absolve the vessel from responsibility for injury caused by the negligence of the pilot. It is different in England within certain districts, by reason of the statute of 17 & 18 Vict.

We do not find in *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 63 Fed. 847 (a case much cited by the appellant), anything not in consonance with the views upon which our decision rests. The injury complained of in that case being to a pier, a part of the land, and it not being a marine tort, the question involved was the liability at common law. The maritime law as to the responsibility of the vessel, and as to the position and powers of the master, is not derived from the common law. It is founded upon usages and practices so remote that their origin cannot be traced. This places the liability for all injuries done, not primarily upon the owner, but upon the vessel itself. All that

was actually decided in Ramsdell's Case was that the shipowner was not liable at common law for damages to a pier caused by the negligence of a pilot compulsorily employed. *Ralli v. Troop*, 157 U. S. 386, 15 Sup. Ct. 657.

Nor are we moved to a change in our views by the consideration of those cases cited by the appellants' counsel which hold that the navigation of the ship is under the exclusive control of the pilot. Whatever may be the rule in those jurisdictions wherein compulsory pilotage is in force, and where there is a body of intelligent, trained, and experienced pilots licensed by law, we are of the opinion that in this case, and with the pilot selected under the circumstances here disclosed, there was nothing to absoive the master from responsibility for the safe navigation of his vessel, and that he had the right and duty to displace him if any manifest incapacity was disclosed. *The China*, 7 Wall. 67; *The Oregon*, 158 U. S. 194, 15 Sup. Ct. 804.

This whole subject had thorough examination by Mr. Justice Grier in *Smith v. The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033, who there states the law:

"The vessel, when under the control of a pilot, is in the legal possession of the owners. The pilot is their servant, acting in their employ, and receiving wages for services rendered to them. The fact that he was selected for them by persons more capable of judging of his qualifications cannot alter the relation which he bears to the owners. He is still their servant."

The decree of the district court is affirmed.

SPEDDEN et al. v. KOENIG et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 180.

SHIPPING—SUPPLIES—LIABILITY OF PART OWNERS.

In the home port, where all the owners reside, the managing owner, though registered as such at the customhouse, cannot, merely by virtue of that relation, order supplies, and bind his co-owners to a personal liability therefor; nor do they become liable merely because the creditor, on his books, charges the supplies against the vessel "and owners."

Appeal from the District Court of the United States for the District of Maryland.

This was a libel in admiralty by Robert M. Spedden and Harvey E. Birch, trading as Spedden & Birch, in personam, against George Koenig and Nicholas R. Ford, part owners of the steam tug *May Russell*, to recover for supplies furnished for her use. The circuit court dismissed the libel, and the libelants have appealed.

Robert H. Smith, for appellants.

Beverly W. Mister, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The libelants, who were engaged in the business of machinists and steamship supplies in the city of

Baltimore for some years prior to the date of the filing of this libel, furnished supplies to one Phillips, who built, owned, and managed several tugs, among them the May Russell, which was completed about August 1, 1893; and one-half interest in this tug was then sold to one Koenig, in pursuance of an agreement made with Phillips, that he would buy a half interest in one of the tugs which were then building. About the same time, one Ford loaned Phillips some money, taking a bill of sale of one-fourth of said tug as security. Phillips afterwards repaid Ford a part of the amount loaned, and in the autumn of 1895 Koenig's wife purchased this one-fourth interest, and took a bill of sale from Ford. The tug was enrolled, and papers issued to Phillips, as managing owner, in compliance with the Revised Statutes, requiring managing owners to give a bond of indemnity to the government against any frauds under the revenue laws. A part of the supplies (about one-fifth of the entire amount claimed) were furnished prior to August 1, 1893; the remainder between that date and the summer of 1895, during which period Phillips, by an agreement between himself and Koenig, had the use, employment, and earnings of the tug for his own benefit. No profits were made, and Koenig and Ford received no part of the earnings. All of the parties were residents of Baltimore, and acquainted with each other. The supplies were furnished to Phillips, and charged on the books of the libelants to the "May Russell and owners." Phillips, during this period, was the owner and manager of other tugs, supplies for which were bought from the same parties. In making his settlement, it is in evidence that he at one time directed that a small amount of money paid in should be credited to the account of the May Russell; but, at the request of the libelants, he consented that it should be applied to other indebtedness. Phillips became embarrassed in the summer of 1895, and in the autumn of that year the May Russell passed into the possession of Koenig. There is no question of the liability of Phillips, and the court below has entered a decree against him; but it appears that he is insolvent, and it is clear that the supplies were such as were necessary for the use of the tug in the business for which she was built. The only point for decision is whether Koenig and Ford are liable. The district court has held that they were not. Hence this appeal. There is no proof that Koenig or Ford had any knowledge that Phillips was ordering these supplies from the appellants, or that he had any authority from them to buy them or to pledge their credit, or that the appellants ever consulted them, or made known the fact, or demanded any payment from them until after Phillips became insolvent.

It is well settled that, by the law of this country, no maritime lien is allowed for supplies furnished to a vessel in her home port; and it is conclusively presumed that they are furnished upon the owner's personal credit, and it is equally well settled that co-owners of ships are not partners. Their relation to each other is that of tenants in common, where each is severally liable upon his own contract. As between partners, the relation of principal and agent

is implied by law; between part owners it must be proved,—the only modification of this rule being the implied authority of part owners on the spot to order for the common concern whatever may be necessary for the preservation or proper employment of the ship, the other owners being absent; but in the home port, where all the owners reside and are easily accessible, no such authority to bind the ship can be presumed. The presumption in such cases is that the supplies are furnished upon the personal responsibility of the owner. Whether the owner has authority to bind his co-owners for such supplies is a question of fact to be determined in each case by the circumstances. The fact that Phillips was registered in the customhouse as managing owner does not of itself imply authority by his co-owners to use their credit. Such registry, required by section 4320 of the Revised Statutes, is requisite to the licensing of vessels for the coasting trade or fisheries, and demands that the managing owner shall enter into bond, with sureties, to indemnify the government against the vessels being employed in any trade whereby the revenue of the government may be defrauded. It neither enlarges, diminishes, defines, nor affects the relations of the owners towards each other. It is required simply to enable the government to have some responsible person of whom it can require compliance with its revenue laws, and cannot be construed so as to create such managing owner a plenipotentiary of the other owners for purposes with which the government has no concern.

The function and authority of the "managing owner" being thus limited to the purposes and provisions of the statute, we must look elsewhere for his authority and rights towards his co-owners and persons dealing with him. "In respect to repairs and necessities in the port or state to which the ship belongs," says Mr. Justice Story in *The General Smith*, 4 Wheat. 443, "the case is governed altogether by the municipal law of that state, and no lien is implied, unless it is recognized by that law."

The law of Maryland is settled by *Pentz v. Clarke*, 41 Md. 338:

"The later decisions hold that no implied authority arises from the relations of master and owner per se to bind the owner in the home port; but that, in order to bind such part owner, the master must have special authority for that purpose, or the owner must have held out the master as having such authority, or he must have ratified the contract after it was made."

In the purchase of supplies alleged to be necessary, the managing owner would have no greater authority than the master, as the principle which governs in such cases is the same.

Scul v. Raymond, 18 Fed. 547, was a libel in personam, wherein it was sought to hold a part owner of a steamer liable for damages caused by collision. In that case the steamer which was in fault was in the exclusive possession and control of other part owners. In deciding that *Raymond* was not liable in consequence of being a legal part owner, Judge Brown says:

"The primary relation of part owners of ships to each other is that of tenants in common of chattels. By the common law one tenant in common having possession of a chattel may use it for his own exclusive benefit, and, while so doing,

he alone is liable for all charges affecting it. This rule as applied to ships has been so far modified as to entitle each part owner to receive his share of the earnings of the vessel, unless he has dissented from the voyage. Prima facie, therefore, the master or ship's husband, or the managing owner, is the agent of all the part owners in the ordinary business of the ship, and all will be prima facie liable for necessary repairs, supplies, and for torts of navigation, because, presumptively, the voyage is for the benefit of all. But this presumptive agency and benefit, and consequent liability, may be rebutted by any appropriate proof. And when it affirmatively appears that any one part owner was neither intended to be represented by the master in the navigation of the ship, or in ordering repairs or supplies, and that he never authorized the master to represent or bind him, and that he never ratified or adopted the voyage, but dissented from it, there is no reason or legal principle upon which he can be held for the supplies ordered or for the torts of the voyage. * * * If a part owner expressly dissent to repairs or supplies, he is not personally bound. The implied authority of the master to bind him is in such cases rebutted by proof of the dissent; and, if the material man had no previous dealings with the dissenting owner, the notice of dissent need not even be brought home to him."

After citing several cases in support of the view that owners are not personally bound for supplies unless they expressly authorize them or participate in the profits of the voyage, he says:

"These several classes of cases show one principle running through them all, namely, that the personal responsibility of a part owner does not necessarily attach as an incident to his naked legal ownership, but depends upon the possession, use, and control of the ship."

It does not appear that this case ever went to the supreme court. *Thorp v. Hammond*, 12 Wall. 410, was decided by the same learned judge, and his decree, confirmed by the circuit court, was affirmed; the supreme court being equally divided. That also was a case of collision. The schooner at fault was commanded, sailed, and exclusively managed by Hammond, one of the owners, under an arrangement made between him and the other owners, whereby he had, in effect, become the charterer, retaining one-half the net freight after expenses were taken out, and paying to the general owners the other half. It was contended that all the general owners were liable for the torts committed by the schooner while she was thus let to charter. The court below was of opinion that they were not. The supreme court was equally divided on that question, but all held that the owner *pro hac vice* was liable.

Thomas v. Osborn, 19 How. 22, held that the power of a master or charterer or owner *pro hac vice* to create a lien upon the ship in a foreign port for repairs or supplies was limited to cases of necessity, and that it is the duty of the lender to see that the necessity exists, and that where the freight money was sufficient to pay for repairs and supplies, and might have been commanded for such use if it had not been diverted by the master, with the assistance of the parties making the advances, they had no lien. And that such power in the master or owner, *pro hac vice*, "does not exist in a place where the owner is present."

The *St. Jago de Cuba*, 9 Wheat. 416, holds that the necessities of commerce require that, when remote from the owner, the shipmaster should be able to subject the owner's property to liability for repairs and supplies, without which it is reasonable to suppose he

will not be able to pursue his owner's interest, but, when the owner is present, the reason ceases.

We take the true rule, then, to be that in the home port, where the owners are resident and easily accessible, the master, or managing owner or charterer, or owner pro hac vice, cannot purchase supplies that will bind the ship or make the owners personally responsible without some authority, express or implied, and that such authority to the managing owner from the other owners cannot be implied from the mere fact that they are co-owners. "Title has nothing to do with these cases," says Lord Ellenborough in *Annett v. Carstairs*, 3 Camp. 354. "We must look to the contract between the parties."

In the case before us it is earnestly contended that all the owners are responsible for these supplies—First, because they were charged to the "tug May Russell and owners"; second, because Phillips was registered as the managing owner, and is to be presumed to have had authority to purchase on the credit of her owners such supplies as were necessary and proper for her use. In *Beinecke v. The Secret*, 3 Fed. 665, supplies were furnished to Murray, Ferris & Co., charterers of *The Secret*, a foreign vessel, and the goods were charged on the books of libellant to "steamer Secret and owners." It was held that credit was given to Murray, Ferris & Co.; that libellants were put upon inquiry as to the interest of the charterers, and could easily have learned that Murray, Ferris & Co. had no right or power to bind the vessel or her owners for supplies, and had no lien upon the vessel. "A mere charge to the ship on libellant's books," says Judge Brown in *The Francis*, 21 Fed. 722, "is an inconclusive circumstance, even as regards the libellant's own intention. The usual practice of merchants to make such charges against the vessel indifferently, whether the vessel be in her home port or not, shows that such a charge is very slight, if any, evidence of an actual reliance on the ship. In practice, it is scarcely more than a habit adopted by merchants in order that their books may not tell against them, if, in fact, they would be entitled to hold the ship." As it is not claimed that Koenig or Ford had any knowledge of this entry, it must be regarded as a mere matter of bookkeeping, a self-preserving practice on the part of the creditor, or, at most, as evidence of a secret intention to hold them, which, not being communicated to them, can have no weight as evidence against them.

We have already considered the effect of the registry of Phillips as managing owner, and have determined that that fact alone cannot be looked to as defining the nature and extent of his powers. There is no magic in the term "managing owner," as used in circumstances like these, which would confer upon him powers and rights which otherwise did not exist to bind personally his co-owner. The right of one owner to bind another not springing from operation of law, and not being deducible from mere naked proof of title, it was necessary for libellants to prove either authority conferred, or participation in profits, or such a course of dealings as would warrant the inference that authority previously given was

continued, or ratification. No such proof was offered. On the contrary, it may fairly be presumed that credit was given to Phillips alone. There was evidence that, during the time that the supplies were furnished, he was running the vessel on his own account, under an agreement with Koenig that he (Koenig) was not to be responsible for any debts, and Koenig received no part of the earnings during that period. There was no evidence of any act, representation, or course of dealing on the part of Koenig or Ford, or either of them, from which it could legally be inferred that they had clothed Phillips with authority to bind them. They were readily accessible, were seen nearly every day, and nothing was said to them from which they could reasonably infer that any credit was given to Phillips on their account. There are other and special considerations affecting so much of the indebtedness as was contracted prior to August 1, 1893, and as relates to Ford; but our conclusion renders any determination of them unnecessary. The decree of the district court is affirmed.

THE M. M. MORRILL.

WHITE v. THE M. M. MORRILL.

(District Court, D. Washington, N. D. February 5, 1897.)

1. SEAMEN—ASSIGNMENT OF WAGES—PART OWNERS.

Persons employed as hunters for a sealing voyage, by the master, from whom they had purchased interests in the vessel, agreeing that half their wages might be applied to the purchase price, *held* to be within the protection of Rev. St. § 4536, forbidding the assignment of mariners' wages.

2. SAME—LIEN.

Persons employed as seal hunters, after purchasing interests in the vessel from the master, and giving mortgages thereon for unpaid balances, may, as against the master and other part owners, maintain a suit in rem for their wages.

This was a libel in rem to recover seamen's wages.

G. M. Emory, for libelant and interveners.

James Kiefer, for respondents.

HANFORD, District Judge. In this case the libelant, Charles H. White, and the intervener, S. N. Johnson, are suing to recover money earned by and due to them for their services as hunters on a sealing voyage in the North Pacific Ocean. The case is defended by A. S. Nelson, one of the owners of the vessel, and by Edward Cantillion, who was master of the vessel on the voyage. Cantillion was owner of one-third of the vessel, and he sold his interest to said libelant and intervener, conveying one-sixth to each, for which he received from Johnson \$350 and a promissory note for \$350, and from White a promissory note for \$700; and, to secure payment of said notes, he received mortgages upon the interests of each in the vessel. He also held mortgages from the other owners upon all of their interests. He then entered into a contract with the owners, by which he undertook to furnish supplies for the voy-

age, and to go as master, for which he was to be paid a stipulated sum for wages, and also to have a certain amount for each seal skin secured, and one-fourth of the proceeds from all seals which he should kill; and he was to be repaid for his advances for supplying the vessel, with interest. He then hired the libellant and said intervener to go on said voyage as hunters, agreeing to pay them for their services one-fourth of the proceeds of all seal skins which they should secure. He also made a special contract with them, by which one-half of their earnings on the voyage should be applied to pay their indebtedness to him upon said promissory notes. The voyage proved to be unprofitable. Cantillion sold the seal skins secured, and from the proceeds thereof has paid himself his wages in full, and his compensation at the agreed rate for all seals which he individually killed; and after deducting such disbursements, and applying the remainder on account of advances which he made for supplies, there remains due to him a balance of \$943.08, and the individual indebtedness of the several owners, secured by mortgages on the vessel, remain wholly unpaid. The libellant acknowledges to have received on account of his wages the sum of \$113.02, and there remains unpaid \$259. Johnson received on account of his earnings \$118, and there remains unpaid \$209. These balances Cantillion has taken out of the proceeds from the sale of the seal skins which came into his hands, and claims the right to retain the whole thereof, on account of the indebtedness to him for supplies furnished, and the promissory notes above mentioned.

Section 4536 of the Revised Statutes of the United States makes any contract or agreement in the nature of an assignment of mariners' wages invalid. I hold that these men are mariners, and that their wages are protected by this section,—as much so as if they had shipped for a whaling voyage, or in any other capacity, in the services of a vessel engaged in commerce.

Cantillion and Nelson dispute the right of these men to maintain this suit in rem on the ground that, being part owners of the vessel, they are not entitled to a lien; and in behalf of Cantillion it is especially urged that it is contrary to equity for these men to impair the security which they have given by mortgages upon their interests in the vessel, by enforcing a lien for wages. The rule forbidding an owner of a vessel to claim a lien, to the prejudice of others extending credit to the vessel, is well established by the authorities. *Patton v. The Randolph*, Fed. Cas. No. 10,837; *Petrie v. Steamtug*, 3 Fed. 531; *The Short Cut*, 6 Fed. 630; *The Queen of St. Johns*, 31 Fed. 24; *The Lena Mowbray*, 71 Fed. 720. But in this case there are no innocent creditors or purchasers to be prejudiced by the discovery of a secret lien, and I hold that the peculiar facts of this case make the rule inapplicable. When it is said that these men have given the vessel as security for their debts, the argument cuts backward, for it is equally true that Cantillion, by virtue of his authority as master of the vessel, gave the vessel as security for the wages of those whom he employed in her

service, and he also became personally liable to them; and it may well be argued that it is contrary to the principles of equity for him to now impair the value of the security for mariners' wages by enforcing his rights as mortgagee, unless the wages be first paid.

With the acquiescence of all parties interested, the vessel has been sold by the marshal, and Cantillion became the purchaser, for the sum of \$1,800; and he is now claiming the proceeds of the sale, after payment of costs, to apply on the indebtedness of the several owners to him; so that, if he should prevail in defeating the libelant and the intervener from recovering their wages, the result of the adventure may be summed up as follows: Cantillion will have the \$350 paid by Johnson, and for the balance, of less than \$1,000 on account of supplies and the marshal's costs upon the sale of the vessel, will have absorbed the entire earnings of the vessel and her crew, and acquired the vessel itself, and still hold the libelant and the intervener indebted to him for a considerable part of the promissory notes given for the purchase price of their interests in the vessel. All this by his cleverness in persuading these men to purchase his interest in the vessel before hiring them. I consider that the justice of the case requires that these men should receive their wages from the money in the registry, and it will be so decreed.

Against the claim of John Johnson, intervener herein, for supplies furnished, on the credit of the vessel, under contract with Nelson, as managing owner, there seems to be no defense. The decree will also award payment to him of the amount sued for.

THE GLEN IRIS.

BURTIS v. THE GLEN IRIS.

(District Court, E. D. New York. December 2, 1896.)

ADMIRALTY—SALE OF VESSEL—LIEN ON DOMESTIC VESSEL UNDER STATE LAW—COSTS—DISTRIBUTION OF PROCEEDS.

In disposing of the proceeds of the sale of a steam tug plying in New York harbor, against which decrees exceeding in amount such proceeds have been rendered upon default in favor of different parties for seamen's wages, damages for collision, and for repairs, supplies, and wharfage, extending over a year and a half,—the claims of the latter class being made liens under the state law by specifications filed in the county court,—the claims for wages having been first paid in full, and the sum remaining being insufficient for all other claims, priority in the distribution of the remainder was given to those claims for which monthly bills had been rendered and liens obtained within 40 days before the vessel was attached, and before the incurring of the liability for collision. Next in order of payment was placed the claim for damages by collision which had accrued 30 days before the first libel was filed; and the remainder of the fund was applied, so far as it would go, towards liens contracted subsequent to the incurring of liability for damages by collision. *The Gratitude*, 42 Fed. 299, followed.

On July 29, 1896, Divine Burtis, Jr., filed a libel against the steam tug *Glen Iris* for repairs, from April 18, 1895, to June 2, 1896, under which the tug was attached, and afterwards, on August 26, 1896, sold for \$1,050.

On July 31st, the Moquin-Offerman-Heissenbittel Coal Company filed a libel against the tug for coal furnished on monthly bills between June 1, 1895, and July 31, 1896, claiming a lien on the tug as a domestic vessel under the New York statute of April 24, 1862, and its amendments. On August 3d, Robert Keasby filed a libel against the tug for supplies and repairs furnished in December, 1895, also claiming a lien under the state statute. On August 7th, Joseph Meron, owner of the canal boat Gen. S. Moffitt, filed a libel against the tug for a collision occurring on June 28, 1896. On August 11th, H. G. Townsend and two others filed libels against the tug for wages. On August 12th, Caroline Ruther filed a libel against the tug for supplies furnished between May 16, 1896, and July 7, 1896, claiming also a lien under the state statute. On the same day, Bernard H. Seemann filed a libel against the tug for supplies furnished between May 16 and July 7, 1896, claiming a lien under the state statute. On August 17th, George E. Lanagan filed a libel against the tug for repairs made between July 7 and 14, 1896, claiming a lien under the state statute. On August 19th, Eugene Sullivan filed a libel against the tug for wharfage from February 14, 1895, to June 12, 1896, claiming also a lien under the state statute. No appearance was made on behalf of the tug in any of the cases. Upon reference to the commissioner, testimony was taken in the several cases, and upon the commissioner's report a decree was entered in each case against the tug for the amount found to be due, the aggregate considerably exceeding the proceeds of the sale of the tug. The decree for seamen's wages was paid in full, and the causes are now brought on for hearing as to the disposition of the remainder of the proceeds of the sale of the tug.

Macklin, Cushman & Adams, for Burtis.

Alexander & Ash, for the coal company and Lanagan.

Peter S. Carter, for Keasby, Ruther, and Seemann.

Hyland & Zabriskie, for Meron.

James Troy, for Sullivan.

J. P. Henderson, for Townsend.

BENEDICT, District Judge. In these cases several questions have arisen in regard to the distribution of the proceeds of the tug Glen Iris, a domestic vessel, which was sold under a decree of this court. Claims for wages, as to which none of these questions can arise, have been already paid, and the fund is not enough to pay all the other claims. It will be sufficient for the case, as I understand it, for me to say that the clerk, in distributing the proceeds, after payment of the fees of the officers of the court, should pay, first, the liens which existed upon the vessel under the state law, excluding all cases in which monthly bills had not been rendered 40 days prior to the incurring of the liability to Meron for negligent towing of his boat, June 28, 1896, and making a rest in the monthly accounts for supplies at that date; next should be paid the claim of Meron; and, out of any surplus remaining after paying Meron's claim, the liens that were created subsequent to the contracting of the liability to Meron. Costs and disbursements should be paid with each claim in its order. The claim for wharfage will take the same course. The amount of wharfage due at the time of the origin of Meron's claim should be paid prior to that; the rest of it, subsequent. The application of the rule for retaining priority of liens in such cases, laid down in *The Gratitude*, 42 Fed. 299, produces the above results. None of these questions arose in the case of *The S. W. Morris*, 59 Fed. 616, where the fund was sufficient to pay all.

HOLMES et al. v. UNITED STATES.

(District Court, D. Connecticut. February 5, 1897.)

JURISDICTION OF COURTS—CLAIMS AGAINST UNITED STATES—CANCELLATION OF JUDGMENT LIEN.

Chapter 359, Acts 1887 (Supp. Rev. St. p. 559), giving the court of claims and district courts jurisdiction to hear and determine claims against the United States, does not authorize those courts to entertain a petition to cancel a judgment lien alleged to have been unlawfully placed upon the property of the petitioners by an officer of the United States in an attempt to enforce a judgment recovered by the United States.

Henry G. Newton, for complainants.
Chas. W. Comstock, Asst. U. S. Atty.

TOWNSEND, District Judge. In equity. The petition herein alleges that prior to December 16, 1889, the attorney for the United States for this district obtained a judgment against one Rocco Calvello as surety on a bond, and on said day filed a judgment lien on certain real estate in said district, in which said Rocco Calvello had never had any interest, except a tenancy by curtesy as the husband of Mary Calvello, then deceased, who had owned the same in fee; that said interest was not then liable to attachment or execution; and that these petitioners are, respectively, the owners, mortgagor, and mortgagee of said real estate. They pray, either that said lien may be adjudged void and may be canceled, or that "a decree may be made that unless the United States of America pay to the petitioners the amount due to them upon said mortgages, within such reasonable time as this court may limit, said United States of America be foreclosed of any right or equity to redeem said mortgaged premises." To this petition the attorney for the United States has filed a plea claiming that this court has no jurisdiction to grant such relief. The argument of counsel for the petitioners is based upon chapter 359 of the Acts of 1887 (Supp. Rev. St. p. 559), which provides that the court of claims and the district court shall have jurisdiction to hear and determine "claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." Counsel for the petitioners claims that this statute is a remedial one, intended to confer jurisdiction upon this court in all cases other than those sounding in tort, and that this lien is an attempt on the part of the United States to enforce the contract upon which the judgment was obtained.

It is unnecessary to consider all the jurisdictional questions raised by counsel for the United States. The jurisdiction of this court is defined and limited by the federal constitution and laws. It cannot entertain suits against the United States except in cases

where jurisdiction is conferred by statute. These claims are not "for damages liquidated or unliquidated in cases not sounding in tort in respect of which claims the party would be entitled to redress against the United States if it were suable." No damages are claimed. It does not appear that any have been suffered. Even if these claims could be considered as claims for damages, this would not help the petitioners. The damages suffered, if any, arise, not from the lawful appropriation of the property by the United States for their use, but in the unlawful imposition of a void lien upon said property. That the United States are not liable on an implied assumpsit for the tortious acts of their officers committed while in their service, and for their benefit, is well settled. *Gibbons v. U. S.*, 8 Wall. 269; *Carpenter v. U. S.*, 45 Fed. 342. Upon the pleadings herein, it appears that the United States have no lien upon the property in question. It does not appear that they either authorized or have ratified the unlawful act. In these circumstances, none of the cases cited by counsel for the petitioners support their claim. In *U. S. v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, the United States were held liable for the use of a patent under a license from the patentee on the express ground that a contract was implied from the license and use. In *U. S. v. Great Falls Manuf'g Co.*, 112 U. S. 645, 5 Sup. Ct. 306, it was held that the United States might be held upon an implied contract to pay for private property appropriated by authority of act of congress for a public use. In *Chappell v. U. S.*, 34 Fed. 673, the decision is expressly based on the above rule. If it had been therein decided, as the petitioner claims, that where "officers of the United States unlawfully, but in the exercise of their duty, prevented the plaintiff from using his land," the United States would be liable, such decision would be contrary to the law as laid down in *Gibbons v. U. S.*, *supra*, and other cases. In *Belknap v. Schild*, 161 U. S. 17, 16 Sup. Ct. 443, the supreme court defines the line between the two classes of cases. It says:

"The United States, by successive acts of congress, have consented to be sued upon their contracts, either in the court of claims, or in a circuit or district court of the United States. * * * But the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties."

There are two answers to the further claim of counsel for the petitioners that in cases of tort the party may waive the tort and claim under an implied contract. The first is found in the fact that they have not done so. In *Schillinger v. U. S.*, 155 U. S. 169, 15 Sup. Ct. 85, the court says:

"If it be said that a party may sometimes waive a tort and sue in assumpsit, as on an implied promise, it is technically a sufficient reply to say that these claimants have not done so. They have not counted on any promise, either express or implied."

The second answer is that the rule does not apply to this kind of a case.

"The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed

in their name by their officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract. * * * An action in the nature of assumpsit, for the use and occupation of real estate, will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious, and makes the defendant a trespasser. * * * Hill v. U. S., 149 U. S. 598, 13 Sup. Ct. 1011.

The case is a hard one, and I have no doubt that, upon presentation of satisfactory proof of the facts alleged to the proper department, it will grant the appropriate relief. The petition is dismissed.

RIES v. HENDERSON.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1897.)

APPEAL—FINAL DECREE.

A decree dissolving a partnership, enjoining, "until the final decree in this suit," both parties from disposing of the partnership property, directing that testimony be taken before a commissioner as to moneys claimed to have been advanced to the partnership by complainant, and that costs shall "abide the further and final decree of this court," is not a final, appealable decree.

Appeal from the Circuit Court of the United States for the District of Maryland.

This was a suit in equity by Albert H. Henderson against Elias E. Ries for dissolution of a partnership existing between them, which was formed for the purpose of owning, exploiting, selling, etc., certain patents covering inventions made by defendant, Ries, relating to the art of electricity. The bill of complaint prayed for an injunction to restrain the defendant from selling or disposing of the patents, inventions, and other property of the partnership, for dissolution of the partnership, for the appointment of a receiver to wind up its affairs, and for an accounting. Among other things alleged in the bill, it was asserted that complainant had advanced large sums of money to the partnership for the exploitation and development of the patents, which sums he was entitled to have repaid to him before any division of the firm profits.

On June 19, 1896, the following decree, omitting the merely formal parts, was entered by the circuit court:

This cause having been set for preliminary hearing upon the prayer of the bill of complaint for an injunction and for the appointment of a receiver, and having been argued by counsel for the respective parties, and the court having read and considered the pleadings, exhibits, and all the proceedings, and having also considered the arguments of said counsel, it is thereupon, this 19th day of June, eighteen hundred and ninety-six, by the circuit court of the United States for the district of Maryland, sitting in equity, adjudged, ordered, and decreed that the co-partnership heretofore existing between the plaintiff and the defendant, under the firm name of Ries & Henderson, be, and the same is hereby, dissolved. And it is further adjudged, ordered, and decreed that, until the passage of the final decree in this case, both parties to this suit be, and they are, hereby restrained and enjoined from selling or in any manner disposing of any of the inventions, patents, and improvements or other co-partnership assets of the late firm of Ries & Henderson, or of any interest therein, except by mutual written agreement, and in pursuance of the special order of this court to be passed in the premises; but leave is hereby reserved to either party to this suit to negotiate prior to final decree for the sale of the entire or partial interest in any patent belonging

to the partnership, and to report to this court any offer which he may obtain therefor; and this court will, after proper notice to the other party and the opportunity to him to be heard, proceed to pass upon the propriety of accepting or rejecting any such offer as may be so obtained, and as to the temporary and final disposition of the proceeds of sale. And forasmuch as it does not certainly appear from the proceedings what, if any, advances have been made by the plaintiff to or for account of the late co-partnership of Ries & Henderson, as charged in the bill of complaint, it is further adjudged, ordered, and decreed that testimony be taken by the parties before one of the standing commissioners of this court to ascertain what moneys, if any, have been so advanced by the plaintiff; and, upon the coming in of said testimony, the court will proceed to finally decree as to the repayment and reimbursement to the plaintiff of such of the said advances as may be proper, and as to the manner in which his lien therefor, if any, upon the partnership assets, may be made effective and be worked out, and also as to the distribution of the firm assets between the parties. And, forasmuch as it is represented to the court by the defendant that it is necessary that certain appeals or legal proceedings be at once taken for the protection of the patent rights of the said firm, it is now further ordered that either party may advance the amount requisite to defray the expenses thereof, without prejudice, however, to either party, and with liberty to both parties, to be heard by this court as to the legal effect of such payment, and to it to decree hereafter as to whether the same has been properly incurred for account of the firm or for either party to this case, and as to the proper charge to be made therefor. And it is further adjudged, ordered, and decreed that the payment of the costs of this suit abide the further and final decree of this court, and that the plaintiff's application for the appointment of a receiver of the firm assets stand over until said final decree or the further order of this court.

From the foregoing decree an appeal was taken by the defendant on December 12, 1896. The complainant has now moved to dismiss the appeal, on the grounds (1) that, so far as it is an appeal from a decree granting a preliminary injunction, it was taken too late; and (2) that, as to the rest of the decree, the same was not final, and the appeal would therefore not lie.

John P. Poe and Arthur Stewart, for appellant.
Schmucker & Whitelock, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This cause having been called for hearing upon the motion of the appellee to dismiss the appeal, and counsel for the respective parties having been heard in argument, and the court being of opinion that the decree of the lower court is not a final decree, from which an appeal will lie at this stage of the cause to this court to review the same, it is now here ordered, adjudged, and decreed by this court, this 13th day of February, 1897, that the appeal of Elias E. Ries be, and the same is hereby, dismissed, without prejudice to the rights of either party in the court below, and that the said Elias E. Ries do pay the costs in this court. Let the mandate issue forthwith.

LAKE NAT. BANK v. WOLFEBOROUGH SAV. BANK et al.

(Circuit Court of Appeals, First Circuit. January 18, 1897.)

No. 176.

1. JURISDICTION OF CIRCUIT COURT OF APPEALS—INTERLOCUTORY DECREE FOR INJUNCTION.

In a case in which a final decree would be appealable to the circuit court of appeals under sections 5 and 6 of the act of March 3, 1891, an appeal will lie to that court, under section 7, from an interlocutory decree granting an injunction, even though such appeal raises only the question of the lower court's jurisdiction.

2. SAME—APPEALABLE INTERLOCUTORY DECREE—INCIDENTAL INJUNCTION.

In a decree which appoints a receiver for a corporation, orders its officers to deliver the property into the receiver's hands, and enjoins them from interfering further with it, the injunction, while incidental to the appointment of the receiver, is not merely nominal, but forms a substantial part of the decree, and is therefore appealable. Such an appeal, however, raises only the question whether, assuming the receiver to have been properly appointed, the injunction was improvidently granted.

3. JURISDICTION OF CIRCUIT COURTS—NATIONAL BANK RECEIVERSHIPS.

Under the provision in the judiciary act of 1887-88, that "the provisions of this section" shall not affect the jurisdiction of the circuit courts in cases for "winding up the affairs" of any national bank, the circuit courts have at least concurrent jurisdiction (whether exclusive or not is not decided) with the state courts in cases of that kind, without regard to the citizenship of the parties.

4. SAME—CONFLICT OF JURISDICTION—COMITY—APPOINTMENT OF RECEIVERS.

A state court appointed a receiver of a national bank, but he never obtained possession of its property. The original complainant discontinued, and the defendant filed a motion to dismiss, but no formal order of dismissal was entered. *Held*, that the pendency of the suit in that condition was no bar to a subsequent suit between the same parties in a federal court for the appointment of a receiver, etc.

Appeal from the Circuit Court of the United States for the District of New Hampshire.

Reuben E. Walker and Hollis R. Bailey, for appellant.

Heman W. Chaplin (John R. Poor, on brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. This is an appeal from an interlocutory decree appointing a receiver, and granting or continuing an injunction. The appellees (complainants below) have filed a motion to dismiss the appeal upon the ground that this court has no jurisdiction. In support of this motion, it is urged that in the assignment of errors the appellant raises only the question of the jurisdiction of the circuit court, and that under the act of March 3, 1891 (26 Stat. 826), this court cannot entertain an appeal which presents solely this question. Section 5 of the act declares:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

Then follows a list of other classes of cases in which an appeal may be taken to the supreme court.

Section 6 provides:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act," etc.

Section 7, as amended by Act Feb. 18, 1895 (28 Stat. 666), provides as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals."

By section 7 an appeal lies to this court in any case in which an appeal would lie from a final decree under the provision of this act. In order, therefore, to determine the jurisdiction of this court over the present appeal, it is necessary to inquire whether it could take jurisdiction on appeal from final decree. In *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, it was held that an appeal to the supreme court, under section 5, only lies after final judgment, and that at that time the party against whom the judgment of the court had been rendered has his election either to take the question of jurisdiction alone directly to the supreme court, or to appeal to the circuit court of appeals upon the merits of the case, as well as upon the question of jurisdiction. In the latter event the circuit court of appeals has authority to pass, not only upon the merits of the case, but also upon the question of jurisdiction; and it may then, if it deem proper, certify the question of jurisdiction to the supreme court. See, also, *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39. As this case may be appealed to this court from a final decree, under the construction given to sections 5 and 6 by the supreme court, it follows that we have jurisdiction over an appeal from an interlocutory order under section 7, although such appeal raises only the question of jurisdiction. The provisions of section 7 are of a highly remedial character, and should not receive a narrow construction. These provisions were evidently intended to afford a speedy review by an appellate tribunal of all interlocutory orders or decrees granting or continuing injunctions, unless such review was clearly forbidden by the other provisions of the act.

The appellees further urge in support of their motion to dismiss that the injunction was merely incidental to the receivership order, and therefore not appealable under section 7. The interlocutory decree ordered the defendant, its officers and agents, forthwith to deliver the property held by them into the hands of the receiver, and absolutely enjoined them to refrain from interfering with the property. While the injunction order was incidental to

the appointment of a receiver, it was not merely nominal, but formed a substantial part of the decree. The question whether an interlocutory injunction was erroneously or improvidently granted is appealable to this court. *Blount v. Société Anonyme*, 3 C. C. A. 455, 53 Fed. 98; *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 277; *Construction Co. v. Young*, 8 C. C. A. 231, 59 Fed. 721; *American Paper-Pail Co. v. National Folding-Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229. *Potter v. Beal*, 2 C. C. A. 60, 50 Fed. 860, is in no way in conflict with the position taken by the court in this case. In that case the court merely intimated that no appeal would lie, under section 7, in a case in which the injunction order was nominal, or in which the decree would be equally effectual without it. The appellees' motion to dismiss the appeal is overruled.

We now come to the consideration of the appeal. The appellant, under its assignment of errors, attacks the jurisdiction of the circuit court to make the decree appealed from, upon two grounds. By the second assignment of error the point is raised that the jurisdiction of the circuit court is dependent upon diversity of citizenship, and that, as the bill avers no such diverse citizenship, the court was without jurisdiction. Without passing upon the question whether the federal courts have exclusive jurisdiction in this class of cases, we are satisfied that by the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 436), which provides that "the provisions of this section" shall not affect the jurisdiction of the circuit courts of the United States in cases for "winding up the affairs" of any national bank, the circuit court has at least concurrent jurisdiction with the state court in this class of cases.

The first assignment of error is based upon the ground that, the supreme court of New Hampshire having already appointed a receiver in a suit which is still pending between the complainants and the defendant in this suit, this court is without jurisdiction. We are of the opinion that the facts disclosed in the record do not state a case in which the circuit court should have declined to take jurisdiction by reason of the proceedings which were begun in the state court. The rule which requires that the court which first obtains jurisdiction retains it to the end is based largely upon the doctrine of comity. The original complainants in the state court discontinued the suit in that court. The defendant in that suit filed a motion to dismiss. The receiver there appointed never obtained possession of the res.

Upon the facts as they appear of record, although no formal order of dismissal was entered in the state court, we think the circuit court properly acquired jurisdiction. Whether a receiver ought to have been appointed is not before us upon this appeal, and we only decide that, assuming the appointment of a receiver to have been properly made, the order for an injunction should be affirmed. *Construction Co. v. Young*, 8 C. C. A. 231, 59 Fed. 721. Decree of circuit court affirmed.

UNITED STATES v. SEUFERT BROS. CO.

(Circuit Court, D. Oregon. February 9, 1897.)

Nos. 2,308-2,318.

1. EMINENT DOMAIN—DAMAGES.

In estimating the value of land taken for a public use, its value for such use is not to be considered. *Boom Co. v. Patterson*, 98 U. S. 403, distinguished.

2. SAME.

An estimate of the value of land taken for a public use should not be based upon the adaptation of the land to a special purpose, in the absence of anything to show a reasonable expectation of some demand at some time for the use of the land for that purpose.

3. NEW TRIALS—PRACTICE IN FEDERAL COURTS—STATE PRACTICE.

The discretion of the courts of the United States to grant new trials is not affected by state laws on the subject, and a new trial may be granted by a federal court for an error of law affecting a substantial right, though no exception has been taken to the ruling, and the error has not been urged on the hearing, and though a state statute requires an exception in such a case.

Daniel R. Murphy, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

Alfred S. Bennett and Lionel R. Webster, for defendants.

BELLINGER, District Judge. This is a proceeding by the United States to condemn a right of way for a portage boat railway along the Columbia river, on the south side, between Celilo and Dalles City, to avoid the obstructions to navigation in the river known as "The Dalles of the Columbia." Two trials have been had. On the first trial the jury assessed defendants' damages at \$25,087.50. Both parties moved for a new trial, which was granted as of course, without implying, however, that the court might not refuse the motion notwithstanding such an agreement. Upon the second trial the defendants' damages were assessed by the jury at \$35,000. The United States moves for a new trial upon the ground that there were errors of law occurring on the trial, and that the verdict is excessive.

In the argument, the only error of law pointed out in support of the motion was the ruling of the court excluding evidence offered to show that, at a place on the line of the proposed boat railway not on the land of defendants, the existing appropriation by the Oregon Railway & Navigation Company occupied all the space between the bluff and the river. This evidence was intended to meet defendants' claim that the land taken had an especial value as a railroad right of way; the contention being that the availability of the land through this pass for railroad uses, and for the particular use, must be determined by its capacity for such use at the narrowest point in the pass, so that, if the pass was already fully occupied by a prior condemnation and road at any point through which a line must be located in order to reach defendants' land, the value of such land for right of way purposes would be thereby diminished. This evidence was not admitted because I was of the opinion that, in estimating the value of land taken for a public use, its value for such use is not

to be considered. The decision of the supreme court in *Boom Co. v. Patterson*, 98 U. S. 403, was thought not to apply to the case on trial, since the question of value there considered had regard to existing business wants, of which the owner might avail himself either on his own account or for general use. The use for which condemnation was sought in that case was for the construction of log booms in the Mississippi river adjacent to the lands condemned. The owner might use his land for this purpose on his own or on public account. The use was not necessarily a public one, and required no public license, so long as the navigation of the river was not obstructed. There is therefore no reason why the adaptability of the lands condemned for boom purposes was not a proper element to be considered in estimating the value of such lands.

The court, however, appears to give its approval to the case of *Young v. Harrison*, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated. The supreme court of Georgia held that the value of the land as a bridge site, in addition to its other capacities, should be allowed, in the estimate of compensation to be awarded to the owner, although such use, in the nature of things, was not available to the owner, but was exclusively in the public. If this is the true rule, then, in estimating the value of the land thought to be condemned in this case, its adaptability and value for right of way for a boat railway may be considered, although the owner cannot so use it, and there is no standard by which such value can be estimated. If, in condemning land for a bridge site, its "availability" as such site is a measure of value to be paid the owner, there is involved a consideration of the importance of the particular place to the intended use. In other words, the availability of the site is measured by the importance of the use, and in a matter of the greatest public concern a value so measured may be inestimable, and so the supreme necessity of the country to build defenses against its enemies become a measure of value, to be paid the owner whose land is taken for that purpose. The claim that the extent of the private interest to be taken is to include, in addition to all the uses available to the owner, the value, if that is possible of ascertainment, of the public interest to be served, is, in my opinion, without equity, and against public policy. Nevertheless, I was persuaded, further on in the case, by the apparent sanction given the case of *Young v. Harrison* by the supreme court, to allow witnesses to give their opinions as to the value of the land in question as a right of way for railroad uses, and instructed the jury, at defendants' request, that, if the land was especially adapted to the construction of railways, that fact must be taken into consideration in estimating its value. Upon this view of the question as to the measure of defendants' compensation, the court erred in sustaining defendants' objection to the testimony offered by the plaintiff to prove that, at different places along this portage of The Dalles, the entire available land was already appropriated and occupied by the Oregon Railway & Navigation Company, so that a second road could not be built without accommodations from that company, or the expenditure of very large sums of money in reclaiming portions of the river for a roadway. It

was shown that the proposed boat railway made it necessary to change the line and grades of the existing railroad at different points, in order that the jury might understand the inconvenience in getting fish to the cars for shipment, and the consequent damage to defendants caused by such changes. But the jury was not allowed to consider the availability of the pass, as a whole, for railroad purposes, in determining the availability of the particular portions in question.

It is argued, however, that this question is not involved in the ruling objected to, for the reason that the testimony excluded tended to show that there was not room for a third road, which question is immaterial, since there is now but one road through this pass. A witness having testified that at certain points the line of the existing railway and the ship railway will occupy the entire bottom, the question was asked, "How would it be on the land of Michell, or the land of The Dalles Packing Company?" To this the defendants objected, and the objection was sustained. If it is true, as claimed, that the entire pass on the premises named is now occupied by the Oregon Railway & Navigation Company's road, the answer to the question would likely have disclosed the fact. The question admits of such an answer. The objection made on the trial to the question is not the objection now made. The objection then was that the inquiry should be confined to defendants' land, and the correctness of this ruling is the question to be determined. As already suggested, the availability for railroad purposes of the particular portions of the pass sought to be condemned depends upon the availability of the pass as a whole. The inquiry might properly go even further, and so far as it relates to railroads, other than portage roads, extend beyond Celilo and The Dalles. Defendants contend that, inasmuch as no exception was taken to the ruling, it cannot be made a ground of a motion for a new trial, and that the state statute in that regard is to be followed here. The discretion which the courts of the United States have in the allowance of such motions cannot be affected by any state law upon the subject. *Railroad Co. v. Horst*, 93 U. S. 301. In a case where no exception was taken, the court might, in the exercise of its discretion, refuse, upon that ground, to allow the motion for a new trial; but, in a matter that appeals to the discretion of the court, an error of law affecting a substantial right should not be allowed to take refuge behind a technicality. The right of defendants to have the availability of their land for railroad purposes, by reason of the fact that it is so situated that any road down the valley of the Columbia must pass over it, considered as an element of value in this proceeding, was an important question in the case. Testimony was introduced by the defendants tending to prove that such land had a special value on this account of \$100,000, and at defendants' request the jury was allowed to include such value in their estimate of value. If this ruling is not correct, there should be a new trial on that account. If it is correct, then the plaintiff should have been permitted to show that there are obstructions in the way of any road to be built along this route that detract from its avail-

ability as a whole, and therefore affect the particular parts in litigation.

Importance was given on the trial, by the defendants, to the adaptability of the land in question for railroad purposes, and much testimony was received tending to prove that it had a large value on that account, and it is probable that the verdict was influenced by such a consideration. Since the argument of this motion, I have carefully read all the evidence in the case, and find that there was, however, nothing tending to show that another road at that point could reasonably be anticipated; that there was any existing business want, or any reasonable expectation of a future want, of that character, except as to a boat railway. It does not appear that there is any probability whatever that this land will be available at any time for any other kind of road. The most that can be said as to this is that there is a possibility of such a thing. It is true that some of the witnesses for the defendants testified that this land had a market value for railroad purposes, but nothing was stated to support such an opinion, and the only reason given for it was the fact that a party of surveyors had at one time been engaged in surveying a portage railway line in the hills to the south of the defendants' premises. There was no basis whatever for the claim of value made on this account, and no evidence legitimately tending to support the instruction, given at defendants' request, that, "if the land sought to be condemned is especially adapted to the construction of railways," the jury must take such fact into consideration in estimating its value. An estimate of value based upon the especial adaptation of the land condemned to railway purposes is not warranted by the facts of the case, in the absence of anything to show a reasonable expectation of some demand at some time for the use of this land for that purpose. Without this, there is nothing to distinguish this land from any other land, no matter where located. The public agitation for the construction of a boat railway between Celilo and The Dalles, which has led to the location by the government of the present line, may tend to warrant a reasonable expectation of the construction of such a road. But, as has already been shown, the demand which is thus created cannot be considered in estimating the value of the land taken. The owner cannot avail himself of the adaptability of these lands to a boat-railway line, to enhance his recovery. The character and magnitude of such an undertaking, as a practical matter, takes it out of the field of private enterprise, if it is one in which such enterprise is authorized by law to engage. It is necessarily, therefore, a great public work, and must, so far as the question under consideration is concerned, be assumed to be within the exclusive province of the government. The owner of the lands condemned is wholly precluded by these conditions from the use which the government seeks to make of them. That use is in no way available to him. It is not a property right in him, and adds nothing to the value of which his lands are possessed, or to the advantages of which he will be deprived by the proposed appropriation. He is entitled to the full value of his

land considered with reference to all the uses, present and prospective, which he can or has the right to make of it; but the necessity of the government cannot be made a measure of his compensation.

I am also of opinion that the compensation awarded by the verdict is excessive, and the motion for a new trial should be allowed on that ground. It is argued that all the witnesses who testified as to value placed the amount above that found by the jury, and that there is no contradiction of this testimony. None of these witnesses estimated defendants' damages at less than \$100,000, and some of them placed the damages at \$150,000. These amounts are so far above what was found by the jury that it is apparent they could not have regarded this testimony. It was mere opinion evidence, based in large part upon conjecture. In arriving at their verdict the jury must have disregarded the opinions of these witnesses, and formed their own opinions from the facts in evidence, and these facts do not, in my judgment, warrant the finding made. Inasmuch as there must be a new trial upon the other grounds mentioned, it is unnecessary to comment upon these facts. The motion for a new trial is allowed.

UNITED STATES v. TAFTE.

(Circuit Court, D. Oregon. February 9, 1897.)

No. 2,309.

1. EMINENT DOMAIN—MEASURE OF DAMAGES.

In estimating the value of land taken for a public use, its value for such use is not to be considered.

2. SAME.

An estimate of the value of land taken for a public use should not be based upon the adaptation of the land to a special purpose, in the absence of anything to show a reasonable expectation of some demand at some time for the use of the land for that purpose.

3. NEW TRIAL—DISCRETION OF COURT—STATE PRACTICE.

The discretion of the courts of the United States to grant new trials is not affected by state laws on the subject, and a new trial may be granted by a federal court for an error of law affecting a substantial right, though no exception has been taken to the ruling, and the error has not been urged on the hearing, and though a state statute requires an exception in such a case.

4. SAME—CONCURRING VERDICTS.

Two verdicts, assessing the value of lands taken for public use at different sums, do not amount to two concurring verdicts. U. S. v. Seufert Bros. Co., 78 Fed. 520, reaffirmed.

Daniel R. Murphy, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

Zera Snow and Wallace McCainout, for defendant.

BELLINGER, District Judge. This is a case for the condemnation of a right of way, and, in its facts, is substantially like the case of U. S. v. Seufert Bros. Co., 78 Fed. 520. As in that case, there have been two trials and two verdicts in this; the difference be-

tween the two being that the court set aside the first verdict, and granted a motion for a new trial, against the objection of the defendant. Upon the facts of the two cases, there is no substantial difference, and the conclusion reached in the case of the United States against Seufert is conclusive in this case. In this case the court went further than it did in the other case, and instructed the jury that if they believed from the evidence that the land sought to be condemned, by reason of its location, was valuable as a right of way for the boat railway, or for any other railway line, the jury should consider such fact as one of the elements of the defendant's damage. As stated in the Case of Seufert, there was no basis whatever for the claim of value made on this account, and no evidence legitimately tending to support the instruction. As was stated in that case, the use of this land for boat-railway purposes is in no way available to this defendant. It is not a property in him, and adds nothing to the value of which his lands are possessed, or to the advantages of which he would be deprived by the proposed appropriation. He is entitled to the full value of his land, considered with reference to the uses, present and prospective, which he can, or has the right to, make of it, but the necessity of the government cannot be made a measure of his compensation.

What was said in the other case as to the right of the court to consider errors committed by it, although not excepted to at the time, and although not urged as a ground in support of the motion on the hearing, applies here. While the court may be at liberty to refuse to grant a motion because of such error, yet I am of the opinion that it is within the discretion of the court to consider such error, and make it a ground for the allowance of the motion. I am also of the opinion in this case, as in that, that the damages are excessive, and are not warranted by the testimony. It is true, the opinions of the witnesses who testified on that subject all place the damages much higher than the amount found by the jury,—so much higher, in fact, that it becomes apparent that the finding made was not based upon such testimony, but that the jury must have reached the conclusion they did upon the facts testified to by the witnesses, rather than upon the opinions of such witnesses as to the value of the land taken.

It is further urged against the motion that there have been two concurring verdicts in this case, and that the court is not authorized to grant a motion for a new trial in such a case. There is no rule which precludes this court from granting a motion to set aside a second verdict where there have been two concurring verdicts. Nevertheless, that question does not arise in this case. There are no two concurring verdicts here. The first verdict was for a much less sum than the verdict now moved to be set aside. So far from supporting this verdict, the first verdict is against it. The most that can be said as to this is that the second verdict concurs with the first as to the amount found in that verdict; but this motion is concerned only with the second verdict, not with the first, and this verdict is not concurred in by the first verdict, and is, in my judgment, not supported by the facts in evidence in the

case. In the first case the claim for damages made by the defendant in his testimony was more extensive than that made in the last case. In the first case much importance was given to the value of the lands taken, as a gold mine, and the defendant at first, in effect, testified that, notwithstanding the great value of his property as a fishery, it was even more valuable as a gold mine; and it was his claim that this mine was practically destroyed, or greatly injured, by the proposed appropriation. In the second case he makes no particular account of this element of value in his property, and, in effect, denies his former testimony in respect to it. So it comes to this: that notwithstanding the fact that in this case the defendant, in his testimony, claimed less than in the former case, the award of the jury is much greater. The former verdict was set aside upon the ground that it was excessive, and, upon the case as now presented, there is even less to sustain the finding than there was in the former case. The motion for a new trial is allowed.

CHURCH et al. v. CITIZENS' ST. R. CO. et al.

(Circuit Court, D. Indiana. February 13, 1897.)

No. 9,373.

1. CORPORATIONS—ILLEGAL STOCK—SUIT TO CANCEL—EQUITY JURISDICTION.

Where one has made a single purchase of a number of shares of the stock of a corporation, and afterwards discovers that a part of the stock of such corporation has been illegally issued, but cannot identify any particular shares of the stock purchased by him with the illegal issue, equity has no power to aid him in electing to cancel a proportional part of his stock, or to decree that any part of his stock is valid and the remainder invalid.

2. SAME—MULTIFARIOUS BILL.

A bill by a stockholder of a corporation which seeks, on his own behalf, to cancel a part of the stock held by him as invalid and to relieve him of the burdens of ownership thereof, and, on behalf of all the stockholders, to set aside transactions by which the property of the corporation has been diverted and misapplied, is multifarious.

3. SAME—BONA FIDE PURCHASE OF STOCK—EQUITIES.

Shares of stock in a corporation are not negotiable securities governed by the law merchant, and one who purchases such shares for value, in good faith, acquires thereby no rights or equities in respect to the stock which did not belong to his transferrer or assignor.

4. SAME—SUIT BY STOCKHOLDER IN BEHALF OF CORPORATION.

Under the ninety-fourth equity rule, it is not a sufficient excuse for the failure of a stockholder, suing to enforce rights of the corporation, to attempt to obtain remedial action by the corporation, that five of the seven directors who participated in the fraudulent transactions sought to be set aside are still members of the directory.

Lew Wallace, Jr., Hawkins & Smith, F. B. Burke, and Baker & Daniels, for complainants.

Miller, Winter & Elam, for defendants.

BAKER, District Judge (orally). I am as well prepared to make a ruling upon the demurrer at this time as I should be if I held it longer for the purpose of deliberation and examination of authorities. The court has invited the fullest discussion of all the questions that appear to be raised by the demurrer to the bill,

more for the purpose of seeing whether or not there was any ground upon which equitable relief might be afforded than because the court entertained serious doubt as to the decision that must eventually be made. The bill is one which sets out facts and transactions that appeal very strongly to the conscience of a court of equity, and one which, if any substantial basis could be found for it in the principles of equity jurisprudence, would incline the court to support the bill without very much regard to technical questions that might arise. This is a suit brought by the plaintiffs, citizens of the state of New York, against the defendant the Citizens' Street-Railroad Company, and other individual defendants, who are citizens of the state of Indiana. The plaintiffs allege that they are the owners of 200 shares of stock out of 50,000 shares issued by the corporation; that in the year 1895 they purchased these 200 shares of stock, in good faith, for the purpose of an investment, in the open market, at the price of 45½ cents on the face value of the stock. They allege that, shortly before the filing of their bill, —perhaps a month,—they discovered that, something over two years before the purchase of their stock, McKee and Verner, who had purchased for \$2,250,000 the entire stock of the railroad company, consisting of 15,000 shares of stock, had conceived the idea of issuing 35,000 additional shares of stock, and of placing an incumbrance of \$4,000,000 upon the railroad property, and that the purpose of such increased stock, and of the execution of such proposed mortgage, was to enable McKee and Verner by gift to obtain possession of the entire additional issue of stock, and to have enough of the issue of bonds or of their proceeds to reimburse them in full for the original purchase price that they had paid in acquiring the original stock that was outstanding at the time of their purchase, and which gave them the entire ownership of the corporation and its assets. It is alleged that, in furtherance and for the purpose of consummating this alleged fraudulent scheme and combination, McKee and Verner transferred a single share to each of certain other persons, who are named, in order to qualify them to act as directors; that these parties, including McKee and Verner, were elected as directors, and that McKee and Verner and those parties who had received by gift a single share of stock constituted the board of directors and the entire membership of stockholders of the corporation, and that they all, as stockholders and directors, with a knowledge of the fraudulent purposes on the part of McKee and Verner, and acting in concert with them as a board of directors and as stockholders, voted to increase the stock by the sum of 35,000 shares, and to issue a mortgage upon the property of the corporation to the amount of \$4,000,000. It is further alleged that this fraudulent combination and scheme was fully consummated by these stockholders and directors, and that McKee and Verner were given, without any consideration whatever, the 35,000 shares of stock, and that they received out of the bonds that were issued the \$2,250,000 that they had paid for the property, and it is charged that they have received, over and above that, a large sum of money out of the proceeds of the bonds and stock.

It is further charged in the bill that it was one of the purposes of this fraudulent combination and conspiracy that the stock should be gambled with, and, by artifices known to those who deal upon stock boards, that an artificial value, in excess of any real value that the stock possessed, should be apparently imparted to it, with a view of unloading on the general public. It is alleged that this fraudulent purpose and scheme was successfully consummated. Now, the plaintiffs allege they discovered, after purchasing their stock, something like a year, the existence of this conspiracy and the results that had been accomplished; and they allege that before this fraudulent scheme had been entered upon, this property was a valuable property, worth far more than the amount of the bonded indebtedness resting upon it, so that its stock was a valuable property; that the corporation has been rendered insolvent; and that the entire property of the corporation, if the corporation were wound up and its assets converted, would be insolvent, and would lack a million or more of dollars of paying out the mortgage indebtedness, leaving the stock absolutely valueless. This suit is brought by the plaintiffs, as shareholders in the corporation, suing, as they allege, for themselves and for and on behalf of all other stockholders in like case who are willing to come in and make themselves parties to the litigation and contribute to the expenses of the suit.

The first question that is raised by the averments of the plaintiffs' bill is the question whether the plaintiffs have any standing in a court of equity on the theory on which they have grounded their cause of action. The plaintiffs allege that having learned that the stock which they purchased in the open market was tainted with fraud, and that the whole number of shares of stock that they had bought was indistinguishable, so that they were unable to ascertain what shares of stock originated in the fraudulent conspiracy which they charge, and what shares of stock represent a portion of the original and valid capital stock of the company, they come into court and elect to repudiate, and ask the court to cancel, an aliquot part of their 200 shares of stock, in the proportion that 15,000 shares of stock, the original valid shares, bear to the 35,000 shares which they charge were brought forth as the result of this fraudulent conspiracy. They ask the court to aid them in making an election by virtue of which they shall be relieved from the burdens that they assume may be cast upon them if they retain the 140 shares of stock which they claim are tainted with fraud; and that the court shall adjudge that they are entitled to do that, and at the same time to retain 60 shares of stock which they ask the court to adjudge are valid and binding and unaffected by the fraud complained of. The question arising, then, is this: Can a party who makes a single purchase of stock, as a single act of contract, repudiate, either with or without the assistance of the court, so much of the single and indivisible contract as may be burdensome to him, and involve him in liability to suits and damages by reason of his retention of it, and at the same time retain the other portion of the stock which he alleges

in his bill it would be beneficial for him to retain? After the best reflection that I can give to the subject, it seems to me impossible that the law will afford any such relief. The purchase was an entirety. The contract was an entirety, and it is elementary that the court is possessed of no power to make a new contract between parties entirely distinct and different from the contract that they have entered into. And it is further familiar law that, where a party has been led into a contract by a fraud that has been practiced upon him, he is required, with reasonable promptness, to make his election, either to repudiate the fraudulent contract in toto, or else to retain the property that he has received as the result of the contract which he has been induced to enter into, and to sue at law for the purpose of recovering the damages that he has sustained by reason of the fraud that has been practiced upon him. A purchaser who has been induced to enter into a contract by fraud cannot repudiate the contract in part and affirm it in part. If he elects to take the benefit, he must also bear the burden. So that on this question it seems to me that there is no possibility of the plaintiffs recovering on the theory that stands at the very front of their bill.

A further objection is made to the bill, that it is multifarious. Multifariousness consists in stating against the same party two or more independent causes of action in the same bill, or it may consist in stating one or more causes of action against a portion of the defendants and another cause of action against another portion of the defendants. Here, in so far as the plaintiffs seek to be relieved of the fraudulent stock that they purchased, and to have it canceled, and to have the valid portion of it adjudged to be valid, and they adjudged to be stockholders and entitled to the rights of stockholders in the corporation in respect of that, it constitutes a cause of action which belongs alone to the plaintiffs. It is a cause of action which does not present a right of action in favor of the corporation or in favor of any other stockholder. It is a right of action that inures exclusively to the benefit of the plaintiffs, and in which no other stockholder in the corporation is directly or legally concerned. The portions of the bill in which the plaintiffs as stockholders seek to redress the wrongs that have been suffered by the corporation by reason of the wrongful diversion of 35,000 shares of stock, and by reason of the wrongful gift of \$2,250,000 or more of the proceeds of the bonds to McKee and Verner, constitute a cause of action that concerns the entire body of stockholders as *cestuis que trustent*, who are entitled, after the payment of debts, to have that fund distributed among them. The primary right to enforce any cause of action that exists for such wrongs is in the corporation, and a stockholder cannot intermeddle by bringing a suit to recover such assets until he has shown that it is impracticable that the just rights of the stockholders can be preserved through corporate action. The two causes of action, then, that are set out in this bill of complaint, are distinct and independent; one being a cause of action that belongs individually and exclusively to the plaintiffs, and the other a cause

of action belonging primarily to the corporation, and in which the plaintiffs have no interest except an equitable right as cestuis que trustent in common with the owners of the other 49,800 shares of stock. It would seem on the statement of the proposition to be manifest that it would be incongruous, and not in harmony with the practice of a court of chancery, in a single bill to prosecute causes of action so diverse in their character. In my judgment these two causes of action are so entirely independent,—one a cause of action belonging primarily to the plaintiffs, and the other a cause of action belonging primarily to the corporation, which if sued for by a stockholder inures solely to the corporation,—they are so diverse in character, that it needs no argument to show that the bill cannot be maintained.

It is further objected that the plaintiffs in this case, having become purchasers of the stock, although they were good-faith purchasers of it, took it and hold it by no better or different title than the transferrer of it to them. It is clear that the shares of stock in a corporation are not governed by the law merchant, nor are they governed by the statute of this state touching bills of exchange and notes made payable in a bank in this state. Securities of that character, in the interest of commerce and commercial dealings, are placed upon such a footing that if they reach the hands of an innocent purchaser for value, before maturity, the holder acquires them by a new and indefeasible title, which enables him to collect the contents of such bills or promissory notes without regard to the defenses, legal or equitable, existing between the original parties to them. But stocks are mere choses in action, governed by the principles of the common law, and by the common law such choses in action are no better or higher evidence of title or right in the hands of an assignee than they were in the hands of the assignor. That is the general rule,—a rule that, in my judgment, is applicable to this case,—and, without a reference to the adjudications that have been read to the court, the court would have reached the same conclusion by the application of the general principles of law with which the members of the bar as well as the court are familiar. So that in this case I see no principle of the law that would authorize the plaintiffs to maintain the present bill on the ground that the stock that they had purchased, by the transfer or assignment of it, had acquired some new rights or equities that the stock did not possess in the hands of the transferrer or assignor. And this view seems to be supported by the authorities that have been read, which are in harmony with the understanding that the court has of the principles involved in this sort of contracts.

It is not necessary that the court should express any opinion with reference to the proper scope and effect of the ninety-fourth rule in equity. The rule seems to be so plain and explicit that no commentary upon it would make more apparent the meaning than that which is obvious from the mere reading of it.

There is no averment in the bill or in the affidavit that any effort was made to procure remedial action from the board of directors.

of the company before suit was brought, and this failure is attempted to be excused by the allegation that five of the seven directors who participated in the original fraudulent combination and conspiracy are still members of the directory, and it is therefore urged that it must be apparent to the court that an application to them to undo the wrong that they have inflicted on the corporation would be unavailing. Applying the general principles of equity jurisprudence, and following the current of authority in the state courts on the subject, the court would be clearly of opinion that that would be a sufficient excuse. But the language of the rule in question, and the interpretation that has been given by the court which promulgated the rule, make it obvious that it was the purpose to introduce a more stringent rule in the national courts than the rule which is applied on the same subject in the state courts, and that such an excuse as is offered here does not satisfy the rule. It appears from the rule, further, that if formal application had been made to the board of directors, and efforts to induce the board to undertake corporate action had been made and refused, such refusal is not of itself sufficient to authorize the institution of a suit by a stockholder against the corporation for the purpose of recovering a corporate asset. It is still required that an effort should be made to induce action by the body of the corporation,—by the stockholders,—and that, if action cannot be obtained either from the board of directors or from the body of the stockholders, the bill shall show the character and extent of the efforts, and shall particularly show the reasons why the party who brings his suit failed to obtain remedial action within the body of the corporation. The bill fails to show proper action in these particulars; and it fails to show that complainants owned the stock at or before the commission of the fraudulent acts of which they complain, or that they have since acquired the stock by operation of law, as required by the rule. There are some other features of the bill that would justify comment, if enough had not already been said to dispose of the demurrer which has been filed.

There only remains one further inquiry, and that is whether or not the demurrer should be sustained and the bill dismissed without prejudice, or whether leave should be granted to amend the bill.

Mr. Wallace: If your honor please, we do not care to have leave to amend.

The Court: It seems to the court to be apparent, from the observations already made, that it would be impossible for the plaintiffs to amend their bill so as to obviate the objections that have been pointed out to it.

In finally disposing of the case, the court desires to say that it is always a matter of regret to the court, where grave charges of misconduct are imputed to defendants, that the case should be disposed of by a ruling on demurrer, instead of being disposed of after a full investigation and inquiry into the real truth of the grave charges that are made. The order of the court is that the demurrer be sustained, and that the bill be dismissed, but without prejudice, at the costs of the complainants.

JONES v. WILKEY.

(Circuit Court, W. D. Pennsylvania. . January 27, 1897.)

1. PAYMENT—INSTRUMENT UNDER SEAL—PRESUMPTIONS.

A shorter period than 20 years, aided by circumstances, may furnish ground for inferring payment in fact of an instrument under seal.

2. JUDGMENTS—EFFECT AS TO STRANGERS.

One not a party or privy is never concluded by a judgment against which he had no opportunity to defend.

3. SAME—PARTIES AND PRIVIES.

A son who holds land under a deed from his father, in respect of that land is neither party nor privy to a subsequent judgment obtained against the administrator of his father's estate in a suit in which the widow and heirs were not joined as defendants.

This was an action of ejectment by Eliza J. Jones against Philip Wilkey. A jury was waived, and the case was tried by the court.

Edw. Campbell and J. M. Garrison, for plaintiff.

Knox & Reed and R. H. Lindsey, for defendant.

ACHESON, Circuit Judge. Both parties claim title to the land in dispute through James Wilkey, their father. By deed dated January 4, 1883, James Wilkey conveyed the land to his son, the defendant, Philip Wilkey, for the use of Philip during his life, and after his death to the use of his (Philip's) children. James Wilkey died November 7, 1883, intestate. On July 7, 1888, John Wilkey, another son of James, brought suit in the court of common pleas of Fayette county, Pa., against Catherine Wilkey, as administratrix and widow of James Wilkey, and the heirs of James, upon a note under seal, for \$1,684.51, purporting to be signed by James Wilkey, dated March 15, 1869, and payable to him, John Wilkey, one day after date. Catherine Wilkey having died on July 14, 1891, letters of administration upon the estate of James Wilkey issued to Samuel H. Dunshane, who was substituted as defendant in said suit. On March 28, 1893, the plaintiff in the said suit, by leave of court, struck from the record the names of the heirs of James Wilkey (including the name of Philip Wilkey); and the cause then proceeding against the sole remaining defendant, Samuel H. Dunshane, the administrator, a verdict was rendered in favor of the plaintiff for \$2,541.13, and on April 4, 1893, judgment on the verdict was entered. By virtue of a writ of vend. ex. issued under this judgment, the sheriff of Fayette county, on August 5, 1893, sold the land in dispute, for the consideration of \$75, to Eliza J. Jones, the present plaintiff, and on December 14, 1893, the sheriff executed and delivered to her a deed for the premises. As plaintiff in this ejectment, Eliza J. Jones claims title to the land in dispute under the sheriff's deed.

In her abstract of title, the plaintiff set forth that the deed of her father, James Wilkey, to her brother Philip, was made and accepted for the purpose and with the intent of delaying, hindering, and defrauding the then-existing creditors of James Wilkey; and, in her answer to the defendant's abstract of title, she set forth that the deed to him was made "especially to delay, hinder, and defraud John

Wilkey, to whom said James Wilkey was then indebted in a large sum of money." In support of these allegations, upon the trial of the case, and as part of her proofs in chief, the plaintiff introduced evidence tending to show that, at the date of the deed from her father to Philip, her father was indebted to John Wilkey. She put in evidence the above-mentioned judgment, and also another judgment in the court of common pleas of Fayette county for \$1,631, obtained on April 3, 1894, by John Wilkey against Samuel H. Dunshane, administrator of James Wilkey, deceased, in a suit brought December 4, 1890, upon a note under seal for \$1,000, purporting to be signed by James Wilkey, dated April 1, 1871, and payable to him, John Wilkey, one day after date. As part of her case in chief, the plaintiff also put in evidence the original notes upon which these judgments were obtained; and she called and examined John Wilkey to show that, at the date of the deed from James Wilkey to Philip, the former was indebted to him (John) upon said notes and otherwise, and that the father had no property left after the conveyance to Philip Wilkey. Upon the question of the alleged indebtedness of James Wilkey to John Wilkey on January 4, 1883 (the date of the deed to Philip), the evidence is conflicting; but the weight of it, I think, is with the defendant. The evidence, direct and circumstantial, considered as a whole, fully justifies these conclusions, namely: That, at the date of the deed from James Wilkey to his son Philip, James Wilkey was not indebted to his son John, and that said deed was not intended to delay, hinder, or defraud creditors, but was made by James, and was accepted by Philip, in perfect good faith. In accordance with these conclusions will be the finding of the court in the issue between the parties to this ejectment.

Here this opinion might well end, but one or two observations touching certain points may not be out of place. The above-mentioned notes being under seal, a presumption of payment from mere lapse of time does not arise, as suit was brought thereon within 20 years after maturity. They were, however, very stale claims when proceeded on; and it is well settled that a shorter period than 20 years, aided by circumstances, may furnish ground for inferring payment in fact. *Tilghman v. Fisher*, 9 Watts, 441; *Brigg's Appeal*, 93 Pa. St. 485; *Walls v. Walls*, 170 Pa. St. 48, 32 Atl. 649. Weighty circumstances in aid of such inference appear here. Immediately after the conveyance to Philip, and undoubtedly with a view of invalidating it, John Wilkey instituted a proceeding to have his father declared a lunatic, wherein he failed. Why did John take that step if these notes were valid outstanding obligations of his father? Why did he not then put them in suit, and attempt to enforce them against this land, instead of waiting until his father was dead? Again, some years before the date of the deed to Philip, John got from his father an undivided one-half (worth, it would seem, \$4,000) of the "Keeper's Property," and also "some bank stock." Furthermore, at some date, between 1880 and 1883, James Wilkey gave to John \$8,000. It would seem, indeed, that this money was in the nature of a testamentary gift, for about that time the father determined to divide his estate among his children in accordance with a

scheme of distribution contemplated by his will previously executed and then destroyed. In that division, John got the \$8,000, and Philip and his children got the farm, the subject-matter of this ejectment. And here mention must be made of a significant fact testified to by Alfred Whaley. This witness states (truly, no doubt) that these old notes were once shown to him by John Wilkey, who cautioned him not to tell his father that he held them, for, if he did, his father would not give him (John) anything out of his estate. If these notes had not been actually paid or canceled in some way, why should their existence be concealed from James Wilkey? Is it not plain that, when the father divided his estate among his children, it was the mutual understanding of himself and John that these notes were out of the way? In view of the conduct of John Wilkey, can it be credited that he had any valid claim against his father upon these notes when Philip got his portion of his father's estate? Finally, after this suit was brought, the plaintiff herself solemnly declared, in the hearing of her nephew Isaac Wilkey, and under impressive circumstances, "that John hadn't done as he promised to with her, and that these notes were not good, and that she didn't believe that grandpap owed him anything." The plaintiff denied that she had ever said that the notes were forgeries, but she did not deny that she made the above statement, testified to by Isaac Wilkey.

The plaintiff's counsel, however, notwithstanding the issue of fact raised by the abstracts of title, and the course which the trial took, contend that the above-recited judgments conclude the defendant. But it is a fundamental principle that judgments conclude only parties and privies, and one not a party or privy is never bound by a judgment against which he had no opportunity to defend. *Rittispaugh v. Lewis*, 103 Pa. St. 1. Thus, in an ejectment against the terre-tenant of mortgaged premises by the purchaser at a sheriff's sale, the defendant may avail himself of any defense he might have made if he had been a party to the scire facias suit. *Mather v. Clark*, 1 Watts, 491. So, the owner may defend on original grounds in ejectment by the purchaser at a sheriff's sale under a judgment upon a mechanic's lien (*Christine v. Manderson*, 2 Pa. St. 363), or under a judgment upon a municipal claim, in a procedure to which the owner was not a party (*Delaney v. Gault*, 30 Pa. St. 63). Now, as *heir*, Philip Wilkey would have the right to contest John's claims on original grounds, whether sued with the personal representative or brought in afterwards by scire facias. *Sample v. Barr*, 25 Pa. St. 457. Considered, however, solely as *grantee*, Philip stands in no privy whatever to the judgments here set up. *Posten v. Posten*, 4 Whart. 27, 42. There the court, in overruling an assignment of error to the allowance by the trial court of proof that no debt upon which the judgment was based existed, said:

"The defendant insists that this judgment is conclusive evidence of the debt, for which it was rendered; but, if this be so, the plaintiff's land might be sold under a judgment confessed subsequently to his deed for a debt alleged to be prior, although he could prove that the debt was feigned, and the judgment covinous and fraudulent as to him. This is certainly not the rule of law, nor of justice. If a judgment between other persons be given in evidence to affect the rights of a third person, neither party nor privy to the judgment, he may show

that it was set on foot by covin, and thus avoid it. The plaintiff here was neither party nor privy in respect of land which he held by a previous deed from the father."

This language is very pertinent to the case in hand.

Nor is Philip Wilkey concluded by the proceeding in the orphans' court of Fayette county. *Russell v. Place*, 94 U. S. 606, 608. That proceeding related to personal estate. It did not at all concern this land. Moreover, Philip was not a party to that proceeding, and was not before the auditor.

Finding of the Court.

The parties, by stipulation in writing, having waived a jury, and agreed upon a trial of the issue of fact by the court, this cause accordingly came on for trial by the court, without the intervention of a jury, on the 24th day of November, 1896; and on that day and the succeeding day the court fully heard the parties and the evidence submitted by them, respectively, and the arguments of counsel; and now, this 27th day of January, 1897, the court, upon due consideration, finds in favor of the defendant.

O'CONNELL et al. v. CENTRAL BANK.

(Circuit Court, D. Oregon. February 9, 1897.)

No. 2,177.

ASSIGNMENTS FOR BENEFIT OF CREDITORS—MORTGAGE SECURING PREFERENCES—OREGON STATUTE.

The Oregon statute declaring invalid general assignments for creditors, unless made for all creditors (Hill's Ann. Laws, § 3173), does not apply to a mortgage made by an insolvent to secure one creditor, though it covers all the mortgagor's property, and though the mortgagee had knowledge of his insolvency. *Beall v. Cowan*, 21 C. C. A. 267, 75 Fed. 139, followed.

This was a suit in equity by Eugene O'Connell and others against the Central Bank to set aside a mortgage made to the latter by the Oakland Box & Barrel Manufacturing Company.

Wm. Wirt Minor and J. W. Bennett, for complainants.

E. B. Watson and J. F. Watson, for defendant.

BELLINGER, District Judge. This is a suit to set aside a mortgage made by the Oakland Box & Barrel Manufacturing Company to the bank. It is claimed and appears that the mortgage in question was upon all the property of the Oakland Box & Barrel Manufacturing Company, and that the Oakland Box & Barrel Manufacturing Company was insolvent at the time the mortgage was made, and I have no doubt but that the bank knew of this condition. Nevertheless, it is the law of this circuit that such a mortgage is not within the provision of the statute (section 3173, Hill's Ann. Laws Or.) which provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all

his creditors in proportion to the amount of their respective claims." In the case of *Beall v. Cowan*, 21 C. C. A. 267, 75 Fed. 139, the circuit court of appeals for this circuit, following the decisions of the supreme court of the state of Oregon, held, in effect, that the court would regard the form of the instrument, and, if it be not in form an assignment, it is not within the act quoted. The doctrine of this decision, and of the decisions of the supreme court upon which it is founded, is that the statute "was not intended to prevent an insolvent debtor from preferring one creditor to another, and was not intended to apply to any and all instruments or means by which an insolvent might divest himself of his property, and thereby pay or secure certain creditors to the exclusion of others, but was intended to apply to the subject-matter of the statute, which was the voluntary distribution of an insolvent's estate through an assignee, and substantially in the method contemplated in the statute,—a proceeding by which the insolvent surrendered his estate to another for the benefit of his creditors, and under which the assignee distributed the estate, and in which the transfer became effective without the assent of the creditors, and the insolvent lost all dominion over his property." Following these decisions, I must hold that the mortgage in this case is not within the statutory definition of a general assignment. It is therefore ordered that the bill of complaint herein be dismissed.

COWEN et al. v. ADAMS et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1897.)

No. 367.

1. SUIT UNDER WILL.—NECESSARY PARTIES.—LEGATEES.

One M. made his will, in 1880, leaving his estate to be equally divided among his four children and a grandson, the son of a deceased child. The will also referred to advances made by the testator to his children, and charged to them on his books, and declared that the provision made by the will was to be in addition to such advances, and that, in the settlement of his estate, such advances already made, and any that should be afterwards made, should not be treated as advancements, but as gifts, not in any manner to be accounted for by the children or grandson. Some time after the making of this will, W., one of M.'s sons, met with financial disaster, and became very deeply involved. M. then directed J., another son, to do what was necessary to relieve W., and thereafter, through J., advanced very large sums to pay W.'s debts, taking W.'s notes therefor, and taking assignments of collateral from some of W.'s creditors. Shortly before the death of M., and when it was expected, the persons who afterwards became administrators with the will annexed took from W. a paper authorizing the application of his share of his father's estate to these notes. This paper W. afterwards revoked, and then revoked the revocation, and afterwards gave the administrators a receipt for nearly the whole amount of his share of the estate by its application to the payment of the notes, and thereafter he received the remaining collaterals, taken by his father when he paid W.'s debts, and which had not been realized on by him. In the meantime, in a suit instituted against W. by his wife, a decree had been entered, pursuant to which he conveyed to trustees, for the benefit of his family, all his interest in his father's estate. The trustees under this deed brought suit against the administrators executing M.'s will to set aside the receipt given to them by W., to establish W.'s right to his interest in his

father's estate, and for an accounting thereof. *Held*, that the legatees under M.'s will were not necessary parties to the suit, either as it was thereby sought to set aside W.'s receipt or as it was sought to establish W.'s interest in the estate notwithstanding the advances to him.

2. CONSTRUCTION OF WILL—ADVANCES.

Held, further, that the dominating purpose of M.'s will was that the property he should leave at his death should be equally divided among his children and grandchild, irrespective of previous advances, and, while a debt from a legatee might be created which would be independent of the absolution accorded by the will, to establish the creation of such a debt would require clear proof of the existence of a distinct purpose on the part of the testator himself, at the time of the transaction, to put such debt outside the pale of the forgiveness written in the will, and that the advances made to W., for which his notes were given, though debts during M.'s life, were not shown by the evidence to be outside the provisions of the will, and they were extinguished on M.'s death.

3. ESTOPPEL—LEGATEE'S RECEIPT.

Held, further, that the receipt of the collaterals, to which he became entitled upon the extinguishment of his debt, did not estop W. to dispute the receipt given to the administrators, and that, in view of the position of trust in which the administrators stood towards W., the receipt procured by them from him, by which, without legal obligation to do so, he surrendered the greater part of his share of the estate, would not be permitted to stand in the way of the enforcement of his rights in the estate of M.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This is a suit in equity brought in the circuit court for the district of Kentucky, by the above-named Benjamin R. Cowen, Evan F. Williams, and A. S. Frazer, appellants, as trustees under a deed of trust executed by William Means on the 26th day of December, 1891, and which purported to convey all the interest of the said William Means as devisee under the will of his father, Thomas W. Means, in trust for the purposes recited in a certain decree of the court of common pleas of Greene county, Ohio, against the defendants Thomas M. Adams and E. C. Means, as administrators with the will annexed of the estate of Thomas W. Means, and John Means, who had been connected with the transactions out of which the controversy grows. As the appeal is not prosecuted as against John Means, it is not necessary here to state the particular relationship of John Means to the subject-matter of the suit in respect to his liability to account. The object of the suit is to set aside a certain instrument of settlement and receipt given by William Means to the above-named administrators on the 16th day of October, 1890, and for a declaration establishing the right of the said trustees to recover, in virtue of the interest of William Means as legatee, a one-fifth interest of the estate of the said Thomas W. Means, and for an accounting and payment to them of the amount of the legacy bequeathed to the said William Means.

In order to a proper understanding of the grounds of the decision of this court, it is necessary to give a brief account of so much of the history of the prior events and of the transactions involved in the controversy as are deemed by the court material, supplemented, however, by some further incidental facts which are stated in the opinion. Thomas W. Means was on the 20th day of July, 1880, and for many years prior thereto had been, a resident of Hanging Rock, in the state of Ohio, and had reached the age of 77 years. He had been an active and capable man, engaged in many kinds of business enterprises, and had accumulated a large property, amounting to \$700,000 or \$800,000. He had had five children,—John, William, Mary, Margaret, and Sarah,—the latter of whom had married one Culbertson. Previous to the date just mentioned, Mrs. Culbertson had died, leaving her son, Thomas M. Culbertson, as her only heir. These five persons, the four children and the grandson, were all living at the date referred to. Prior to that time he had been in the habit of assisting his children, and in that way had already advanced to them large sums of money. He had opened accounts with each of them, in which he had charged them with the sums which he had furnished them,

and given them credit for various items to which he had conceived them entitled for the purpose of keeping these accounts. He had assisted some of his children in business, introducing them into various enterprises in which he was himself concerned, and, when such enterprises had been disastrous or unprofitable, had charged off the losses to himself, or furnished them with the means to balance up their losses and take a fresh start; his purpose seeming to have been, while he lived, to take upon himself such burdens, and help them along through their misfortunes and discouragements. At one time, on December 9, 1873, he made a gift to his children of \$400,000, \$80,000 to each. Previous to that time he had advanced them, in all, more than \$250,000. Without for the present going into further particulars of this kind, Thomas W. Means, on the said 20th day of July, 1880, made and executed his last will, the fourth and fifth paragraphs of which are here given:

"(4) I give, devise, and bequeath all the residue and remainder of my estate, personal, real, and mixed, wherever situated or located, of which I shall die possessed, to be equally divided among my four children, John Means, William Means, Mary A. Adams, and Margaret A. Means, and my grandson, Thomas M. Culbertson (son and sole heir of my deceased daughter, Sarah Jane Culbertson), who shall be living at the time of my decease, and the issue of any child now living, and of said grandson, who may then have deceased, such issue taking the share to which such child or grandson would be entitled if living. But said share given, devised and bequeathed to said grandson or his issue is to be held in trust as hereinafter provided, and to be subject to the provisions hereinafter contained as to said grandson's share.

"(5) I have made advances to my said children which are charged to them, respectively, on my books, and I may make further advances to them, respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision herein made for said children, and the provision for said grandson, to be a provision for them, respectively, in addition to said advances made and that may hereafter be made, and that, in the division, distribution, and settlement of my said estate, said advances made and that may hereafter be made be treated, not as advancements, but as gifts, not in any manner to be accounted for by my said children and grandson, or any of them."

After the making of this will the testator continued to make advances to his children, and to keep regular accounts with them, as he had previously done. To some of them he advanced very considerable sums, thus: To John Means he supplied \$20,685; William Means, \$41,590; Mary A. Adams, \$48,792; Margaret A. Means, \$55,568. These, with former advances, made up the sum of \$100,000 to each, exclusive of the \$80,000 which, as above stated, he had given to each of them. No advances appear to have been made to the grandson, Culbertson, the reason probably being that he was a minor, and perhaps, also, because he had other resources, on his paternal side. John Means, the oldest son, was himself a prosperous man, and acquired a considerable fortune. William established himself in Cincinnati, and became a man of distinction there, being at one time mayor of the city. He became president of the Metropolitan National Bank, one of the leading financial institutions of the city. He acquired, and for many years maintained, the reputation of being a sound and capable business man. But the Metropolitan National Bank, which had for some time been laboring under heavy embarrassments resulting from mismanagement and irregular dealings with its funds by the president, became so much involved that in February, 1888, it failed, and directly went into the hands of a receiver. By reason of his defalcations as trustee for large properties, and of his irregular transactions in the affairs of the bank, William Means became deeply involved, not only with respect to his character and standing as a man, but also in respect to his financial affairs. Proceedings, both civil and criminal, were threatened, and were imminent. While he had large and valuable collaterals, they could not be presently realized upon, and, if they could have been realized in full, they would have been scarcely sufficient to have met his liabilities. In this state of affairs he turned to his father, who in 1884 had removed to Ashland, Ky., for help. The latter summoned to his counsel John Means, his other son, and, after considering the ways and means of helping William out, he sent John to Cincinnati to investigate affairs, and do what should be found needful to relieve William in his embarrassed situation. The result was that, on its being ascertained that Wil-

liam's indebtedness to the bank amounted to the sum of \$125,911.74, John Means paid to the bank that sum, and took an assignment to Thomas W. Means of all the collaterals which the bank held as security therefor, amounting, in all, at their par value, to the sum of \$182,350,—their estimated salable value being \$146,000. This was on February 15, 1888. On the following 22d day of February, at John's request, William Means executed his promissory note to Thomas W. Means for the sum of \$125,911.74, which John had paid to the bank. The following is a copy of the note:

"Cincinnati, O., Feb. 15, 1888.

"Due Thomas W. Means, or order, one hundred and twenty-five thousand nine hundred and eleven and $\frac{74}{100}$ dollars, with interest from date.

"\$125,911.74.

William Means."

On the 11th day of March, 1888, John Means paid for William Means, to the Bank of Ashland, \$15,027, to take up two notes, given by William Means, for which the Bank of Ashland held collaterals of the par value of \$22,000, which were transferred to Thomas W. Means, and William Means thereupon executed to Thomas W. Means his promissory note therefor, as follows:

"Yellow Springs, O., March 19, 1888.

"One day after date I promise to pay to the order of Thomas W. Means fifteen thousand and twenty-seven dollars, for value received.

"15,027.00.

William Means."

On August 20, 1888, Thomas W. Means took up a note of William Means for \$5,000, and William Means sent to Thomas W. Means his note for that amount, with some accrued interest, as follows:

"New York, August 20, 1888.

"One day after date I promise to pay to the order of Thomas W. Means five thousand forty-one and $\frac{67}{100}$ dollars, for value received.

"\$5,041.67.

William Means."

Another transaction of like character was the payment by Thomas W. Means to Hunt & Gurkey of the sum of \$2,100, for which, on October 24, 1888, William Means executed the following note:

"New York, October 24, 1888.

"One day after date I promise to pay to the order of Thomas W. Means twenty-one hundred dollars, for value received.

"\$2,100.

William Means."

At this stage of affairs, there appears to have been some scheme concocted for obtaining a nolle prosequi in reference to the criminal prosecution which had been commenced in the federal court on account of William Means' transactions in the affairs of the bank, or of obtaining a pardon therefor. In furtherance of this scheme, a note for \$75,000 was made by William Means to Thomas W. Means, as follows:

"New Haven, Conn., November 9, 1888.

"One day after date I promise to pay to the order of Thomas W. Means seventy-five thousand dollars, value received, with interest from date.

"\$75,000.

William Means."

Appended to this note was the following:

"It is agreed, as part of the transaction by which I have procured a loan of seventy-five thousand dollars upon the foregoing note, that the amount thereof, and all the interest, shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

"November 9, 1888.

William Means."

Exactly how this \$75,000 was intended to be used does not appear. It is not shown that the money was actually employed, and the scheme was either not pursued or fell through. William Means was tried upon the indictments in the United States district court at Cincinnati and acquitted. On the 22d day of November, 1888, another note was executed by William Means to Thomas W. Means for the sum of \$45,000, as follows:

"\$45,000.

New Haven, Conn., November 22, 1888.

"One day after date I promise to pay to the order of Thomas W. Means forty-five thousand dollars, for value received, with interest from December 1, 1888.

"William Means."

Appended thereto was the following:

"The above is for money loaned to me by Thomas W. Means, on account of my indebtedness as executor and trustee of the estate of A. Labrot, deceased, and it is agreed, as part of the transaction by which I have procured a loan of forty-five thousand dollars upon the foregoing note, that the amount thereof and all interest shall be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

"November 22, 1888.

William Means."

John Means was acting as the agent of his father in all of these transactions, and used his father's funds in making the payments on account of which the notes of William Means were given. Certain correspondence took place between John Means and William Means, during the pendency of these transactions, in relation to the giving of the above-mentioned notes by William Means, and the form in which they were put, to which the appellants refer as explanatory of the purpose for which the notes, and the stipulations at the end of some of them, as above shown, were made. This correspondence is referred to in the opinion. Thomas W. Means, already 85 years of age, had, in 1888, become almost blind, and that affliction was increasing upon him. He was somewhat enfeebled in mind, and quite infirm, and by June, 1889, had become quite imbecile. He had, up to that time, at least, had a general understanding of what was being done for William, and approved of it. He was deeply troubled at the calamities which had befallen his son, and felt a deep interest in relieving him. Soon after the above-mentioned transactions in aid of William were begun, John Means, with the assent of his father, opened up a separate account in his father's books, in his own name as debtor, with reference thereto, in which were recorded the substance of the matters of account involved, and in this separate account John Means continued the record of the transactions.

Thomas W. Means died June 8, 1890, and on the 28th day of the July following his death Thomas M. Adams and E. C. Means were appointed administrators with the will annexed. These persons—Thomas M. Adams and E. C. Means—had, a short time previous to the testator's death, obtained from William Means the following instrument:

"Ashland, Ky., June 16, 1890.

"I hereby direct the executors of the will of Thomas W. Means, or the personal representatives hereafter to be appointed, to charge against my distributable share as heir at law of Thomas W. Means, or as devisee under his will, the notes heretofore given by me to Thomas W. Means; and I do further hereby assign such interest or share, or sufficient thereof to pay and discharge such notes.

"William Means.

"Witness:

"S. B. E. Dranan.

"James Means."

On the 17th, the day following, William Means delivered to the said Thomas M. Adams and E. C. Means the following paper:

"Ashland, Ky., June 17, 1890.

"To Whom It may Concern: This is to certify that my object in signing a certain paper, dated June 16, 1890, in which the executors of the estate of Thomas W. Means are directed to charge up my obligations against my interest in said estate, was done to insure the estate against loss through the purchase of such obligations, no matter how obtained, and for no other purpose whatever.

"William Means."

On the 28th day of July (although it bears date the 29th), Thomas M. Adams and E. C. Means, under appointment as administrators, indorsed upon the back of the paper above set forth, bearing date June 16, 1890, the following:

"This paper came into the possession of the undersigned June 16, 1890, and has been held jointly since. And now, as administrators with will annexed of Thomas

W. Means, deceased, and upon our appointment and qualification as such, we note and indorse hereon its delivery and acceptance to and by us.

"E. C. Means,

"T. M. Adams,

"Administrators with Will Annexed of Estate of Thomas W. Means.

"July 29, 1890.

"Attest:

"John F. Hagar.

"W. P. Seaton."

Then, also, on the day of the appointment of the administrators, July 28th, William Means delivered to the administrators an instrument of revocation, as follows:

"To the Executors and Legal Representatives of the Estate of Thomas W. Means, Deceased, and to E. C. Means and Thomas M. Adams, Individually:

"Gentlemen: Inasmuch as, by a certain paper, dated June 16, 1890, it is claimed that I authorized certain notes to be deducted from or charged against my distributable share as heir at law of Thomas W. Means, and further assigned certain interests to pay said notes: Now, this is to notify you, and all other persons interested herein, that I hereby revoke and annul said paper writing, and all consent and authority conferred by it, and declare said paper to be null and void for any purpose whatever. And you are notified not to deliver said paper to any person, or make any use of the same; and I make this notification for the following, among other, reasons: (1) That said paper was not to be delivered without my consent. (2) Said paper was wholly without consideration and inoperative for any legal purpose. (3) Said paper was signed without legal advice or proper information as to the contents or meaning. (4) Said paper was obtained from me in ignorance of important facts and of my legal rights. (5) Said paper was obtained under circumstances that make it inequitable that I shall be bound by it. (6) Said paper was not intended to be used in any manner against my interests or desire.

"Yours, respectfully,

William Means.

"Ashland, Ky., July 28, 1890."

On October 4th following, William Means revoked his revocation of July 28th, by the following indorsement upon the margin thereof:

"To E. C. Means and Thomas M. Adams, Administrators with the Will Annexed of Thomas W. Means:

"The matter of revocation contained in this notice and paper are hereby revoked.

"October 4, 1890.

William Means.

"Attest:

"John F. Hagar."

On the 16th of October, William Means gave the administrators the following receipt:

"Ashland, Ky., October 16, 1890.

"Received of Thomas M. Adams and E. C. Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty five and seventy-five one-hundredths dollars, being a part of my distributable share as legatee under said will, applied by them, as ordered by me, upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz.: [Here follows description of 10 notes, with balance due on each, aggregating \$136,035.75.] This receipt is given in pursuance of settlement made October 16, 1890.

William Means.

"Attest:

"John F. Hagar.

"A. E. Lampton."

On the same day, the administrators took from William Means a further receipt, which was dated the 17th, and changed to the 18th, for the sum of \$26,240.79, as a part of his share in the estate, the money to be paid to his brothers and sisters on account of antecedent debts, if there should be enough left for the purpose, after paying the above-mentioned 10 notes. It appears that the sisters

were unwilling to carry out this part of the proposed arrangement, and the receipts were returned to William Means by the administrators shortly afterwards. On October 23, 1890, William Means received from E. C. Means the notes of William Means, which had been taken up from the Metropolitan National Bank, February 15, 1888, amounting to \$125,911.74, and received, also, certain collaterals, which had been taken by John Means for his father at the time when he paid William Means' obligations.

There is evidence tending to show that William Means, at the time when he signed the instrument of October 16th, was induced to do so by the expectation that he would in some way get the expected surplus of \$26,240.79, which was, at about the same time, receipted for by him to be paid to his brother and sisters, as above mentioned; but the evidence does not disclose very clearly in what way this was to be accomplished. The appellants introduced evidence, which, they claim, tends to show that, some time in February, 1890, William Means, having fallen into a pecuniary controversy with his wife and children (more particularly his wife), and being pressed for a settlement upon them, with the intention of satisfying such claims and reconciling their differences, entered into an agreement whereby he undertook to assign and transfer to them his expectancy in his father's estate. It appears, from the proof in the case, that a suit was commenced in the court of common pleas of Greene county, Ohio (where the wife and children then resided), by them, against William Means, for the purpose of compelling the specific performance of such an agreement as having been made in 1890. Process was served upon William Means, but he did not defend the suit. The case was heard upon the pleadings and proof introduced before the court, and thereupon a decree was rendered, finding the existence of the agreement above mentioned, and substantially decreeing a specific performance thereof, and directing the defendant, William Means, to execute a deed of trust, conveying his expectancy to the present complainants as trustees, "upon the trust that they take possession of all of said property, and convert it into money, and hold and invest the same upon security such as is required by a guardian under the laws of Ohio, being hereby vested with all the authority and powers necessary or appropriate for such purpose, and that they apply the net increase thereof, and so much of the principal as may be necessary, to the reasonable support of the family of William Means, including himself, the plaintiffs, and their said mother: provided that, upon agreement in writing of all the parties as to distribution of said trust funds, the trustees shall execute such agreement,"—with other incidental details and directions. And such a deed was executed by William Means, December 26, 1891.

The answer of the defendants sets up and claims that the sums advanced by Thomas W. Means to William Means, on and after February 15, 1888, were loans, and were not included in the scope of the will of Thomas W. Means, whereby advances of the kind therein described were to be forgiven; that, therefore, the administrators are entitled to set off the demand of the estate arising thereon against the legacy directed to be paid to William Means; and, further, that, if this were doubtful, the questions creating the controversy on this matter have been settled by and between the administrators and William Means, without notice of any assignment by him to the complainants, and that, upon such settlement, they have given up to the said William Means certain valuable securities; and, incidentally, they claim that the alleged agreement for an assignment to the wife and children, which formed the basis of the judicial proceeding in Greene county, did not, in fact, exist; and they also insist, on this appeal, that the suit is defective for want of proper parties defendant, it being urged that the other legatees under the will of Thomas W. Means should have been made parties to the suit.

Upon hearing the case on the pleadings and a voluminous body of proof, the presiding judge in the court below rendered an opinion, in which he suggested a difficulty in dealing with the case for the purpose of distribution, arising from the want of necessary parties to the suit; but, nevertheless, the court proceeded to discuss and decide the merits of the case, reaching the conclusion that the sums paid for the benefit of William Means were loans, not intended to be covered by the bequest in the will, and holding, further, that the question of the validity of the settlement by William Means with the administrators ought not to be decided in the present suit, but be postponed until the general settlement of the estate should be had, with all the necessary parties before the court. Thereupon, the following order was entered: "This cause came on to be heard at this term, and

was argued by counsel, and thereupon, on consideration thereof, the court finds the issue joined against the plaintiffs, and in favor of the defendants, and the bill is dismissed as against the defendant John Means at the cost of the plaintiffs. The plaintiffs are given leave, within thirty days, to amend their bill, so as to make it a bill for the general settlement of the estate of Thomas W. Means; but such amendment must be upon the basis of the conclusions of the court upon the issues already joined, as stated in the opinion herewith filed, and, in default of such amendment, the bill shall stand dismissed, as against all the defendants, at plaintiffs' costs."

The complainants having declined to amend their bill by bringing in other parties, a decree absolute was entered on the 31st of July, 1895, dismissing the bill, with costs, but without prejudice to the right of the complainants to recover in another suit the amount of said William Means' legacy, over and beyond the amount of the receipt of said William Means, for \$136,035.75, and without prejudice to any issues not joined and found against them in this suit. It should further be stated that the court below held that John Means acted as the agent of his father in the transactions involved in the controversy, and was, therefore, not liable to account to the complainants. Accordingly, the bill was dismissed, as against him, unconditionally. The complainants appealed against both parts of the decree,—that in favor of John Means, as well as that in favor of the administrators; but they have since dismissed their appeal as against John Means, thus leaving only the question of the correctness of the decree of the court below in respect to the principal questions in the case touching the transactions in the furnishing of money by Thomas W. Means to William Means, and the settlement and receipt between the latter and the administrators.

John J. Glidden, John Little, H. P. Whittaker, and Little & Spencer, for appellants.

Lawrence Maxwell, Jr., Julius L. Anderson, and John F. Hager, for appellees.

Before LURTON, Circuit Judge, HAMMOND, J., and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of facts in the case, delivered the opinion of the court.

The first question, in due order, which we are required to decide, is whether the suit is defective for the want of parties in respect to the object sought to be attained. The suggestion of the defendants is that the other legatees than William Means should have been made defendants. The object of the bill is to obtain a decree setting aside a receipt given to the administrators by William Means for the legacy given him by his father's will, and establishing the right of the complainants to recover the amount of such legacy. It cannot be doubted that the subject-matter of the suit is one of equitable cognizance, and that the bill was filed in the proper court. *Payne v. Hook*, 7 Wall. 425; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. The transactions in which the receipt was obtained were conducted in behalf of the estate by the administrators, and by them only. They alone represented the estate, and they are its sufficient representatives in a suit to set it aside.

In respect to the other branch of the relief sought, attention must be given to the essential nature of the controversy. It related substantially to the question whether certain funds which had been supplied by Thomas W. Means to William Means were in the nature of a debt to the estate, and so competent to be set off against his legacy. This is the theory of the counsel who represent the administrators, and we think it is entirely correct. Ad-

ministrators and executors are possessed of the legal title to the personal property of the estate. If there is a debt, they have a right to it in their representative capacity. In any controversy as to whether it is a debt or not, they are the proper litigants, and the only proper ones on that side of the controversy. They are trustees of the estate, and whether a certain claim is or is not parcel thereof is to be determined in a suit in which they stand for the estate. That there are legatees who are consequentially interested in the result does not make it necessary that they should be present in the suit, unless in a case where the trustees behave fraudulently towards them. The beneficiaries may sometimes be proper parties, but ordinarily, at least, they are not necessary parties. The controversy, as above stated, is the only one which exists, except that which relates to the receipt. No one questions the existence of the will, or the right of William Means to the legacy, and the only question is, as before stated, whether he owes a debt to the estate which must be set off against it. The question in this case is one relating to personal property only. The administrators have not the title to real estate. That passed directly to the devisees. The personal property they take from the hand of the administrators. We think that the administrators were the competent representatives of the estate, and the only necessary ones as the controversy now stands. It may be that the court cannot go so far as to order distribution, but it may go so far as to determine the right of complainants, and set aside the receipt, if that should be held proper. This would be no new thing. There are several cases in the supreme court and circuit court reports, where that has been the limit of the action of the court. *Payne v. Hook*, *supra*, is one of them, and is familiar. Nor is the bill premature for such purposes.

In the court below no question was raised as to the necessity of other parties until the hearing, when it seems to have occurred to the court that the suit might, on bringing in the other legatees, be treated as one for the settlement of the estate and proceed as such. In his opinion the learned judge held against the complainants on the principal question, "that the balance due by William Means to the estate of his father at his death was properly a debt, and not a gift." The court thereupon caused to be entered an order giving leave to the complainants to amend their bill, so as to make it a bill for the general settlement of the estate of Thomas W. Means, but that such amendment must be upon the basis of the conclusions of the court upon the issues already joined, as stated in the opinion of the court, and that, in default of such amendment, the bill be dismissed. The complainants having declined to amend, the court directed the following decree, which was entered:

"The complainants having failed and declined to amend their bill herein, as permitted by the order entered May 25, 1895, or within the extended time allowed by subsequent orders of this court, it is now adjudged and decreed that their said bill be, and the same is hereby, dismissed, and the defendants shall recover their costs herein expended. But this dismissal is without prejudice to the right of complainants to recover in another suit the amount of one-fifth interest in the estate of Thomas W. Means, deceased, over and beyond the amount of the receipt

of William Means for \$136,035.75, mentioned in said bill, and without prejudice to any issues not joined and found against them in this suit."

For the reasons already stated, we think there was no defect of parties for the principal objects of the bill. And, clearly, at that late stage of the case, no objection of the kind having been previously taken, the defendants were not entitled to have the complainants turned out, if they were entitled to some part of the relief sought, even if the suit were so constituted that all the purposes of a bill of wider scope could not be accomplished. *McGahan v. Bank*, 156 U. S. 218, 15 Sup. Ct. 347; *Society of Shakers v. Watson*, 15 C. C. A. 632, 68 Fed. 730.

The court below must have thought that the bill was sufficient for the purposes of deciding that the advances made to William Means constituted a debt to the estate, for it entered a decree which was expressly made final on that subject. The court declined to decide whether the receipt in question was valid or not, leaving that as one which might be tested on the final settlement. But the bill alleges the title of William Means to the legacy, and, in effect, the fraudulent procurement of the receipt from him without payment, and with knowledge of the complainants' rights under their assignment from the legatee. The pleadings were understood to involve the validity of the receipt while the parties were taking the testimony. We cannot doubt that this question was fairly open for decision, and we conclude that the proper parties were before the court for deciding as well the question of the existence of the claim as a debt as also the question whether the receipt was a valid recognition of it, and a release thereof.

Counsel for the administrators claim that, if William Means owed this debt, as one which survived the testator's death, it was and is proper matter of set-off against his legacy, and we think this claim well founded; and the proposition has, in this case, the support of an additional equity arising from the insolvency of the legatee. 2 *Woerner, Adm'n*, § 564; *Wat. Set-Off*, §§ 189, 190; *Courtenay v. Williams*, 3 *Hare*, 539; *Hodgson v. Fox*, 9 *Ch. Div.* 673; *Blackler v. Boott*, 114 *Mass.* 24; *Brown's Adm'r v. Mattingly*, 91 *Ky.* 275, 15 *S. W.* 353.

Upon the merits, the fundamental question is that which relates to the construction of the will of Thomas W. Means, the fourth and fifth paragraphs of which are set out in the preceding statements of facts. Much acute analysis and criticism has been bestowed by counsel on both sides upon its interpretation, and various canons of construction invoked. But we think the intention of the testator is so clearly indicated as scarcely to require the aid of more than the primary rule that, when the dominating purpose is clearly seen, the language of the will is to be construed, if possible, in such a way as to give it effect. This is called the "pole star" in discovering the intention. By the fourth paragraph, the testator devises and bequeaths all his personal property to his four living children, and the son of his deceased daughter, share and share alike. Then, by the fifth, after reciting that he had already made advances to the legatees, which had been charged

upon his books, he goes on to say that he desires the equal division he made in the fourth paragraph "to be a provision for them, respectively, in addition to the advances" already made or which might thereafter be made, and that, in the division and distribution of his estate, the advances which he had made, whether before or after the making of his will, to any of his children, should "be treated, not as advancements, but as gifts, not in any manner to be accounted for by my said children or grandson, or any of them." The language could hardly have been made plainer to indicate that the leading purpose of the testator was that the property which he should leave at his death, irrespective of what he might have advanced to them during his life, should be divided among the five persons named. What they should have received from him, by way of loan, no longer was to be treated as such, but was to be forgiven. He uses the word "advances" in the sense of "furnishing," "supplying," in advance of the final distribution of his will. It is absurd to suppose that he used the word as equivalent to the technical word "advancements," for, in the face of the disposition to be made of his property at his death, he must have known that if, in the meantime, he should bestow property upon them, whether by way of gift or loan, it would not be an "advancement," as that word is used in legal phraseology. In the nature of things, it was not possible for him to have intended by "advances" the same thing as "advancements," for that involves an intention, at the time of supplying the money, that it shall be such. Besides, he uses that term indiscriminately to apply to what he had given and charged to his children before the making of the will, as to what he might thereafter charge them. The legacies of the equal provision were to be "in addition" to such advances, and how could the testator be supposed to have used the word "advances" in its technical sense, which involves a satisfaction or diminution of the legacy pro tanto, when he expressly declared that the legacies should be in addition to them? The testator intended that they should not be eaten away by what he should be moved to do for his children during his life. The will becomes operative upon the death of the testator. What this will then meant was this: Whatever the testator has helped his legatees to before this time, when distribution has finally come, though then a debt, is now forgiven. It "is not in any manner to be accounted for." The equal distribution now to be made of what remains is "in addition to said advances." For the lack of a more suitable word, we have frequently used this word in this opinion to express a similar meaning to that for which the testator employed it.

We are not prepared to say that under no circumstances could a debt from a legatee to the testator be created as an obligation independent of the absolution accorded by the will. Indeed, we think otherwise. But we think, also, that, having regard to the manifest purpose of the testator, when this will was made, to hold a free hand to help his children during his life as their necessities might require, and then at the end to divide what remained of his property equally among them, the court ought to require clear proof of some distinct purpose, on the part of the testator, during the

transactions when he furnished the helping means which is supposed to have created the debt, to put that debt outside of the pale of the forgiveness which he had written in his will. And it must have been his purpose, and not that of some other. Even an expectation on the part of the legatee that the moneys paid for his benefit would, in the end, come out of his share of the estate, would not change the situation, unless the testator himself had a corresponding intent. He was the master of his fortune, and if he did not lend his money with the intent that if not repaid in his lifetime it should be repaid to his executors, then it would fall under the provisions of this will. There is not to be found in this record any such clear proof of the purpose of the testator to establish by the furnishing of the financial help, which he did, to his son, an independent obligation on the son's part which, if not paid during his life, should not be condoned by the provision in his will. At the time when he sent John to Cincinnati to aid William in his distress, the substance of all he said, according to John's account, was to go and do for William what he thought best. John at that time held a power of attorney from his father, some time previously given, "to receive money, sign checks, notes, drafts, and bills of exchange; to indorse notes, checks, drafts, and bills of exchange payable to me or my order; to buy, sell, and transfer notes, bonds, stocks, bills of exchange, drafts, and checks,—hereby allowing, ratifying, and confirming whatever said John Means, attorney in fact, for me and in my name, may do by virtue of this authority." So far as appears, this, and the direction from his father to do what he thought best, was all the authority which John had when he went to Cincinnati and paid off William's liabilities to the bank, amounting to over \$125,000,—a sum almost as large as the amount covered by the receipt in question. It does, indeed, appear that, by the father's acquiescence, upon the suggestion of John, who had the handling of his father's books, the account of these transactions was entered in a distinct place in these books, and they were kept separate from the former accounts with William. But there is not much, if anything, in all this, or in anything else disclosed by the testimony, to prove that Thomas W. Means had a purpose to banish William Means from his favor, or isolate him from the benefits of the plan of distribution of his property after death which had become the settled purpose of his life. It was immaterial to that purpose in what book or how the account was kept. Whenever and however kept, the charge would fall under the provision of exclusion by the will in the end, and the details of the bookkeeping he may well be deemed to have left to John, who had all such matters in charge. He had himself become blind, and incapable of supervising his books in person, and, as he confided in John, there was no reason for his going over them with the help of others, even if we assume that there was something on their face which disclosed this extraordinary purpose, which, indeed, we think is contrary to the fact. John's attention, when he testified in the case, was repeatedly drawn to his interview with his father about helping William, and the mode of keeping the books, but he continued to say that substantially all

his father said was to do as he (John) thought best in respect to both those matters. In reply to this question of his counsel, "State what, if anything, you said to your father with reference to taking a note from William Means for the amounts that he obtained after the failure of the bank in preference to a receipt," he said, "I gave as a reason to him that a receipt or charge on his books, simply, would not have the same effect, in law, that a note showing indebtedness to him would; that my understanding of his will, as he had made it, as he understood it, that it was better to take note than have an account or receipt,—to take a note showing evidence of indebtedness, and the collaterals received or redeemed from the bank on sale to be applied as credit on the note, keeping it as an indebtedness, in the shape to indicate and show an indebtedness." To the further question, "State what answer, if any, he made," he replied, "He told me to do as I thought was the best way to do,—to do as I thought best." As the father undoubtedly intended to keep it as an indebtedness, John's statement to him imported nothing more than the mere question as to the best mode of doing the business "in the shape to indicate and show an indebtedness," and there is nothing in the very full detail of testimony given by John to show that on any occasion the idea of establishing an indebtedness beyond the scope of the will was ever broached to his father, or that anything ever fell from him to show that such an idea had occurred to him. There was no suggestion by John to William, at the time when he came to his relief, that anybody expected that the money which was being supplied to him by his father was to be put beyond the operation of the will, or would stand on any special footing in that regard. On the other hand, we think the moral probabilities are all against the appellees' contention. Thomas W. Means was a man of strong character and fixed adherence to his plans in life. He was also a man of strong paternal affections, and had been accustomed to extend his assistance and support to all his children by employing his large means on every occasion of their need. It is incredible that he should have changed his attitude when William's calamities came upon him. The latter had gained considerable distinction in life, and no doubt he felt sensible of the credit to the family which his son's attainments reflected. He was the character of man who would be likely to have taken pride in them. He did not then know what, if any, moral delinquency there was in William's transactions. He knew that his son was in financial distress, and he came forward as was his wont, to help him out and re-establish him on solid ground. We are fully persuaded that we do him exact justice in refusing to believe that he then had a thought of inaugurating a new plan of dealing with William's expectancy. And if he did not then have such purpose, there is nothing in the evidence which would justify the belief that he at any time afterwards formed one.

There is much testimony going to prove the vigorous and persistent efforts of others interested in the estate to impress upon those transactions the character which their interests inclined them to think would be just. We greatly doubt whether John

Means had at any time any desire or intention to treat the advances made for William as excluding him from his share in his father's estate. It appears, and much stress is laid upon this by the appellees, that William gave his notes for the sum paid out for him, and towards the last appended to them a sort of pledge of or charge upon his expectancy. The giving of the notes would not, of itself, alter the character of the advances. There is no doubt that Thomas W. Means was accustomed to enter his charges in his books as denoting an indebtedness from his children to himself, or that he intended to continue that practice, and to hold them as debtors. The will signifies as much, when read in connection with his books, to which it refers; and, if his advances had meant gifts, the provision about them would have been superfluous, for a gift is neither an advancement nor a loan. If they were intended as loans for the time being, as no doubt they were, there was nothing out of the way in taking notes for them. But in the original and main transaction even this was not done. The subsequently taking a note was evidently an afterthought, and we think the probabilities are very strong that the taking of the note was not with any view to confirm, as against William, the idea that he was creating a debt to his father of any extraordinary character. There are many letters in evidence which passed between John and William during the time that these transactions were going forward. They are too many to transcribe here. We shall state the substance of them. On John's part they are full of manly tenderness and sympathy. He speaks in them of taking notes, but there is no intimation that they were to be taken for the purpose for which they are now sought to be used, and so of the pledges attached to some of the later notes. They signify, on the contrary, that the object was to put up a bulwark against the attacks of creditors, and to shield the collaterals which John had taken from William's creditors on paying them his debts, and probably, also, the legacy of William, for the father was old, and, as John's letters show, was not expected to survive for more than a short time. After John had returned home from Cincinnati on the occasion when he paid out \$125,911.74, he wrote William, stating the sum he had paid, and said, "I think you had better send me a note at one day in father's favor for the amount," and that he had had a talk with a lawyer on his way up, who agreed with him that that was best, to close the matter up at present. This was the 16th of February. On the 20th of February, he wrote William again, saying:

"Herewith find forms which explain themselves. Please copy, sign, and return to me at your earliest convenience. * * * I also think it best for you to have as herewith indicated, fearing suits will be brought against you and other directors which may give you trouble as it now stands."

One of these forms was that of the note for \$125,911.74. To this William, on the 21st, replied:

"Yours of the 20th received, and I send you by this mail my note to Thomas W. Means, or order, for \$125,911.74; receipts for \$700, \$1,200, and \$1,000, February 10th, 11th, and 18th, respectively; and authority to dispose of secu-

rities,—all as requested by you. I fully agree with your action in the premises as the best preparation for the civil suits which are likely to follow.”

On the 23d John again wrote to William, saying:

“My Dear Will: Yours of the 21st inst., note and authority to sell securities, came to hand last evening. Am sorry that my reference to father's sight caused you trouble. He keeps cheerful and contented, walks out every day if good weather, some one taking his hand as he walks. Have explained to him my action in your affairs, amounts paid, how obtained, the advantage of saving securities pledged from being sacrificed, etc. He understands all, but soon forgets details, so that have to explain again when next I see him, and always ends by telling me to do as I think best for you.”

In this correspondence, John's purpose in taking the note and authority to dispose of the collaterals is somewhat (though not very) obscurely stated, but it is not difficult to understand what he meant, or how William understood it. It is contended that this was a dishonest and illegal purpose, and that William should be precluded from setting up the invalidity of the notes. But the suggestion of taking them came from John. The correspondence between him and William, above referred to, shows that William was in great trouble and distress. He was agitated by the sense of his financial disaster, his becoming discredited as a man, and the fear of impending criminal prosecution. He confessed to John his unfitness for doing business, and he therefore turned over to him the charge and management of affairs. This correspondence, as well as the other evidence, all concur in showing that William yielded to John's suggestions, and followed them without question. John stood in the relation of a fiduciary toward his brother. In such circumstances it would be a strange perversion of the doctrine of estoppel to hold that William should be the party who is estopped. Such facts would indicate the propriety of holding the administrators to be estopped from setting up the products of John's unlawful proceedings, assuming they are such, as a bar to William's claim. The administrators do not represent any person who could have been defrauded, and it does not appear how these administrators of Thomas W. Means can assert any rights which belong to creditors, unless they are themselves such. We are convinced that the notes and instruments charging the legacy were intended to be operative only in case the creditors should proceed against the collaterals or for the purpose of subjecting William's legacy to the payment of their debts.

It is contended, on the part of the administrators, that it is not competent to controvert, by parol testimony, the plain terms of a written instrument, and this is undoubtedly a well-settled rule; but it does not apply to an instrument which has been given with the intention of both the parties thereto that it should become operative only upon some condition. 2 Whart. Ev. § 927; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816. In the case cited, the rule was stated and applied in an opinion delivered by Mr. Justice Harlan, in which he cited and discussed a large number of authorities illustrating the subject. *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174; *Pym v. Campbell*, 6 El. & Bl. 370, 373; *Davis v. Jones*,

17 C. B. 625; Wallis v. Littell, 11 C. B. (N. S.) 369; Wilson v. Powers, 131 Mass. 539; Pawling v. U. S., 4 Cranch, 219. Besides this, when we consider the relations of the parties, it could not be permitted that the administrators should avail themselves of instruments, procured by John Means for the professed purpose of benefiting William, as a means, by converting it to another purpose, of cutting him off from his legacy. We cannot, therefore, hesitate in reaching the conclusion that there was no intention on the part of the testator, in making the advances to William on February 15, 1888, and subsequently, to create an obligation on William's part which would not be forgiven by his will. Whether John Means conceived such an idea, at a late stage in the transaction, we are not sure, and it is not necessary to decide. It is probable that William anticipated that some such fate might befall him. After his downfall, he seems to have been unsteady in his course, sometimes inclining strongly to his father's family, and seeming to be anxious to secure their affection and favor, and willing to do as they wished to that end. At other times he turned to consider the welfare of his own family, and his own obligations towards its members.

Having reached the conclusion that the debts incurred by William Means to his father were extinguished by the will, and that the administrators had no just foundation for claiming William's debts as a set-off against his legacy, it remains for us to consider whether what has been done between the administrators and William should be treated as a satisfaction of it. The defendants have exhibited extraordinary diligence in obtaining from William repeated renunciation of his claims. Some days before the testator's death, they obtained one such, and then, upon the day of their appointment, they solemnly indorsed upon the instrument their acceptance of the same as administrators, notwithstanding he had in the meantime revoked it; and on later occasions they obtained like concessions, culminating in the receipt and order of October 16, 1890, now in controversy. Such activity on the part of an administrator executing a will, in procuring the surrender of one who, by its terms, is a legatee, excites suspicion that they were conscious of standing on dubious ground, and ill comports with the duties of one standing in the place of a trustee for all the parties in interest. It is a violation of his duty when an executor becomes a partisan for one legatee and sacrifices the other. The law will not permit any unfairness on his part, or sanction a proceeding whereby the legatee is induced by his trustee to give up valuable rights without any, or a wholly inadequate, consideration. Here there was no consideration for the abandonment of his legacy by William Means to the administrators. It is contended by the appellees that the collaterals given up were valuable, and that William could not retain them and repudiate his receipt. Nearly all of them had been realized upon during the father's life, and the proceeds credited to William. A small part of them only were left. The collaterals which they surrendered to him had become his own property, when the debts which they secured had

been extinguished by the will. While the father was alive, he was a creditor of William in respect of the moneys loaned to him, and undoubtedly he had the right to enforce the collaterals, and thereby satisfy or reduce William's debt; but the situation was changed at his death. Then the will came into effect, and, the debt itself being discharged thereby, the purposes of the security ended by inevitable consequence. These collaterals had all the while remained in John's hands, and were obtained from him by one of the administrators, to turn over to William, whose receipt states that they were "received of E. C. Means (from John Means)." These collaterals the administrators claimed as property which they held in pledge for the debt which they asserted in favor of the estate against William. William had lost all his property, and was in very straitened circumstances. Since his downfall, he has been broken in spirit and wavering in his purposes. He seems at times to have been impressed that the administrators had a moral, if not a legal, claim upon him that he should yield up his legacy to the estate, and this claim was pressed and insisted upon by the administrators. That they had no such legal claim upon him we have already determined. His brother and sisters all being in affluent circumstances, and his own family in needy circumstances, that he should have voluntarily given up the whole of this large sum, with no mistake in regard to what his legal rights were, it is difficult to believe. It amounted simply to a gift to the administrators for the benefit of the other legatees, whose only claim rested on the bounty of the testator. Courts of equity view such transactions with distrust, and, if the circumstances indicate that the trustee has dealt with the beneficiary unjustly, will not hesitate to set them aside. The absence of any adequate consideration in itself raises a presumption of unfairness, which the trustee is bound to repel. Equity will relieve the legatee in such transactions, where he has, under a misapprehension of his legal rights, surrendered to the trustee valuable interests without any adequate consideration, especially where the situation is such that no harm will come to the interests of others. Such would be the case where the claim relates to a fund which has not yet passed beyond control. These propositions are amply sustained by authority. 1 Story, Eq. Jur. §§ 307, 308; 2 Pom. Eq. Jur. §§ 948, 951, 955, 956, 958, 1088; Taylor v. Taylor, 8 How. 183; Comstock v. Herron, 6 U. S. App. 629, 5 C. C. A. 266, and 55 Fed. 803, and the cases there cited; Mills v. Drewitt, 20 Beav. 632; In re Ashwell's Will, Johns. Eng. Ch. 122; Snow v. Booth, 2 Kay & J. 132; Oil Co. v. Hawkins, 20 C. C. A. 468, 74 Fed. 395. "It is not," says Mr. Justice Story, *ubi supra*, "upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to permit a voluntary gift or other act of a man, whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort." They "will not, therefore, arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relations between the parties which compel the one to

make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence." It makes no difference that the other legatees would ultimately obtain the benefit of the wrong. However innocent of it they may be, it would come tainted to their hands. Even gifts between persons who stand in no confidential relation to each other are watched with jealousy. 2 White & T. Lead. Cas. Eq. 582; Cooke v. Lamotte, 15 Beav. 234. Where the transfer is of a large sum, and constitutes the whole of the property of the party making it, himself having obligations to those in need, to one standing in no need, it raises an almost insurmountable presumption that there has either been some untoward influence or gross misconception on the part of the party making it of his rights and obligations. It is possible that the administrators were actuated by a purpose to get William's share out of the way of creditors, thinking the other legatees were more justly entitled to it; but they do not charge themselves with any such purpose, and we shall not impute it to them. We are, therefore, of the opinion that the transactions which took place between the administrators and William Means, among them that of taking the receipt of October 16, 1890, ought not to be allowed to bar the enforcement of the payment of the legacy.

In view of the conclusions which we have reached in respect to the title of William Means to the legacy in question, it is not necessary for us to decide whether, as against the administrators, there is any sufficient proof of the existence of the agreement between William Means and the members of his family which is said to have been made in February, 1890. The trust deed executed by him on December 26, 1891, conveyed his interest to the present complainants as trustees. As between William Means and the complainants in the Greene county court of common pleas, there having been due service of the process upon him, the decree therein rendered, and the trust deed, were effective in transferring the title, and estop him from denying that it was in fact transferred. It is no concern of the administrators whether they are required to pay the legacy to the legatee, or to his assignee; nor can they require that the rights of William Means' creditors should be litigated in this suit. They are not parties, and that subject could only be considered in independent litigation. Akin to that matter is the question presented in regard to the complainants' trust being in part for the benefit of the grantor in the deed. Whether, as to creditors, that part of the trust would be obnoxious to their attack, we do not, for the reasons above stated, think it is necessary or proper to decide.

The result is that the decree of the court below must be reversed, and the cause remanded, with directions to enter a decree for the complainants setting aside the receipt of October 16, 1890, and directing an account to be taken for the purpose of ascertain-

ing the amount due in respect of the legacy of William Means, and that thereupon the complainants are entitled to recover the same. The complainants will recover costs in this court and in the court below, to be paid by the administrators from the funds of the estate.

HAZZARD v. FITZHUGH et al.¹

(Circuit Court of Appeals, Fifth Circuit. December 8, 1896.)

No. 490.

MORTGAGE OF HOMESTEAD—COLORABLE CONVEYANCE—FORECLOSURE—ACTION FOR POSSESSION—BILL TO ENJOIN—INNOCENT PURCHASER.

A husband and wife, colorably and for the purpose of borrowing money thereon, conveyed, by deed absolute, their homestead to a third person, for a recited consideration, part in cash and part in a purchase-money note; at the same time making affidavit that the sale was bona fide. No cash passed; but the note, by previous arrangement, was taken by a mortgage company, which paid the amount to be loaned directly to the husband, the grantee of the land giving it a deed of trust to secure the same. The note, guarantied by the mortgage company, was sold by it to defendant, an innocent purchaser for value, without notice, who, after maturity of the note, caused the property to be sold under the trust deed, and bought it in for less than the sum due. Defendant then brought an action at law to recover possession of the land from the husband and wife, who had remained in possession, whereupon they filed this bill in equity to enjoin the prosecution of such action. *Held*, that the injunction must be denied, the case being ruled by the equitable principles that between equal equities the law will prevail, and that the equity of a person misled is superior to that of the person misleading.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a suit in equity by Mrs. A. E. Fitzhugh and her husband, L. H. Fitzhugh, against Mrs. Fisher Hazzard, to enjoin the latter from prosecuting an action of ejectment; complainants claiming to be the equitable owners of the land in controversy, as their homestead. The title sued upon in the ejectment suit by the defendant herein was a title acquired by purchase upon the foreclosure of the trust deed mentioned in the opinion of the circuit court, which is set out below. The defendant filed an answer under oath, and also a cross bill, praying affirmative relief. The circuit court entered a decree dismissing the cross bill, canceling the alleged lien of the defendant and all her muniments of title, and perpetually enjoining her from setting up any claim to the premises, or further prosecuting her action of ejectment.

The circuit court (McCormick, Circuit Judge) delivered an opinion, which is here set out in full:

All of the chief actors in the transaction out of which this suit grew are persons of high respectability and superior intelligence. They have all testified by deposition in this case, and I find no substantial conflict in their testimony. I have examined fully and carefully all of the evidence, and find that the complainants, L. H. Fitzhugh and A. E. Fitzhugh, were married in December, 1851, and from that time have lived together as husband and wife. In 1886 they acquired the land in controversy, and from that year have continued to occupy and

¹ Rehearing denied January 26, 1897.

use it as their residence homestead, having and claiming no other homestead. In the latter part of November, 1888, L. H. Fitzhugh applied to Bryan T. Barry, then the manager of the Security Mortgage & Trust Company, for a loan of money to be secured on the land in controversy. The form of security offered was a deed by the complainants to S. H. Milliken and a note by Milliken, purporting to be for the unpaid purchase money in the sum of six thousand five hundred dollars, with the vendors' lien on the land. Barry knew that the premises were Fitzhugh's homestead; that Milliken was their son-in-law; and when, after some conference and inquiry, he had satisfied himself that the dealings with Milliken were simulated, he declined to take the note. A few days after this, negotiation began with H. M. Taylor, and he and L. H. Fitzhugh saw Barry in reference to getting from the company about \$4,500, which Fitzhugh desired to raise on the land, the security to take the customary shape of a deed from the husband and wife to H. M. Taylor, reciting a cash consideration in part and a purchase-money note for the balance, to become due in five years. The abstract of title was submitted to Judge T. S. Miller, the company's legal adviser, but no intimation was given him touching the recent offer and rejection of the Milliken deed and note on the same property. The attorney's report on the title being satisfactory, Barry agreed to give \$4,500 for the note. The deed from L. H. Fitzhugh and his wife, A. E. Fitzhugh, to H. M. Taylor, the joint affidavit of all three, the purchase-money note, and the deed of trust executed by H. M. Taylor, were all prepared in the office of the company, under Barry's dictation, on printed forms kept in stock in readiness, and furnished by the company for such transactions. The deed recited a cash consideration in the sum of \$9,000 in hand paid to the grantors by the maker of the note, and the further consideration of \$5,200, for which latter sum the lithographed note with coupons was given, payable to the order of the Security Mortgage & Trust Company; and the deed of trust was made to J. T. Dargan, trustee, and to his successors in this trust, to secure the payment of the principal note and interest coupons as each matured. These papers all bear date 10th December, 1888, and appear to have been executed and delivered on that day. The joint affidavit of the three parties is as follows:

"The State of Texas, County of Dallas—ss.: We, L. H. Fitzhugh and wife and H. M. Taylor, do solemnly swear that on the 10 day of December, 1888, the said L. H. Fitzhugh and wife sold to said H. M. Taylor a certain parcel of land, to wit, $3\frac{1}{2}$ acres of the John Grigsby survey, in East Dallas, Dallas county, Texas, described in the deed thereto, and in part payment for which a balance of \$5,200 will be due on the 1st day of December, 1893, with interest at the rate of seven per cent. from December 10, 1888; that said balance is a subsisting vendor's lien against said land conveyed in said deed, recorded in Book —, page —, Records of Deeds of Dallas County, to which said deed and the record thereof reference is hereby made for a more complete description of said land; that the vendor's lien is specially retained in said deed to secure the payment of said balance; that all payments made on said balance have been credited; that there are no pending suits or unsatisfied judgments in the supreme court, or any circuit or district court of the United States, or in the supreme court, court of appeals, or any district, county, or justice of the peace's court of this state, or in any other court whatsoever, which in any manner affect the title to said land; that there are no executions against us in the hands of any United States marshal, or of any sheriff or constable, and that none of said officers have levied on, or advertised for sale, or made a deed to, said land, or any part thereof, since the said L. H. Fitzhugh and the said H. M. Taylor acquired title to it; that we are neither principal nor surety upon any bond which is or may become a lien upon said land; that there are no mechanics' liens, or liens for labor or materials, upon the buildings situated upon said land; that there are no unrecorded deeds, trust deeds, or mortgages to or upon said premises; that the said deed to said land was made in good faith, and not for the purpose of defeating or avoiding any homestead law of this state; that the title is perfect in the said H. M. Taylor, subject to said lien; that the said vendors were of legal age when said deed was executed; that there are no liens of any kind against said land prior to said vendor's lien; improved city property; that there is on said premises one house, of the value of \$4,500.00; 1 barn, of the value of \$500.00; other outhouses, of the value of \$200.00; and fencing, of the value of \$200.00; that the present value of the premises, without the perishable improvements, is \$9,000.00; that the present

value of the perishable improvements, including fencing, is \$5,200.00; that the total value of the above-described premises is \$14,200.00; that Taylor owns other real estate and property as follows, about \$1,500.00, clear of all lien; that my indebtedness is, besides said note, \$1,600.00; that the above representations are made for the purpose of effecting a sale of the vendor's lien as above described; and that they are true.

H. M. Taylor.

"L. H. Fitzhugh.

"A. E. Fitzhugh.

"Sworn to and subscribed before me, this 10 day of December, A. D. 1888, and I hereby certify that affiants were by me made acquainted with the contents of this instrument before swearing.

"[Seal.]

"Postoffice of Maker, Dallas, Tex.

M. L. Robertson,

Notary Public, Dallas Co."

Bearing the same date is a letter addressed to the Security Mortgage & Trust Company, in these words:

"Gentlemen: I was present and acted as attorney in making the sale of $3\frac{1}{2}$ acres to H. M. Taylor, from L. H. Fitzhugh and wife, A. E. Fitzhugh, and believe the same to be a bona fide transaction, and an absolute sale, without any condition of defeasance. Lafayette Fitzhugh, Attorney."

There is also another affidavit, as follows:

"The State of Texas, County of Dallas. Before me, the undersigned authority, on this day personally appeared L. H. Fitzhugh and A. E. Fitzhugh, husband and wife, who, after having been by me duly sworn on oath, says: That they in good faith have sold and conveyed a certain tract of land as follows: $3\frac{1}{2}$ acres adjoining the city of East Dallas, in Dallas county, out of the John Grigsby survey, beginning at a stake in the S. W. boundary of Gano avenue, 861 feet S., 45 deg. east, from the center of Ross avenue; thence N., 45 deg. W., 360 feet, along the line of Gano avenue to San Jacinto street; thence S., 45 deg. W., 408 feet, to the N. E. line of Fitzhugh avenue, on the E. boundary line of Duncan & Words addition; thence S., 45 deg. E., 360 feet, to a point on Fitzhugh avenue; thence N., 45 deg. E., 408 feet, to the place of beginning,—being $3\frac{1}{2}$ acres out of $4\frac{1}{2}$ -acre tract conveyed to L. H. Fitzhugh by Jno. T. Gano, 31st Aug., 1886, and recorded in Book 92, page 330, Records of Deeds, Dallas County. That the intention and purpose in making said conveyance was to make an absolute sale of said property. That at the time of the execution of said conveyance there was no expressed or tacit understanding between us and said Taylor that said conveyance was made for the purpose of evading the homestead law, and was not made for the purpose of procuring a loan on said property, nor with any condition of defeasance whatever. Witness our hands, this 10th day of December A. D. 1888.

L. H. Fitzhugh.

"A. E. Fitzhugh.

"Sworn to and subscribed before me, this 10th day of December, A. D. 1888.

"[Seal.]

M. L. Robertson,

"Notary Public, Dallas County, Texas."

The writer of the letter is the son of complainants. The transaction, as between the complainants and H. M. Taylor, was wholly colorable. The recitation of the cash consideration was purely fictitious. No money passed or was to pass in the transaction, except the \$4,500, which was passed the same day directly from Barry to L. H. Fitzhugh. The note and deed of trust were sold to Mrs. Hazzard for their full face value, without notice of the simulation; but, by subsequent dealings between her and the mortgage company, she now has no substantial interest in the controversy, and the Security Mortgage & Trust Company is now as much the real beneficial owner of the securities as if no transfer of them had been made.

I conclude that Barry had then present knowledge of facts sufficient to charge him and the company he represented with notice of the character of the transaction between Fitzhugh and Taylor; that the deed of trust was void, and the land is not bound. The respondent is entitled to have a judgment against L. H. Fitzhugh for the amount remaining unpaid on the note, assessing that amount without reference to the \$3,000 which appears indorsed as amount bid at the sale made by the substitute trustee, and all the costs in this suit; and the complain-

ants are entitled to a decree making void their deed to H. M. Taylor, his deed of trust to J. T. Dargan, and De Edward Greer's deed to Mrs. Fisher Hazzard, the respondent; removing the cloud cast by these conveyances on complainants' homestead, perpetually enjoining the respondent from asserting any right thereunder, and quieting the title and right of possession in the complainants to the land in controversy, and adjudging costs against the respondent in favor of the complainant A. E. Fitzhugh.

W. W. Leake and De Edward Greer, for appellant.

K. R. Craig, for appellees.

Before PARDEE, Circuit Judge, and SPEER and PARLANGE, District Judges.

SPEER, District Judge. There are two principles of equity which should control this case. They are: (1) Between equal equities the law will prevail. (2) The equity of the party who has been misled is superior to that of the party misleading.

Now, Mrs. Hazzard holds the legal title. She is a purchaser in good faith. The deed with the affidavits of the Fitzhughs disclose to her no purpose to defeat the homestead laws of Texas, but affirmatively show the contrary. She bought the security in good faith as an investment, and, conformably to its terms, she became the purchaser at the sale by the substituted trustee. She is then a bona fide purchaser, without notice of Mrs. Fitzhugh's alleged equity. Conceding the latter to exist, the equities are equal. The good faith of the purchase is expressly recognized in the opinion of the learned circuit court. It seems clear, then, that the legal title of Mrs. Hazzard should prevail.

It is not a sufficient reply to this to point out that the Security Mortgage & Trust Company, which may have known the transaction to be colorable, has guarantied the value of the security that Mrs. Hazzard bought. She has obtained, as the result of her investment, the legal title, by regular and lawful methods, and the equitable title of a bona fide purchaser. This title is good against everything except a superior equity which would overcome it, and her equity is at least equal to that upon which the complainant relies. A court of equity, therefore, may not enjoin her efforts to recover the land to which she is entitled. In addition to this, the Fitzhughs, including Mrs. Fitzhugh, placed on the market a security which upon its face was valuable and negotiable, and attractive to investors like Mrs. Hazzard. It was commended to her. Without suspecting the faith of husband, wife, and son, Mrs. Hazzard had no reason to doubt that the conveyance of title was valid and absolute. It is judicially ascertained that this was her conclusion. Her broker and her confidential adviser had formed the same opinion. If the conveyance failed to disclose a right in Mrs. Fitzhugh to avoid the sale, Mrs. Hazzard was misled, and misled by the complainants. Now, Mrs. Fitzhugh seeks a court of equity to cancel the purchase to make which she (all innocently, we may assume) misled Mrs. Hazzard. It follows that the equity of Mrs. Hazzard must prevail. Since it is not impossible to sell the homestead under the Texas law, it seems that Mrs. Hazzard has purchased the homestead of Mrs. Fitzhugh, and her title is good.

For these reasons, the decision of the circuit court should be reversed, and a decree to settle the controversy should be granted on the cross bill of the respondents. The decree of the circuit court is reversed, and the cause is remanded, with instructions to enter a decree on the original bill in favor of the defendant therein, Mrs. Fisher Hazzard, and dissolving the injunction, with costs, and to enter a decree in favor of the cross complainant, Mrs. Fisher Hazzard, on her cross bill, confirming and quieting her title to the premises in controversy, with such other relief as may be proper in equity.

BRADY v. EVANS et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 419.

BANKS AND BANKING—FALSE STATEMENTS—ACTION AGAINST DIRECTORS BY DEPOSITOR—PLEADING.

In an action of deceit against the directors of a bank for making false statements as to its condition, whereby the plaintiff was induced to leave in the bank a deposit, previously made, which was lost by the failure of the bank, it is not sufficient to allege that the plaintiff was induced to remain a depositor by the statements so made, but it must be directly averred that, but for such statements, he would have withdrawn his deposits before the failure of the bank.

In Error to the Circuit Court of the United States for the District of Kentucky.

Ed. C. O'Rear and T. J. Bigstaff, for plaintiff in error.

Wm. H. Holt, M. S. Tyler, Lewis Apperson, J. M. Benton, and Ed. W. Hines, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This is a writ of error to a judgment of the circuit court for the district of Kentucky. Brady, the plaintiff below and plaintiff in error, filed his petition against the defendants, alleging that they were directors of the New Farmers' Bank of Mt. Sterling, Ky., a banking corporation; and that on and after the 30th of June, 1893, and prior to the 27th of July, 1893, the defendants published in newspapers and otherwise a statement of the condition of the bank, which statement the plaintiff read; and, as he avers in his petition, it was relied on by him "in making the deposits hereinafter stated; the said published statements being published and circulated by the defendants, the said board of directors of the said bank, with the intention that the public receiving and reading them should rely upon them as being true." The statements are then set forth, showing a prosperous condition of the bank. The petition then proceeds:

"Plaintiff says that he was a depositor at said bank, and had his money there on deposit, and that, relying upon the said published statement, and upon the said statement of the said bank and its said directors as true, and believing that its assets numbered among its resources stated above were collectible and solvent,

as he was induced by said published statement to believe, and believing that the said bank had the capital stock and surplus and undivided profits as stated above, and as stated in said published statement, and believing that it had earned the sum stated hereinabove for the six months prior to said statement, and that of the said earnings it had been able to pay to its stockholders a semiannual dividend of three per cent., this plaintiff was induced to believe, and did believe, that said bank was solvent and good and safe, and thereby he was induced to permit, and did permit, three thousand one hundred and four dollars and twenty-four cents (\$3,104.24), previously deposited by him in the said bank, to remain therein on deposit, when, on July 27, 1893, without this plaintiff knowing that the aforesaid published statements were untrue, the said bank made a deed of assignment for the benefit of its creditors to one R. B. Young, and that said deed of assignment was placed to record, and the affairs of said bank are now being wound up under the said trust."

The petition then avers that on the 30th day of June, and every day thereafter, the bank was insolvent, and that the statements concerning its condition published by the defendants were false. The petition then proceeds:

"And plaintiff now avers that each and all of the aforesaid false statements were known by all of the defendants herein sued to be false when made, or, by the exercise of ordinary diligence upon their part, could have been ascertained by them to be false, before the making of the same, one of which facts is true, but which plaintiff does not know; and plaintiff did not know at the time of any of said published statements, or of his reliance thereon as aforesaid, that they, or any of them, or any part of either of them, were untrue. And plaintiff avers that by reason of said false statements, and of his said reliance thereon, this plaintiff has suffered damage, and is damaged in the sum of two thousand, eight hundred and ninety-three dollars and eighty-two cents (\$2,893.82), and that he sustained the said damage as of the 27th day of July, 1893."

To this the defendants filed a general demurrer. The demurrer was sustained on the ground that the averment in respect to the knowledge of the defendants of the falsity of the statements was not sufficient to entitle the plaintiff to hold them in an action of deceit. Thereupon the plaintiff filed an amendment to the petition, in which the averment of the defendants' knowledge was as follows:

"Each and all knew that the said published statements set out in the petition herein were all made by the said defendants and directors, and that they and each of them knew that the said published statements when made were not true to a material degree, and as stated in the petition; or that said published statements were made by each of the said defendants herein as of their own knowledge, they making said published statements as true, when, in point of fact, they did not know whether the said statements were true or false, and plaintiff says that one of said averments above as to defendant's knowledge and making of said statements sued on is true, but which one plaintiff does not know; and that the said statements were untrue at the time made, and the plaintiff did not know that said statements were untrue when made, and when he acted upon them; and that he believed they were true in so acting, as stated in the petition; and they were made by the defendants and each of them with the intent that the plaintiff should rely upon said statements as being true."

Upon demurrer to this amended petition the court again sustained the demurrer, whereupon the plaintiff moved for leave to file a second amended petition, in which the averment with respect to knowledge by the defendants of the statement was as follows:

"That the defendants knew them to be untrue when they were made; or that the defendants, not knowing whether they were true, made and published them as stated, in reckless disregard of the truth, and as of their own knowledge.

Plaintiff says that either the statement that defendants knew said statements were untrue when published, or the statement that they published them not knowing whether they were true or not, but published them as of their own knowledge, is true; but which of said alternative statements is true plaintiff does not know."

The defendants objected to the filing of this amended petition, which objection was sustained by the court, and the amended petition was thereupon dismissed, and judgment rendered for the defendants. The second amended petition, which was tendered and not allowed to be filed, was embodied in the bill of exceptions.

As the court treated the demurrer below, it raised a nice and much-mooted question in the law of deceit. That question is, how much actual knowledge the defendant in an action for deceit must be shown to have of the falsity of the statement which is the basis of the action before he may be held liable. We have had occasion to comment on the diversity of views upon this question in *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 19 C. C. A. 317, 73 Fed. 653, where we said:

"Whether actual bad faith must be shown in common-law actions for deceit to justify a recovery has been the subject of much controversy, and it has been finally settled in England by the decision of the house of lords in *Derry v. Peek*, L. R. 14 App. Cas. 337, that there can be no recovery in such an action whenever the defendant made the statement complained of in the honest belief of its truth, however unreasonable such belief. Such, too, would seem to be the holding of the supreme court of the United States in *Lord v. Goddard*, 13 How. 198 (see, also, *Biggs v. Barry*, Fed. Cas. No. 1,402), though, in view of some of its later cases, the question may still be an open one in the latter court. *Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219. There is much authority in this country supporting the view that an action for deceit may be maintained against one making an untrue statement, though in the honest belief of its truth, if there was no reasonable ground for such belief; or, to put it in another way, if he ought to have known the truth. *Cooley, Torts* (2d Ed.) 585."

We are relieved, however, from deciding the nice question suggested by a defect in the petition, which the learned judge of the circuit did not, in his view of the law, find it necessary to consider. The common-law action for deceit is an action in tort. There can be no recovery unless it can be shown that injury was done and loss occasioned by the false statement relied upon. In actions of this sort it was long ago laid down that fraud without damage or damage without fraud would not give rise to such an action. *Derry v. Peek*, L. R. 14 App. Cas. 337-343. It must, therefore, clearly appear upon the face of the petition that the false statement complained of actually caused loss to the plaintiff. In this case it appears that at the time the statement complained of was made the plaintiff was a depositor in defendants' bank, and the averment is that he was induced to remain a depositor by these statements. He does not aver that, but for these statements, he would have withdrawn his deposit before the failure of the bank. The date of the statements precludes the possibility that he was induced to make the deposits in the bank because the deposits were all made before the statement. The fact is, therefore, that he lost nothing by reason of the false statements, unless he would have done something but for the false statements; otherwise he was not induced to alter his position by the statements, and no loss

was occasioned to him thereby. It may be argued that the words he was "induced to remain" imply that otherwise he would not have remained a depositor. But we think that, as the action of deceit is founded on fraud, every element of the cause of action must affirmatively appear. While the common-law rule that the pleadings must be construed most strictly against the pleader has been abrogated under most code systems, it is not required, even under the code system, that every equivocal word or phrase shall be construed most strongly in favor of the pleader. On the contrary, the meaning of the pleader must be fairly ascertained, without regard to technical rules, from the whole instrument. *Robinson v. Greenville*, 42 Ohio St. 625; *Crooks v. Finney*, 39 Ohio St. 57. The words of the petition really charge no more than that the plaintiff, being a depositor in the defendants' bank, acquired confidence in its safety from the statements made; whereas, if he had known the truth, he would not have remained a depositor. It is not enough in deceit to show that, if the plaintiff had known the truth, he would have done otherwise than he did. It must appear that he did otherwise than he would have done if the false statement had not been made to him. We concur with counsel for the defendants in error in the view that:

"When one alleges that, relying upon a certain statement, he altered his condition, that is sufficient to show that the statement was the moving cause; but where the allegation is that, relying upon a certain statement, he failed to alter his condition, that is not sufficient to show that the statement was the cause of his failure to alter his condition, but he must go further, and allege that he would have altered his condition but for the statement. In the one case there is a presumption that there was some cause for the alteration of his condition, and it is sufficient to allege what that cause was. In the other case the failure to alter his condition does not require the assignment of any cause, the presumption being that he would continue in the position in which he had placed himself until something happened to induce him to change it; and therefore he must affirmatively allege that he would have changed his position but for the act of defendants of which he complains."

For this reason we think the action of the court below in sustaining the demurrer was correct. Judgment affirmed.

RICAUD v. TYSEN.

(Circuit Court, S. D. New York. January 22, 1897.)

1. RES JUDICATA—DIFFERENT CAUSES OF ACTION.

In an action by a receiver to recover an assessment on certain shares of a national bank, defendant pleaded a prior judgment dismissing a bill brought to charge her father's estate with the same assessment, to which suit she was also a party. *Held*, that the causes of action were different,—that in the earlier suit being the alleged ownership of the shares by the father at the date of the bank's failure, and that in the latter, the alleged ownership by the daughter of the same shares at the same date,—and that, therefore, the former suit operated as an estoppel only as to the matters actually litigated and determined.

2. SAME—EVIDENCE ALIUNDE.

Where the causes of action are different, and the decree in a former suit does not show on its face that the question involved in the present one was directly and necessarily determined, evidence aliunde, consistent with the record, may be received to show that it was actually determined.

This was an action at law by Addison G. Ricaud, receiver of the First National Bank of Wilmington, against Fannie D. Tysen, to recover an assessment made by the comptroller of the currency on certain shares of the bank's stock. The case was heard on plaintiff's demurrer to the answer, which set up a prior adjudication as an estoppel.

L. Karge, for plaintiff.

A. Prentice, for defendant.

SHIPMAN, Circuit Judge. The plaintiff, as receiver of the First National Bank of Wilmington, N. C., has brought an action at law in this court to recover the assessment made by the comptroller of the currency upon the stockholders of the said insolvent bank, and alleges in his complaint that the defendant, Fannie D. Tysen, was on November 21, 1891, the date when the bank failed, the owner of 214 shares of its stock. The plaintiff's predecessor as receiver had previously brought, and prosecuted to final decree, in the United States circuit court for the Eastern district of North Carolina, a bill in equity, the object of which was to charge the estate of James Dawson, the father of the present defendant, with the same assessment upon the same 214 shares, which the bill alleged belonged to the estate of James Dawson when the bank failed. In that suit the present defendant was made a party. The bill was dismissed. The defendant in this cause has pleaded in bar that the questions sought to be litigated in this action were determined in the North Carolina suit adversely to the receiver, and are res adjudicata. To this answer the plaintiff has demurred. It will be perceived that the causes of action in the two suits are not the same, the cause of action in the North Carolina suit being the alleged ownership by the estate of James Dawson of the stock at the date of the bank's failure, while the cause of action in this suit is the alleged ownership by Mrs. Tysen of the same stock at the same date. The effect of a judgment in a prior action upon a second action between the same parties upon a different claim or demand has been frequently considered of late by the supreme court. *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, Id. 423; *Russell v. Place*, Id. 606. In the *Cromwell Case* the court said:

"The judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The course to be pursued when the decree in the former suit does not show upon its face that the question in the second suit was directly and necessarily determined was considered in *Packet Co. v. Sickles*, 5 Wall. 580, in which case the court said:

"In cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may

be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involves its consideration and determination it will not be concluded."

The decree in the North Carolina case does not show that the court necessarily and directly found that, at the date of the failure of the bank, William Hildreth Field, either as executor of Mrs. M. S. Dawson, or as trustee of Mrs. Tysen, owned the stock. The opinions of Judge Seymour in the circuit court, and of Judge Simon-ton in the circuit court of appeals (*Ricaud v. Trust Co.*, 17 C. C. A. 170, 70 Fed. 424), are not necessarily parts of the record. They purport to be opinions, and not to be findings of fact. But extrinsic evidence may show that in fact the court necessarily found who was the owner at the date of the failure, and such evidence can be presented under the answer in this case. The answer avers "that each and all the matters set forth in the complaint herein were settled and determined by the said adjudication, and are, as between this plaintiff and this defendant, *res adjudicata*."

The demurrer to the part of the answer contained in paragraph 6, with regard to the pendency of another suit between the same parties in the superior court for New Hanover county, in the state of North Carolina, is sustained. The demurrer to the answer contained in paragraph 7, which relates to the matter pleaded as *res adjudicata*, is overruled, with liberty to the plaintiff to answer anew, and without costs.

RYAN v. STAPLES.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1897.)

No. 701.

1. VENDOR AND VENDEE—BONA FIDE PURCHASER.

One who buys property from an innocent bona fide purchaser is protected by the latter's good faith and innocence, though he may himself have notice of antecedent defects or equities that would have defeated his title if he had been the first purchaser.

2. EXECUTION SALE—ERRONEOUS JUDGMENT.

One not a party to the suit, who purchases at a sale under a judgment merely erroneous and not void, before a writ of error is allowed, acquires a valid title, which is not divested by a subsequent reversal.

3. REVIEW ON ERROR—TRIAL TO COURT.

Where the court below, trying a case without a jury, makes a mere general finding that one party is the owner of the premises and entitled to possession, the only questions open to review on error are rulings on the admission and rejection of evidence.

In Error to the Circuit Court of the United States for the District of Colorado.

Motion for a Rehearing.

For former report, see 76 Fed. 721.

C. S. Thomas, W. H. Bryant, and H. H. Lee, for plaintiff in error.
Hugh Butler, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. The motion for a rehearing in this case is based upon the erroneous supposition that this court overlooked the fact that the plaintiff in error was refused permission to prove that Spooner and Staples were not bona fide purchasers of the title to the property under the Schoolfield judgment, and that they in fact knew all the defects thereof, and were in their purchase and redemption under it mere agents for Edmund C. Bassick, a director and stockholder of the defendant in that judgment. One reason why this evidence was immaterial, in our opinion, is that after Spooner had purchased the property under the Schoolfield judgment for \$37,599.85, and before any writ of error to reverse that judgment had been sued out, while the judgment and the sale under it to Spooner stood unchallenged, George H. White, who was the owner of an inferior judgment against the same defendant, paid the sheriff \$39,532.05, and thereby redeemed the property from that sale. He then directed the sheriff to sell it again to satisfy his demand, and on May 13, 1886, he did so, and White purchased it for \$60,000, and received the sheriff's usual certificate of sale. By virtue of his redemption White was a bona fide purchaser of the prior lien of \$39,532.05 without notice of any defects in it. Through that purchase and his subsequent sale he acquired a valid lien upon the property for \$60,000, that would have matured into a perfect title at the end of the period of redemption, if no subsequent redemption from him had been made. His title would have been impregnable. The subsequent reversal of the Schoolfield judgment could not have affected it. *Ryan v. Staples*, 76 Fed. 721, 729, and cases cited. Staples subsequently redeemed from this sale to White, and again sold the property to satisfy his claim, and in this way the title finally matured in him. The good faith and innocence of White protected every redemptioner and purchaser under him, and the title is as good in their hands as it would have been in his, whatever their notice or knowledge of defects in the title anterior to his redemption may have been. One who buys property from an innocent bona fide purchaser is protected by the good faith and innocence of his grantor, although he may himself have notice of antecedent defects or equities that would have defeated his title if he had been the first purchaser. *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. 221, 225, 226; *Boynton v. Rees*, 8 Pick. 329; *Funkhouser v. Lay*, 78 Mo. 458, 465; *Wood v. Chapin*, 13 N. Y. 509.

But, aside from the foregoing consideration, no error was committed in rejecting the offer of proof made by the defendant, Ryan, for another reason. The offer was to prove "that Staples was not the real party in interest; * * * that he was not a bona fide purchaser for value of the property in controversy; that he had bought it with full knowledge of all the circumstances concerning the Schoolfield decree; that he had paid no money out of his own pocket, but it had been advanced to him by others; that he was not a purchaser at all of the property; * * * that he had never re-

deemed the property personally from any sale, * * * but that the whole matter was conducted by Edmund C. Bassick, who was a director and stockholder in the Bassick Mining Company." The sum and substance of this offer, in so far as the defendant sought to prove facts, as distinguished from conclusions of law, was that Staples had not furnished any money of his own to redeem the property from prior sales; that the money had been advanced to him by others; that the redemption had been made by others in his name; and that at the sale the title had been taken in his name merely as a trustee. For the reason stated in our former opinion, these facts, assuming them to be true, did not disqualify Staples from maintaining a suit in ejectment, nor impeach his title. The offer to show that Staples was not a bona fide purchaser was an offer to prove a conclusion of law, and, taken in connection with the other facts which the defendant offered to establish, it meant no more than this: that Staples was not a bona fide purchaser, because he had redeemed and bought the property with money furnished by another, and for another's benefit. But this was no impeachment of his good faith. The judgment in the Schoolfield suit was founded upon valid claims against the Bassick Mining Company. It was not obtained by fraud or collusion, and was not affected with any vice, save the single error committed by the court before whom that case was tried, in permitting one of the lienors to participate in the proceeds of the sale of certain mining claims to which his lien did not extend. That defect, as we have heretofore held, did not render the judgment void, but simply erroneous. The error in question could not affect any one who was a purchaser under the judgment, unless he was a party to the suit in which that error was committed. It is familiar law, as shown in our former opinion, that any person who was not a party to the Schoolfield suit could acquire a valid title at a judicial sale made under the judgment in that suit before a writ of error was sued out, which title would not be affected by a subsequent reversal of the judgment by an appellate tribunal, and such a sale was in fact made, as shown by our original statement. It was not claimed at the trial, nor was there any offer to show, that at the sale under the Schoolfield judgment the property in controversy was in fact bought by a person who was a party to the Schoolfield suit, nor that the money to make the purchase, or to redeem from that sale, or any subsequent sale, was advanced by any person who was a party to that suit. The defendant below did not offer to prove that the money to purchase the property at the sale under the Schoolfield judgment, or to redeem from that sale, was furnished by Edmund C. Bassick; and, even if it was advanced by him, we do not see that it would affect the plaintiff's title, as Bassick was not a party to the Schoolfield suit, but a stranger to the record. In view of these considerations, it is manifest, we think, that no error was committed in overruling the defendant's offer of proof.

The suggestion that this court should consider the assignment of error to the effect that the court below did not find for the plaintiff in error, upon the ground that he had been in adverse possession

of the property for the period required by the statute of limitations in the state of Colorado, is without merit. We cannot consider that assignment. This case was tried by the court below without a jury, and that court made no special findings of fact, but it made a general finding that the defendant in error was the owner of the premises and entitled to their possession. Upon such a record we cannot examine the evidence or the facts to see what judgment the court below should have rendered. The only questions open for our consideration are the rulings of the trial court upon the admission and exclusion of evidence. *Adkins v. Sloane*, 19 U. S. App. 573, 8 C. C. A. 656, and 60 Fed. 344; *Trust Co. v. Wood*, 19 U. S. App. 567, 8 C. C. A. 658, and 60 Fed. 346; *Hall v. Mercantile Co.*, 19 U. S. App. 644, 8 C. C. A. 661, and 60 Fed. 350; *Accident Ass'n v. Robinson*, 20 C. C. A. 262, 74 Fed. 10; *O'Hara v. Railroad Co.*, 22 C. C. A. 512, 76 Fed. 718. The petition for a rehearing is denied.

MAIER v. FIDELITY MUT. LIFE ASS'N.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 385.

LIFE INSURANCE—FALSE STATEMENTS IN APPLICATION—ANSWERS BY AGENT.

The F. Ins. Co. issued a policy on the life of M., which was recited on its face to be issued in consideration of the application, which was made a part of the policy, and a copy of which was thereto attached, and to be subject to the conditions thereon indorsed, one of which was that, if any statement in the application was false, the policy should be null and void. The application concluded with a provision that all statements contained in it, by whomsoever written, were warranted to be true, and that no verbal statement, to whomsoever made, should modify the contract. Upon the trial of an action on the policy, it appeared that M. made the application at the solicitation of an agent of the insurance company; that such agent had a short conversation with him when he was in a hurry, and, after answering a few questions, he told the agent to finish the application himself, and he would sign it and leave it for the agent to finish, which the agent did; that the answers to questions in the application as to M.'s health and his habits of drinking were totally at variance with the facts, which were such as, if known, to make the acceptance of M.'s application very unlikely. *Held*, that the insurance company was not estopped to deny the validity of the policy, and a verdict in its favor was properly directed by the court.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

James H. Pound, for plaintiff in error.

Alfred Lucking, for defendant in error.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

HARLAN, Circuit Justice. This is an action upon a policy of life insurance for \$10,000, issued September 30, 1892, by the Fidelity Mutual Life Association of Philadelphia, upon a written application to that association by the assured, Martin Maier, of Detroit, Mich. The beneficiary named was the wife of the assured, the present plaintiff in error.

In the answers to questions embodied in the application, which was made September 26, 1892, it was stated, among other things, that the assured was then in "good health," and "free from any and all diseases, sicknesses, ailments, or complaint, trivial or otherwise"; that he had "never had or been afflicted with any sickness, disease, ailment, injury, or complaint"; that the last physician he had consulted, or who prescribed for him, was Dr. Morse Stewart, of Detroit, two years previously, and that his ailment then was "toothache"; that he had not consulted, or been prescribed for by, any other physician or medical man during the previous 10 years; and that he did not use, and never used, spirits, wines, or malt liquors, and had always been temperate and sober.

The policy recites that it was issued in consideration of the application, "made part hereof, and a copy of which is hereto attached," and subject to all the requirements stated, "and the conditions hereon indorsed." One of the conditions indorsed on the back of the policy is that, "if any statement contained in the application on which this policy is issued be untrue in any respect, then this policy, except as herein provided, shall be ipso facto null and void."

The application thus concluded:

"I hereby agree and bind myself as follows: That the statements above made or contained, by whomsoever written, are material to the risk, and warranted to be true; that I have signed this application in my own handwriting; that * * * all provisions of law in conflict with or varying the terms of this agreement and policy applied for are hereby expressly waived, and the policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health; that no verbal statement, to whomsoever made, shall modify this contract, or in any manner affect the rights of the association, unless the same be reduced to writing, and be presented to and approved by the officers of the association at the home office, in Philadelphia, no agent or examiner having any power or authority to make or alter contracts, waive forfeitures, or grant credit; that * * * this application shall be the sole basis of the contract with the association, if a policy be issued hereon; and that, if any concealments or untrue statements or answers be made or contained herein, then the policy of insurance issued thereon and this contract shall be ipso facto null and void: provided, always, that, if the necessary payments be made to keep said policy in force, it shall be incontestable, except as herein set forth.

"Dated at Detroit this 26th day of September, 1892.

Martin Maier.

"In presence of D. A. Rothschild, Soliciting Agent."

Immediately below the attestation to the application the following direction was printed with a rubber stamp:

"Review the answers to questions given in this copy of your application, and, if any correction has been made, advise the president of the association."

The plea was the general issue, with notice, according to the Michigan practice, that the defendant would give in evidence, by way of defense, the above application of the assured, which, it was alleged, was duly signed by him and delivered to the defendant, and "on the faith of which, and in full reliance upon the statements thereon made, the said defendant did issue to the said Martin Maier the policy of insurance declared upon."

The notice further stated that the company would show on the

trial that the application and statements therein were false and fraudulent in many particulars; among others, in the following: That Maier was not at the time of his application in good health, and free from any and all sickness, ailments, or complaints, but was in bad health, and suffering from epilepsy, attacks of an epileptoid character, fits, convulsions, habitual constipation, alcoholism, softening of the brain, nervous prostration, neurasthenia and kindred troubles, and other diseases; that he had been afflicted with numerous sicknesses, diseases, ailments, and injuries, including those above specified, and with a number of injuries, among others, injuries received on or about January 19, 1887, August 2, 1889, and July 10, 1890, all of which were serious; that he had consulted and been prescribed for by numerous physicians during the period named in the application,—among others, by Dr. George Duffield, Dr. James Campbell, Dr. Wilcox, Dr. W. H. Poole, Dr. Yarnell, and by others unknown to defendant, all within said period; that the statement that he had consulted Dr. Morse Stewart, about two years prior to his application, for toothache only, was false and fraudulent, as he had consulted said Stewart, who prescribed for him, within two years of that date, for an attack of epilepsy, or an attack of an epileptoid character, and likewise had been treated for different serious troubles during the previous 10 years by that physician, who had attended and prescribed for him on various occasions during that period; that the statement made by said deceased in his application, that he did not then use, and never had used, spirits, wines, or malt liquors, and had always been temperate and sober, was false and fraudulent, in that he had used spirits, wines, and malt liquors, and each of them, and had not always been temperate and sober.

It appeared in evidence that Maier made the application for insurance at the suggestion of one Rothschild, who testified that he was at that time working for Mr. Montgomery, the Detroit agent of the defendant. But it does not appear that Montgomery had any knowledge of Rothschild's effort to secure an application from Maier. Rothschild testified:

"I met Mr. Maier in the street, and I asked him to give me his application. He was in a hurry, and we stepped in a clothing store on Michigan avenue, and he says, 'Hurry up. I haven't much time.' I asked him a few questions. He finally said, 'Well, you fill them up yourself.' I asked him about drinking, and he said, 'I am not drinking anything at present, you understand,' so I didn't put that in, and all the other questions accordingly. * * * He was in a hurry, only had two or three minutes to write it up, and he says, 'You finish it.' He says, 'I will sign my name now, and you finish it, and I will go away.' * * * Q. What, if anything, did you say to him about his having been afflicted with sickness or disease or ailments? A. He told me he had some toothache, and I put it down. Q. What, if anything, did you say to him as to who treated him for it? A. He said, 'Dr. Morse Stewart,' and I put that down. * * * Q. What, if anything, did you say to him about intoxicating liquors? A. I knew he did not drink any more at that time. Q. Did you, or did you not, say anything to him about it? A. Yes. Q. At that time? A. Well, no, I didn't, as he told me he didn't drink anything at the time when I took the insurance. Q. Did you say that Mr. Maier told you so at that time? A. I don't know as he did. I knew he didn't drink anything at that time. Q. Now, my question is, did he say anything on that subject at that time? A. No, he didn't say anything." On cross-examination he was asked if

he did not know that Maier had been to the Keeley Cure for drunkenness, and he answered: "No, sir, I didn't know; I heard he was there." Being asked whether he did not know that Maier had been convicted in the police court for drunkenness, he answered: "I don't know anything about it. I knew when he came out of the Keeley Cure." Again: "Q. And he did not use, and had never used, spirits, wines, and malt liquors, and had always been temperate and sober. Now, just what did he say to you about that? A. Only asked him whether he was drinking, and he says, 'No,' he didn't drink any more, and I cut that off. I knew he was not drinking, and I didn't think it was material to put in that."

The evidence of Rothschild, in connection with other proof in the cause, leaves no doubt that if the facts as to Maier's habits and condition had been fairly disclosed, in answer to the questions contained in the printed application, the company would have declined to issue the policy. Rothschild, therefore, according to the weight of the evidence, suppressed the material facts; and, by reason of such suppression, Maier obtained the policy, and the unfaithful solicitor realized his commissions.

Nor can it be doubted, under the evidence, that Maier himself knew that he was not a proper subject of life insurance. It was shown from official records that on the 10th day of September, 1891, July 1, 1892, and September 10, 1892, respectively, he was tried in the police court of Detroit, and found guilty of drunkenness, and that on the 26th day of September, 1892,—the very day of his application for insurance,—a warrant was taken out charging him with being a disorderly person, in that he was a tippler, and, having been tried on the succeeding day in that court, was found guilty, and fined \$7 and costs, \$30, or 45 days in the Detroit house of correction. The fine and costs were paid. It was also shown that in January, 1892, he was an inmate of an institute at Northville, Mich., and was there treated by Dr. Yarnell for "alcoholism, or excessive drinking of alcoholic drinks." According to the testimony of that physician, his disease had then progressed "to the extent that his brain was considerably defective; very strong tendency towards softening of the brain, or paresis." The evidence further showed, beyond dispute, that in 1890, and again in 1891, he was often visited and treated by Dr. Stewart for epileptic attacks, and that for some years prior to his application he was frequently, if not habitually, in a state of intoxication. There was therefore no escape from the conclusion that the statements in the application that Maier never had been afflicted with any sickness, disease, ailment, injury, or complaint; that he had not consulted or been prescribed for by any physician, except Dr. Stewart, during the preceding 10 years; and that he did not use, and had never used, spirits, wines, or malt liquors, and had always been temperate and sober,—were untrue.

But it is contended by the plaintiff that the falsity of these statements cannot be attributed to the assured, so as to render the policy void, because the answers to the questions propounded to him were in fact prepared by the agent of the insurance company, and that the company is estopped to deny the validity of the policy, upon the grounds stated, if its agent knew the facts and

suppressed them when preparing the answers, or failed, fraudulently or negligently, having an opportunity to do so, to bring out the facts called for by the questions embodied in the application.

We cannot accept this view of the contract between the parties. If the assured authorized the soliciting agent to prepare his answers to the questions propounded, and thereafter signed the application so prepared, neither he nor any one claiming the benefit of the policy ought to be heard to say that he did not read the answers, or know their contents before signing the application. His attestation of the application by his signature was a representation to the company that the answers were true; for, by the terms of his application, he stipulated that the statements made in answer to questions, "by whomsoever written," were material to the risk, and warranted to be true, and, if any concealments or untrue statements or answers were made, the policy, as well as the contract evidenced by it, should be ipso facto null and void. And when the accused accepted a policy declaring upon its face that it was issued in consideration of the application made part of the policy, and subject to the conditions indorsed on the policy, the contract became complete, and its terms are to be respected, and cannot, in an action on the policy, be ignored or made of no effect. It is an essential fact in the case that in the body of the contract evidenced by the policy are found recitals which make the application, as well as the conditions indorsed on the policy, part of the contract of insurance.

It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself against the frauds or negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers were wholly due to the negligence, ignorance, or fraud of the soliciting agent, a different question would be presented. But here the accused was distinctly notified by the application that he was to be held as warranting the truth of his statements, "by whomsoever written." Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them. But it is too often forgotten that in giving relief, under such circumstances, to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agree-

ment between the parties, and hold the company liable, if the statements of the assured—at least, those touching matters material to the risk—are found to be untrue.

The views we have expressed are in harmony with the decisions of the supreme court of the United States. In *Insurance Co. v. Fletcher*, 117 U. S. 519, 529, 531, 534, 6 Sup. Ct. '837, the defense was that certain statements and representations respecting his health and condition were made by the assured in his application, the truthfulness of which he warranted, and agreed that they should be the basis of any contract between him and the company, and that the policy should be void if such statements, or any of them, were in any respect untrue, and all moneys paid on it forfeited. The policy in that case was accompanied by a copy of the application, and recited that it was issued in consideration and upon the faith of the statements and representations contained in the application. The plaintiff in the suit pleaded that the answers in the application had been prepared by the agents of the company, and that they had not properly put down what he had said to them in answer to questions. The supreme court said:

"It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in a position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have, upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri. But the case, as presented by the record, is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail, and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed." Referring to the previous cases of *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Wall. 152, the court said: "In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may

well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements." Again: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot, after his death, be avoided."

It is a mistake to suppose that any different views are expressed in *Insurance Co. v. Chamberlain*, 132 U. S. 304, 310, 311, 10 Sup. Ct. 87. That case turned upon its special facts, and the decision was controlled by a statute of Iowa, one section of which provided that:

"Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or the policy to the contrary notwithstanding."

The court said:

"This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company, by any provision in the application or policy, convert him into the agent of the assured. If it could, then the object of the statute would be defeated." Again, in the same case: "The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of 'No other,' having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

While the issues present questions of general law, upon which this court may exercise an independent judgment, we are gratified to find that well-considered decisions of the supreme court of Michigan are to the same general effect. In *Cleaver v. Insurance Co.*, 65 Mich. 527, 531, 533, 32 N. W. 660, it appeared that a policy of fire insurance provided that it should be void if other insurance on the property was procured without the consent of the company

written upon the policy. Additional insurance was procured, with the knowledge and assistance of the company's agent, but the company's consent was not indorsed on the policy, nor did it receive notice of such insurance. The policy declared, as a part of the contract, that the agent of the company had no authority to waive, modify, or strike from the policy any of its printed conditions, nor revise the policy if it should become void by reason of the violation of any of its conditions. It also provided:

"And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted upon and with reference to the foregoing terms and conditions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The supreme court of Michigan said:

"It is claimed here that the action of the agent was the action of the company, and that such action created an estoppel. But it is not shown that the agent had any authority to indorse upon the policy the written consent to additional insurance, or to waive in any way the provisions of the policy. On the contrary, the policy delivered to the insured expressly states that such agent 'has no authority to waive, modify, or strike from the policy any of its printed conditions; * * * nor, in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same.'" After distinguishing that case from *Kitchen v. Insurance Co.*, 57 Mich. 135, 23 N. W. 616, the court proceeded: "If the agent, under the circumstances of this case, by filling out the application for the Lansing insurance, and saying it was all right, can estop the defendant company from raising and enforcing this defense, then the clauses prohibiting the agent from waiving the conditions of the policy, or from reviving it after it has become null and void, are rendered entirely useless and nugatory." Again: "This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Insurance Co. v. Fay*, 22 Mich. 467. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving, altering, or modifying the process of obtaining further insurance. The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them, upon the implied or assumed powers of the agent, cannot help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy. *Merserau v. Insurance Co.*, 66 N. Y. 274; *Catoir v. Trust Co.*, 33 N. J. Law, 487. The circuit judge, as the case stood in the court below, should have directed a verdict in favor of the defendant."

In *Cook v. Insurance Co.*, 84 Mich. 12, 17, 18, 47 N. W. 568, 570, which was an action upon an accident policy, and in which the defense was a false statement by the assured as to his habits, the policy purported to have been issued in consideration of the statement of facts warranted in the application to be true, and upon conditions printed upon the back of the policy, which, it was pro-

vided, could not be waived or altered by the agent. The court, after distinguishing the case before it from *Insurance Co. v. Hall*, 12 Mich. 202, and *Insurance Co. v. Olmstead*, 21 Mich. 246, in which cases it said, "The power of the agents was in no manner limited by the terms of the policies themselves," proceeded:

"In the present case the policy provides that the agent of the company cannot waive or alter any of the agreements and conditions printed on the back of the policy. This question was fully discussed by Mr. Justice Morse in *Cleaver v. Insurance Co.*, 65 Mich. 527, 532, 32 N. W. 660, 662, and it was there said: 'It cannot be successfully maintained but that the company has the right and the power to restrict as it may choose the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law or equity, why such limitations and restrictions shall not be considered as known to the insured and binding upon him.' " "The court below on the trial proceeded on the theory that notice to Mr. Eadus or to Mr. Patton was notice to the company, and charged the jury that the defendant had a right to waive the conditions of the policy, and that, by issuing the policy to Mr. Cook with this knowledge on the part of its agents and receiving the premiums, it waived the conditions relating to intoxication. This was not a statement of the law applicable to the case, as laid down in *Cleaver v. Insurance Co.*, *supra*, and to which we must adhere."

In *Gould v. Insurance Co.*, 90 Mich. 302, 51 N. W. 455 (*Id.*, 90 Mich. 308, 52 N. W. 754), the court, after observing that the plaintiff, in accepting the policy of insurance, and in her subsequent dealing with the agent relative to the furnishing of proofs of loss, must be presumed to have had knowledge of the agent's want of power to waive any of the terms and conditions of the policy, said:

"This restriction upon the agent's power to waive the provisions of the policy was plainly printed upon the face of the policy, and it cannot be successfully maintained that the company had no right to restrict the powers and duties of its agent. It must be held in the present case that this power was expressly limited by the policy, and known to the insured and binding upon her. The case falls clearly within the ruling of this court in *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660. As it was the duty of the court, under this holding, to direct the verdict in favor of the defendant, we need not pass upon the other questions raised."

See, also, *Mallory v. Insurance Co.*, 97 Mich. 416, 56 N. W. 773.

After this cause was argued and submitted, the attention of the court was called to the recent decision of the supreme court of Michigan in the case of *Van Houten v. Insurance Co.*, 68 N. W. 982. The opinion has not yet appeared in the published Reports, but we have been furnished with a copy of it for examination. Nothing decided in that case is in conflict with anything said in the case before us. The contract in the *Van Houten Case* does not seem to have contained any provision warranting the statements in the application to be true, "by whomsoever written." The applicant answered all the questions that were propounded to him, and, under the circumstances disclosed, had the right to assume that the company did not require any answers by him to questions not propounded to him by the agent. The company's representative assumed, without authority from the applicant, to answer for the applicant questions to which the attention of the latter was not called. The answers made to the questions put to the applicant were not impeached on any ground. The claim was that

the answers made by the agent of the company upon his own responsibility, and based upon his own knowledge of the condition of the applicant, and not brought to the attention of the applicant, were untrue. The supreme court of Michigan recognized the general rule that every one is presumed to have read what he signs. But the facts in that case seem to have been such as to authorize the submission to the jury of the question whether the applicant was not misled by the conduct of the company's agent into the belief that what he was asked to sign and did sign embodied only his own answers to the questions actually propounded to him. The supreme court of Michigan said:

"The agent in this case had known the deceased for twenty-five years, had no knowledge of his being ill before the illness which resulted in his death, and, relying upon his own knowledge of the life of the assured, chose to answer these questions himself without interrogating him or calling his attention to him, or informing him that there was any importance to be attached to them. In fact, it does not appear that he informed him that there were any other questions to answer, while those he answered were answered correctly. The applicant had the right to assume that all the questions were asked, and was under no obligation to read the paper to ascertain if there were others. The application was in very small type, and very closely printed. The questions and answers were below the application, and were twenty-two in number. While every person is presumed to have read what he has signed, still we think that there was testimony in this case from which the jury might legitimately infer that the assured was misled by the agent of the defendant in making the application."

This is not inconsistent with anything determined in the present case, nor with the prior adjudications of the supreme court of Michigan in the cases above cited.

We are of opinion that the circuit court, in conformity with the established practice in the courts of the United States, as well as in the courts of Michigan, properly instructed the jury that upon the evidence, and, in view of the legal principles applicable to the contract in suit, the defendant was entitled to a verdict. There was no ground whatever upon which a verdict for the plaintiff could possibly have been sustained, and therefore it was the duty of the court, upon motion, to give a peremptory instruction for the defendant. *Insurance Co. v. Randolph* (just decided) 78 Fed. 754; *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, 465, et seq. A verdict for the plaintiff could not have been upheld unless it was true that the preparation by the company's soliciting agent of the alleged false answers in the application, or the agent's knowledge of all the facts, estopped the company from relying upon the provision of the contract declaring the policy void if the statements in the application, by whomsoever written, were untrue. In view of the undisputed facts, and as a verdict for the plaintiff would have been utterly indefensible under any reasonable view of the evidence, the question whether the plaintiff could recover could not be said to have depended upon the weight or preponderance of evidence, but became a question of law, which was correctly decided by the circuit court when it directed a verdict for the company.

Judgment affirmed.

FELTON v. SPIRO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 452.

1. DAMAGES FOR WRONGFUL DEATH—NUMBER OF BENEFICIARIES.

When the statute giving a right of action for damages for negligence causing death provides that the damages recovered shall inure to the benefit of the family of the deceased, it is competent to prove, upon the trial of such an action, the number of children left by such deceased.

2. SAME—WIDOW AND CHILDREN.

The amendment of 1871 to sections 2291 and 2292 of the Code of Tennessee, relating to the recovery of damages for acts or neglects causing death, was intended to affect the procedure, and not the beneficiaries of the statute; and since such amendment, as before, damages recovered in such actions inure to the benefit of the widow and children of the deceased, and not to the widow alone.

3. NEW TRIAL—REFUSAL TO GRANT.

When a trial court, upon a motion for a new trial, refuses to consider a ground urged therefor, or to exercise its discretion, for the reason that it considers it has no power to do so, such refusal may be assigned as error. *Mattox v. U. S.*, 13 Sup. Ct. 50, 146 U. S. 140, followed.

4. VERDICT—SETTING ASIDE.

A federal court, in which a jury has rendered a verdict, has power to set aside such verdict when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and, in the exercise of a legal discretion, may properly do so, though the case is not one in which it would have been proper to direct a verdict. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, followed.

5. APPEAL—JUDGMENT OF REVERSAL.

A judgment of reversal based solely on the ground that the trial court erred in not exercising its discretion on a motion for new trial requires, not the ordering of a new trial, but only a remanding of the case, for further proceedings from the point where the error was committed. In this case the direction to the trial court should be to consider and decide the motion for new trial.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Chas. R. Head and Edw. Colston, for plaintiff in error.

H. H. Ingersoll, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This action was brought by Fannie Spiro, as the widow of Herman Spiro, deceased, to recover damages for the death of her husband, caused, as she alleged, by the negligence of the servants of the defendant, Samuel Felton, receiver of the court below, engaged, under the order of the court, in the operation of the railway of the Cincinnati, New Orleans & Texas Pacific Railway. The deceased, Herman Spiro, was a passenger on a local freight train of the defendant. As he was about to alight from the train at a small station in Tennessee, he was jerked or thrown violently from the back platform of the caboose to the ground, and so injured that he died very soon after. The negligence charged consisted in the sudden movement of the engine at a time when passengers were invited to alight. The contention of the defendant was, and he called a

great many witnesses to sustain it, that the train had been standing still for five or ten minutes, affording the deceased ample time to leave the train in safety; that he negligently remained on board until the end of this time, and then, when the train began to back up, and while it was in motion, he rushed to the platform, and, in attempting to leave the moving car, he fell, and was injured. It may be remarked that the great weight of evidence supported the view that the accident was solely the result of the negligence of the deceased—first, in not leaving the car when invited to do so; and, second, in attempting to leave it when the freight train was in motion. Upon a first trial the jury disagreed. Upon a second trial, which is the one now under review, there was a verdict for the plaintiff of \$6,000. There are several assignments of error based on the rulings of the court at the trial.

First, the court permitted the plaintiff, over the objection of the defendant, to prove the number of children the deceased left. In *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, where a plaintiff was suing a railroad company for a personal injury to himself, the supreme court held that evidence of the size of the family dependent on the plaintiff was not relevant to the issue, and was calculated to arouse undue sympathy in the minds of the jury, and to enhance the damages beyond a just sum. But, in *Railroad Co. v. Mackey*, 157 U. S. 75, 15 Sup. Ct. 491, where the action was by the administrator of one to recover damages for the death of his intestate caused by defendant's negligence, and the statute giving the right of action provided that the damages recovered should inure to the benefit of the family of the deceased, the same court held that it was entirely proper for the jury, in estimating the loss suffered by those in whose behalf the suit was brought, to take into consideration the number and ages of the children. If, therefore, under the statute of Tennessee, the action by the widow is for the benefit of herself and her children, the evidence objected to was rightly admitted.

By the Code of 1858 of Tennessee (sections 2291-2293) it was provided as follows:

"2291. The right of action which a person who dies from injuries received from another or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representative, for the benefit of his widow and next of kin, free from the claims of his creditors.

"2292. The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative use his name in bringing and prosecuting the suit on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond.

"2293. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin free from the claims of the creditors of the deceased, to be distributed as personal property."

The distribution of personal property, under the Tennessee law, when there are a widow and children, is "to the widow and children equally, the widow taking a child's part." Code 1858, §§ 2429-2431.

There is no doubt or dispute that, under unamended sections 2291 and 2292, the suit brought would be for the benefit of the widow and children, but the suit would have to be brought in the name of the personal representative, with or without his consent. In 1871, the first two sections above quoted were amended by an act which is still in force, and which provides:

"That section 2291 of the Code of Tennessee be so amended as to provide that the right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of his creditors.

"Sec. 2. Be it further enacted, that section 2292 be so amended as to allow the widow, or if there be no widow, the children, to prosecute suit, and that this remedy is provided in addition to that now allowed by law in the class of cases provided for by said section and section 2291 of the Code, which this act is intended to amend."

The contention of the counsel for the defendant receiver is that the act of 1871 made the suit in the name of the widow for her own benefit alone, and that the children of the deceased husband would have no legal interest in her recovery. The argument rests on the substitution in the amendment of the disjunctive "or" for the conjunctive "and," as it occurs in unamended section 2291, in the phrase "for the benefit of the widow and next of kin." If this construction is correct, then we have the anomalous result that, where a suit is begun before the death of the injured person, the avails of the suit recovered after his death pass, by virtue of section 2293, which was not amended by the act of 1871, to the widow and children, but that when the suit is brought after the death, then the recovery is for the benefit of the widow, and not of the children. Certainly this result is to be avoided if possible without straining the language used. It is perfectly manifest that the whole object of the amendment was to remove the necessity for bringing the action in the name of the representative, and to give to the widow, or, in case there was no widow, the children, the right to bring the action without using the name of the representative. It was intended to affect the procedure and not the beneficiaries. This is made manifest by the fact that section 2293 was not amended. As the suit was by that section to proceed in the dead plaintiff's name without revivor, there was no need of using the name of the representative of the deceased, and hence no need of an amendment permitting the use of the widow's name instead of that of the representative. The clause of the amending act in which the disjunctive "or" is substituted for "and" of the old act is an awkward one. The intended meaning could only be certainly conveyed by separating the various cases intended to be covered and stating each by itself. The "or" was probably used in view of the possibility that there might be no widow, in which case the avails of the suit would of course go only to the next of kin; but the contingency in which there might be a widow and children was lost sight of. All the circumstances taken together lead to the conclusion that the change of "and" to "or" was

not to effect a change in meaning as to the beneficiaries, but arose from mere carelessness in the use of language. It is not uncommon, in order to carry out the obvious intent of the legislature, for courts to construe "or" as meaning "and." *Massie v. Jordan*, 1 Lea, 647; *Union Ins. Co. v. U. S.*, 6 Wall. 759, 764.

Though the exact point here presented has never been in judgment before the supreme court of Tennessee, that court has frequently expressed the view that, where the widow sues in such a cause, she sues as trustee for herself and her children. *Greenlee v. Railway Co.*, 5 Lea, 419; *Webb v. Railway Co.*, 88 Tenn. 128, 12 S. W. 428; *Loague v. Railroad*, 91 Tenn. 461, 19 S. W. 430; *Railroad Co. v. Acuff*, 92 Tenn. 29, 20 S. W. 348; *Holder v. Railroad Co.*, 92 Tenn. 146, 20 S. W. 537. In *Railroad Co. v. Bean*, 94 Tenn. 394, 29 S. W. 370, cited by counsel for the receiver, it was held that, where the right of action had once vested in the widow, the cause of action did not pass on her death to her representative, but was extinguished. But in that case there were no children, so that the court was not required to decide, and did not in fact decide, that the widow is the only beneficiary where there are children. We find no error in the action of the court in allowing evidence as to the number and ages of the real parties in interest in the suit.

The next assignment is based on the admission by the court of the statement of a photographer as to the condition of the track, at the point near where the accident occurred, some 23 months after the accident. Without objection, a photograph of the locus in quo, taken 23 months after the accident, was admitted. We cannot see how the photographer's statement prejudiced defendant. The condition of the track had but the remotest relation to the accident, and, the photograph which showed the track having been admitted without objection, it was certainly not reversible error to allow an oral description of the same thing.

It is also assigned for error that the court below permitted evidence by a witness that he had seen chains stretched across the open space in the railing on the platform of other cabooses, as tending to show that defendant's failure to have a chain on this caboose was want of due care. Whether this was error or not, we think it was cured by the court in its charge, which, in effect, instructed the jury that the defendant was under no obligation to have the chain stretched across this space, and that a failure to have the chain could be no ground for recovery. There is some reason for doubt as to whether this was a mere expression of opinion on the facts, or an instruction as matter of law; but we think that, taking all the language together, it may be properly construed as the latter, and that the error, if any, in admitting the evidence was thus cured.

The next, last, and chief assignment of error is based on the action of the trial court in refusing to exercise his discretion in respect of the motion of the defendant to set aside the verdict because contrary to weight of the evidence. The language and ruling of the court in passing upon the motion for a new trial is incorporated in the bill of exceptions. The court said (73 Fed. 91):

"I do not think, on the proof in this case, the court could properly have withdrawn the case from the jury by positive direction; and this brings us to the last objection taken, which is that the verdict is against the weight of the evidence. This is a question which has given this court great trouble, not only in this but other cases, and I shall be very glad indeed when the circuit court of appeals for this circuit shall have occasion to pass judgment upon this question, so that this court may have an authoritative general rule, at least, in the determination of this question. I wish to say, in the outset, that I think the decided weight of the evidence, both as to quantity and quality, shows that the deceased came to his death as the result of his own negligence, in not getting up and going out of the train when it stopped at his point of destination, and that he had ample time to have done so if he had used reasonable care and diligence on his own part. I think the proof shows, by the same decided weight, that the accident to him is due to the fact that he remained in the caboose, engaged in conversation, until after ample time to have left the car; the train was started in a backward motion in its regular operations; and that the deceased was thrown therefrom by reason of being on the rear platform while the train was in such motion, and, most likely, when it stopped moving backward, and let out the slack, or when it started south a second time. But, although the court takes this view of the evidence, the court does not feel that it can lawfully set aside the verdict on that ground alone. I desire not to be misunderstood about this proposition. The question here is one of the weight of the evidence. It is not a question of there being no evidence to support the verdict, misconduct on the part of the jury, error in the charge of the court or in the admission or rejection of evidence, or of the many other grounds on which a new trial may be granted. But the question is, when no other valid ground of rejection to the verdict exists, can the court set aside the verdict alone upon the ground that it is against the weight of the evidence, however decided the preponderance may be? It is to be remembered that the practice in the courts of the United States is different from that of the state court. In this court, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, the court may withdraw the case from the jury and direct a verdict. The terms in which this rule is stated differ somewhat in different cases, although the underlying principle remains the same. Examples of this difference in the form of statement of this rule may be seen by comparing *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, reaffirmed in *Railroad Co. v. Griffith*, 159 U. S. 611, 16 Sup. Ct. 105, with *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, and *Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338. If, then, the evidence is such that a verdict returned in opposition to it would be set aside by the court, it is the duty of the court in the first instance to direct a verdict. It seems to follow, logically and necessarily, that if the evidence is not so conclusive that the court can thus withdraw the case from the jury, and is compelled to submit the case to the jury, the court is then not at liberty to set the verdict aside as against the weight of evidence. It seems to me that the right to do so is inconsistent with the right and duty to give a positive direction for the same reason before the verdict. It occurs to me that in any case it would be idle to say that the court must submit the case to the jury because it may not lawfully direct a verdict, and that, having submitted the case to the jury, it then can effect the same results practically as by direction in setting it aside as opposed to the evidence. * * * What has been said with reference to the cases just cited sufficiently indicates my view of the want of power in this court to set aside a verdict because against the weight of evidence, however decided that weight may be. There have been two trials in this case. On the first trial I would have withdrawn the case from the jury on the ground of contributory negligence on the part of the deceased, except for the testimony of the witness Riseden. On the second trial both sides of the case had been strengthened,—that of plaintiff slightly, and that of defendant decidedly. Nevertheless, I felt that, in view of the testimony of the same witness, Riseden, with some slight corroboration, I could not rightly direct a verdict, notwithstanding the great weight of the evidence introduced by defendant, and, unless I should give such direction, it is not likely that the result of this case will ever be different from what it is; and it is certain that the ver-

dict is a very moderate one, if the plaintiff is entitled to recover at all. I have been thus particular to state the view I take of my right and duty upon this motion, and of the rule under which I am acting; for, while my action in granting or refusing the new trial is not the subject of review, if I refuse to exercise the discretion to grant a new trial under an erroneous view of law and of my duty in the matter, this, I think, is an error which is the subject of review. *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50. It is only when the court, in the exercise of its discretion to grant or refuse a new trial, does so upon all competent evidence, and under a correct view of the law, that its judgment is not the subject of review, and when, instead of leaving it to be presumed that the court below acted under a correct conception of the law, that court distinctly states on record the view of the law by which the court was controlled, no reason is perceived why this is not subject to review on writ of error. For reasons indicated, the motion for a new trial is denied."

The perusal of this opinion leaves no doubt in our minds that the learned judge intended to refuse, and did refuse, to consider or act upon the motion for a new trial, in so far as it was based on the ground that the verdict was against the weight of the evidence, because he was of opinion that the court had no power to set aside a verdict on such a ground. It is contended that the remark of the court, in the course of his opinion, that the result of the case would be likely to be the same in another trial, shows that he was passing on the motion, and denying it on its merits. But, taking the whole opinion together, we must accept the positive statement of the learned judge himself, in his opinion, as to the meaning of his action, rather than the construction of counsel. Again, it is said that the motion for new trial was not filed in time. It was filed during the term at which the verdict was rendered. This is sufficient, under the federal practice authorized by section 726, Rev. St., *Fost. Fed. Prac.* § 376. Section 987, Rev. St., relied on, relates only to method of staying execution pending new trial, and does not limit the time in which motions for new trial may be otherwise filed. *Rutherford v. Insurance Co.*, 1 Fed. 456.

A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error. In *Mattox v. U. S.* 146 U. S. 140, 13 Sup. Ct. 50, it was held that, where the trial court excluded affidavits offered in support of a motion for a new trial, and in passing upon the motion exercised no dis-

cretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the supreme court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court. This furnishes direct support for the view that the refusal of the trial court to consider at all as a ground for new trial that the verdict was contrary to the evidence may be assigned for error here.

We come, then, to the question whether a federal court, in which a jury has rendered a verdict, has the power to set aside a verdict when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of a legal discretion may properly do so. Upon this point we have not the slightest doubt. This court, in *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, has already decided it. In an elaborate and most carefully considered opinion, Judge Lurton, speaking for the court, points out the distinction between that insufficiency in law of evidence to support an issue which will justify a peremptory instruction by the court, and that insufficiency in fact of evidence, when weighed with opposing evidence, which, while not permitting a peremptory instruction, will justify a court in setting aside a verdict based on it, and in sending the parties to another trial before another jury. The cases in England and in this country are reviewed at length by Judge Lurton, and the conclusion reached is fully supported by authority. The result is thus summed up (page 609, 20 C. C. A., and page 477, 74 Fed.):

"We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing on such motions, he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case, we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party."

See, also, a decision of this court at the present term, announced by Mr. Justice Harlan, in *Insurance Co. v. Randolph*, 78 Fed. 754.

It is apparent, from the foregoing, that the view of the learned judge at the circuit, expressed in the opinion on the motion for new trial, that because the court cannot direct a verdict one way, it may not set aside a verdict the other way, as against the weight of the evidence, is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to

support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs.

There is a suggestion, in the opinion of the judge at the circuit on the motion for new trial, that to set aside a verdict as against the weight of the evidence is in violation of the seventh amendment to the constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. An examination of Judge Lurton's opinion in the Lowery Case will show that it was the habit of the judges of England, whence came the common law, to set aside verdicts as against the weight of evidence as early as Lord Mansfield's time and earlier. This would seem to show that the re-examination of the evidence necessary to set aside a verdict on such a ground was according to the rules of the common law.

The defendant receiver, therefore, is entitled to have the court below weigh all the evidence, and exercise its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, and the judgment of the circuit court must be reversed for this purpose. This reversal does not set aside the verdict. It only remands the cause for further proceedings from the point where the error was committed. We found no error in the action of the court upon the trial and before verdict, and hence we shall not disturb it, but shall leave it to the trial court, upon consideration of the weight of the evidence, to grant the motion for new trial, or not, as in its discretion it may deem proper. That the supreme court would have taken a similar course in the case of *Mattox v. U. S.* 146 U. S. 140, 13 Sup. Ct. 50, already cited, had it not been that there were also errors on the trial requiring a new trial, may be seen from the language of the chief justice in delivering the opinion of the court, where, in summing up the result of the action of the court in refusing to consider affidavits on the motion for a new trial, he says (page 151, 146 U. S., and page 53, 13 Sup. Ct.):

"We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court; but another ground exists upon which we must not only do this, but direct a new trial to be granted."

See, also, *Elliott, App. Proc.* § 580.

The judgment of the circuit court is reversed, with instructions to the court below to consider and pass upon the motion for new trial in so far as it is based on the ground that the verdict was against the weight of the evidence. The costs of the writ of error will be taxed to the defendant in error. The costs of the circuit court will abide the event.

BALTIMORE & O. R. CO. v. WEEDON et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 263.

1. CLERKS OF COURT—NEGLECT TO ISSUE PRÆCIPE—LIABILITY AND DEFENSES.

Where it is by law made the duty of the clerk of a court, upon the filing of a præcipe by the moving party in an action, to issue process to the sheriff, whose duty it is to serve the same, and return it to the clerk, who is then to receive and record the return, it is not a defense to an action against the clerk, for neglect and default in issuing process upon a præcipe, that the plaintiff did not give attention to the clerk's performance of his duty, and see to it that it had been performed.

2. SAME—MEASURE OF DAMAGES—MITIGATION.

In an action against the clerk of a court for failing to issue process in error to review a judgment against the plaintiff, when legally required to do so by proper proceedings on the plaintiff's part, the measure of damages is, *prima facie*, the amount of the judgment which the plaintiff has been obliged to pay, but the defendant may show, in mitigation of damages, that, even if the plaintiff had had an opportunity to review the judgment, he would have been unable to reduce the recovery against him.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

The action was begun by the Baltimore & Ohio Railroad Company against Alfred Weedon, the clerk of the court of common pleas of Guernsey county, and his official bondsmen, to recover damages for an alleged breach of Weedon's official duty as such clerk. The penal sum of the bond was \$10,000, and one of the conditions of it was that Weedon should well and truly do and perform, all and singular, each and every duty of his said office as clerk of the common pleas court enjoined upon him by law. Plaintiff's petition set out in detail the circumstances of defendant's alleged breach of duty. It averred that one Grubbs had obtained a verdict and judgment against the plaintiff company for \$1,995 for personal injury; that a bill of exceptions was taken, for the purpose of presenting the same to the circuit court on error; that a motion for new trial was duly made and overruled; that after the rendition of the judgment, plaintiff duly filed a petition in error in the circuit court of said county, attached to which petition was a certified copy of the docket and journal entries in said cause in the court of common pleas, and the original papers as required by law; that he delivered said petition and accompanying papers to the defendant Weedon, clerk of the common pleas court, and ex officio clerk of the circuit court; that with the said petition in error the plaintiff filed a præcipe in due and proper form, in accordance with the statute in such cases made and provided, directing the said clerk to issue a summons in error to the sheriff of Guernsey county, Ohio, returnable according to law, directing the said sheriff to summon the said Thomas Grubbs, the defendant in error named in said petition in error, and to notify him of the pendency of the same; that the said defendant, as clerk, disregarding his duties in the premises, failed to issue any summons in error upon said petition in error and præcipe so filed as aforesaid, and the said cause, after the expiration of six months after rendition of said judgment,—the period of limitation within which error proceedings could be brought under the law,—was dismissed by said circuit court because of the clerk's failure to issue summons as required by statute and the præcipe, and the consequent failure to obtain jurisdiction in error over said Grubbs, named as defendant in error therein; that plaintiff had filed a supersedeas bond to stay execution of judgment pending error proceedings; that Grubbs thereafter collected his judgment and interest and costs, amounting in all to \$2,231.04; that there were numerous errors apparent upon the record in the suit of Grubbs against the plaintiff, and if the defendant, as clerk, had performed his duty, the judgment would have been reversed; and upon the merits of the action Grubbs had no cause of action. Wherefore the plaintiff averred that by reason of defendant's neglect and default

as clerk the plaintiff had suffered a loss of \$2,231.04, for which sum and interest from December 24, 1892, judgment is prayed.

The first defense of the answer was a general denial of all the facts alleged concerning the *præcipe*, the dismissal of the error proceedings, the collection of judgment, etc. The second defense of the answer charged, in effect, that the failure to serve a summons in the cause was the neglect and default of the plaintiff in taking all the papers from the clerk's office, and that he did not know, until after the expiration of the six months, when plaintiff returned the papers, that a petition in error and *præcipe* were among the papers. Defendant denied that any petition or *præcipe* was ever filed in his office. The reply of plaintiff denied that it or its attorney had removed the papers from the clerk's office as alleged in the answer. The cause was submitted to the court, a jury being waived in writing, and the court made the following findings:

"A stipulation in writing, signed by the parties hereto, having been filed in this cause, waiving a trial by jury, the case came on for trial of the facts and law before the court on the 7th day of June, 1894. And, the testimony having been submitted by the respective parties, and the argument of counsel having been heard thereon (the plaintiff requested the court to make a special finding of all of the facts and conclusions of law thereon in this case, which is accordingly done as follows): The court, upon consideration thereof, finds:

"First, in respect of the facts. One Thomas Grubbs sued the above-named plaintiff in the court of common pleas for Guernsey county, Ohio, to recover damages for an injury which he alleged was sustained by him on the 10th day of March, 1885, in consequence of the negligence of the defendant in said suit in suddenly starting its engine at a coaling station at or near —, when the engine had been stopped to have its tender filled with coal from the chutes of parties who, by virtue of a contract with the railroad company, were accustomed to supply coal to trains as wanted at that place. Grubbs was the servant of the owner of the coal, and alleged that, after having gone upon the engine to get the customary certificate of the engineer for the coal which had been taken on, he was descending from the cab, when suddenly and negligently the engine was sent forward with a jerk, which sent him down, and caused his injury. That suit was tried upon the issues joined therein, and resulted in a verdict and judgment for the plaintiff in the sum of \$1,995 and \$— costs of suit. This judgment was rendered on the — day of March, 1892. Certain exceptions were taken by the defendant in that suit upon trial, which were thereafter duly incorporated in a bill of exceptions settled by the judge who presided therein. In due season, and within the six months after the judgment allowed by the laws of Ohio for that purpose, to wit, in the month of June, 1892, the said railroad company delivered, for the purpose of being filed, to the defendant, Weedon, who was, and since the 8th day of February, A. D. 1891, had been, and until the 8th day of February, A. D. 1894, continued to be, the clerk of the said court of common pleas, as well as the circuit court for that county, its petition in error, praying for the transfer into the circuit court of the record in that cause made in the court of common pleas, to the end that for errors which it complained had been committed by the said court of common pleas the said judgment might be reversed; and also at the same time delivered to the said clerk, for the purpose of filing, a *præcipe* for a summons to the defendant in error, Grubbs, to appear in the circuit court to answer the proceedings in error. The petition and *præcipe* were not then indorsed by the said clerk with the proper filing, and were not so indorsed until after the expiration of the six months above mentioned. The said *præcipe* for summons was negligently lost sight of by the said Weedon, and he negligently failed to issue the said summons as he should have done, or at all. The record and other requisite papers were transferred into the circuit court, the proceedings being regular to carry the case into that court for review on error, except for the want of the issuance and service of the summons to the defendant in error, Grubbs, or of any step which was requisite to bring him in on the writ of error. Nothing was done by the plaintiff in error in that proceeding, after filing the petition and *præcipe* aforesaid, to bring in the defendant in error, and no further attention was given to that subject by the said plaintiff in error. In this there was negligence on the part of its attorneys. The cause was upon the calendar of the said circuit court for the December term, 1892, and on the 8th day of that month was called for hearing by that court, when, it being brought to its attention that there had been no summons to the defendant in error, and no

waiver thereof, the proceedings in error were dismissed. The six months aforesaid allowed by the statute for the purpose of such proceedings had then expired, and the dismissal aforesaid operated to finally deprive the railroad company aforesaid of any right and opportunity to obtain a review of the case, or a reversal of the said judgment of the court of common pleas. The dismissal by the said circuit court was the result of the negligence of both the said Weedon, as clerk, and the attorney for the said railroad company; and this court is satisfied by the evidence it would not have happened but for the negligence of each. It was the duty of the clerk to issue the process to the sheriff. It was the duty of the attorney to see that it was made, or the service waived. It is shown that in practice such waiver is frequently made by attorneys as a matter of courtesy, or to save costs. The said railroad company was, in consequence, obliged to pay the amount of the judgment, with interest and costs, which it did on the 24th day of December, 1892, upon an execution which had been duly issued from said court of common pleas therefor; the whole amount paid being the sum of \$2,231.04. Subject to the question of the competency of the inquiry, this court has examined the record and bill of exceptions in the case as subject to removal by the railroad company into the said circuit court, and is of the opinion that for an error in the refusal of the court of common pleas to permit a witness called by the defendants therein to testify whether the movement of the engine at the time of the accident was such as was usual or not (such witness having been the fireman on the engine at the time), the judgment would, in all probability, have been reversed. But this court sees no other reversible error in that record and bill of exceptions, and finds that the evidence in that case was such that the jury might lawfully find the verdict they did. No further proof than that already noted has been given on subject of the measure of the damages sustained by the plaintiff in this suit. Upon the foregoing specific facts this court finds generally thereon for the defendant.

"Second, as to the law, the court holds: (1) That the defendant is liable to such damages as were naturally and legitimately the result of his failure to issue the said summons in error. (2) He is not liable for such damages as resulted from the supervening negligence of the railroad company. (3) The defendant is not liable for the results of his own negligence concurring with the negligence of the railroad company. (4) The defendant is not liable for damages as the result of his negligence, which damages would have been avoided by the exercise of reasonable diligence on the part of the railroad company. (5) The court also holds that, in the absence of any judicial determination upon the merits of the case of Grubbs against the railroad company, that the plaintiff could not recover, and non constat the plaintiff might not have recovered therein. There is no proof showing damages to the railroad company with sufficiently legal certainty beyond the costs and expenses to it of the trial in the court of common pleas, and, there being no evidence of those, the plaintiff is not entitled to recover upon the case, even though it had not been negligent in attending to the service of the summons in error or obtaining a waiver thereof.

H. F. Severens, U. S. Judge.

"Dated June 11, 1894."

The plaintiff at the time excepted severally to each of the following conclusions of law, to wit, the second, third, fourth, and fifth. The plaintiff also excepted to the finding that it was the duty of the plaintiff to see that a summons in error was served upon Grubbs, and that it was negligent in that regard.

John H. Collins, for plaintiff in error.

Geo. K. Nash, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts). Certain of the findings of fact of the circuit court are really findings of law. Thus, the court found that, as matter of law, it was the duty of the clerk to receive and file the petition in error and præcipe. The court found as matter of law that it was the duty of the attorney to supervise the action of the clerk in filing the petition and the præcipe and

issuing summons thereon. The court found, as matter of fact that the clerk did not file the *præcipe*, and did not issue summons; and that, after handing the clerk the petition and *præcipe*, the plaintiff paid no further attention to the same. As a further fact the court found that the loss resulted from the failure of the clerk to issue the summons, and of the plaintiff's attorney to supervise his doing so; that is, from the concurring negligence of both the clerk and the plaintiff's attorney. The plaintiff excepted to the finding that it was the duty of the plaintiff or its attorney to see that the summons was served, or that it was negligent in this regard. If it was not plaintiff's duty to supervise the clerk's performance of his duty, then there was no negligence on plaintiff's part, and the finding that the loss was occasioned by plaintiff's supervising or concurring negligence was erroneous. We have presented, therefore, on this record, for review, the question whether, in a suit for neglect and default by the clerk in issuing summons on a *præcipe*, it is a defense that the plaintiff did not, after handing the *præcipe* to the clerk, give attention to the clerk's performance of his duty, and see to it that it had been performed. It is true that the findings of law and fact are hardly responsive to the issues raised upon the pleadings, but, as no objections and exceptions to the introduction of evidence were preserved for our consideration, we may properly assume that the evidence upon which the findings were made was introduced without objection, and that the court then proceeded, as it had the right to do under the rules of code pleading in Ohio, to hear and decide the case on the issues made by the evidence, rather than upon the pleadings. *Railway Co. v. Whitcomb*, 31 U. S. App. 374, 381, 14 C. C. A. 183, and 66 Fed. 915; *Hoffman v. Gordon*, 15 Ohio St. 211, 218.

Was it the duty of plaintiff to see to it that the clerk issued the summons, or had he the right to rely on the clerk's doing his duty? Or, to put it in another way, can the clerk excuse his default by saying, "You ought to have anticipated my negligence and provided against it"? We think that the questions must be answered by a consideration of the provisions of the Ohio Code of Practice and the decisions under it. Section 6713 of the Revised Statutes of Ohio provides that proceedings to reverse a judgment shall be by petition in error, filed in the court of error; that "thereupon a summons shall issue and be served, or publication made, as in the commencement of an action, and a service on the attorney of record in the original case shall be sufficient." Section 6714 provides that: "The summons mentioned in the last section shall, upon the written *præcipe* of the plaintiff in error or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error or his attorney of record is found; when the writ is issued to a foreign county, the sheriff thereof may return it by mail to the clerk and shall be entitled to the same fees as if it had been returnable to the court of common pleas in which such officer resides; and the defendant in error or his attorney, may waive in writing the issue or service of the summons." Under the title "Procedure in the Courts of Common Pleas and Superior Courts and in Circuit Courts on Appeals," the specific duties of certain officers are

prescribed. By section 4959 it is required that "all writs and orders for provisional remedies and process of every kind shall be issued by the clerks of the several courts; but before they are issued a *præcipe* shall be filed with the clerk demanding the same." This provision appeared in the statutes of Ohio as early as 1824. In *State v. Caffee*, 6 Ohio, 150, the supreme court of the state held that "no clerk is bound to issue process without a *præcipe* in writing filed as his authority and indemnity." By section 4958 he is required to enter the issue of a summons, and to record in full the return thereon. By section 4960 the clerk is required to "file together and carefully preserve in his office all papers delivered to him for that purpose in every action and proceeding." And it has been decided by the supreme court of Ohio that a paper is considered filed when delivered to and received by the proper officer. *King v. Penn*, 43 Ohio St. 57, 1 N. E. 84. By section 4966 the sheriff is required to indorse upon every writ or order the day and hour it was received by him; and by section 4970 to execute every summons, order, or other process, and return the same as required by law. By section 4967, when the sheriff is interested in an action, the process is to be served by the coroner. By section 6713, already quoted, it is provided that summons in error shall issue as in the commencement of an action. Hence the proceedings to begin an action are in *pari materia* with those beginning suits in error. By section 5035 a civil action is to be "commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." Section 5036 requires that "the plaintiff shall also file with the clerk of the court a *præcipe* stating therein the names of the parties to the action, and demanding that a summons issue." Section 5037 provides that "the summons shall be issued and signed by the clerk, and be under the seal of the court from which it is issued; * * * it shall be directed to the sheriff of the county who shall be commanded therein to notify the defendant that he has been sued and must answer at a time stated therein." Section 5041 provides that the summons shall be served by the officer to whom it is directed. Section 5043 provides that an acknowledgment on the back of the summons or petition by the party sued, or the voluntary appearance of a defendant, is equivalent to service.

We have thus reviewed at some length the statutory requirements in Ohio for the beginning of original suits and for the beginning of suits in error, and those which describe the exact duties of the officers. We may take judicial notice of what the actual practice under these statutes is. The language of the statutes, and the actual practice, leave no doubt in our minds that the policy of the state of Ohio from the beginning has been to have process issued and served by a public officer, indifferent between the parties, and not to leave it to the agent of the party plaintiff, as in so many other states. It is the clerk's duty to issue the process to the sheriff; it is the sheriff's duty to serve it, and return it to the clerk; it is the clerk's duty to receive the return and record it. The whole machinery is put in motion by the *præcipe* of the moving party to the action, but after that, the law provides no place for the intervention of the party.

We think this elaborate and detailed provision for the machinery of service and return was for the very purpose of relieving the private party who should properly set it in motion from any responsibility as to its due operation, and that thereafter he has the right to rely on the public officer's performing his duty, secured as it is by his oath and official bond. It is a well-known maxim of the law of evidence that, as between private individuals, negligence is not to be presumed. A fortiori, is one not at fault in presuming that a public officer, under the obligation of his oath and bond, with his duties exactly and minutely fixed by positive law, will not fail to discharge them. He may rightly act on that presumption. Some reference is made in the finding to a common practice among attorneys for plaintiffs in error of procuring from the attorneys for defendants in error a waiver of summons, but we cannot see how this affects the question before us. Certainly, the regular mode of bringing a defendant in error within the jurisdiction in error is by causing summons to issue and to be served. The other mode is only available by consent of the opposing party. When no such consent is shown, can a charge of negligence be predicated on a pursuit of a remedy not dependent on such consent? Clearly not. Nor does the fact that the plaintiff or his attorney must generally be an active agent in procuring a written waiver of summons tend in the slightest degree to show that such agency is either required of them or is customary in the issue, service, or return of the summons in the regular way. Hence we are not satisfied with the view that the failure of the Baltimore & Ohio Company to stand over the clerk and see that he did his duty was negligence contributing to the subsequent loss. In an action against the clerk for his default, we think it can hardly lie in his mouth to say to the plaintiff, "Yes, I was negligent; but you ought to have anticipated that I would be negligent, and to have watched me in my work, and spurred me to do my duty." In the case of Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 22 U. S. App. 102, 109, 9 C. C. A. 314, 60 Fed. 993, the train of one company crashed through the train of another standing on the crossing of the two lines. The former sought to escape liability on the ground that the latter was guilty of negligence in allowing its train to stand on the crossing. It was in evidence that there was an agreement between the companies that the passenger trains of each might occupy the crossing while unloading baggage. It further appeared that a statute of the state required each company to stop its train 50 feet before reaching the crossing. We held that the plaintiff company was not guilty of contributory negligence relieving the defendant from liability. We said (page 109, 22 U. S. App., page 317, 9 C. C. A., and page 995, 60 Fed.):

"Was it negligence, as between the two companies, for the one to rely on the other's compliance with the statute, and its tacit agreement? It seems to us clear that it was not. It does not lie in the mouth of the Louisville Company, after consenting that the Cincinnati Company should put its train in a place not dangerous except through the negligence of the Louisville Company, to say that the Cincinnati Company was wanting in due care in reposing such invited confidence. It is not negligence, ordinarily, for one to act on the theory that another will comply with his statutory duty, unless there is some reason for thinking otherwise.

Jetter v. Railroad Co., 41* N. Y. 154; *Baker v. Pendergast*, 32 Ohio St. 494; *Railroad Co. v. Schneider*, 45 Ohio St. 678, 699, 17 N. E. 321; *Stapley v. Railway Co.*, L. R. 1 Exch. 21. Still less can the charge of contributory negligence be made by one who invited or consented to the action, and thereby impliedly agreed that it should be attended with no danger from him."

We think the principle of these cases applicable in the cause before us. The railway company here could rely not only on the statutory obligation of defendant to issue the summons, but also on something that very nearly resembled a contract obligation implied in the condition of defendant's official bond. In such a case, to hold that a failure of the obligee actively to prevent a default by the obligor will defeat recovery on the obligation, is to render the latter a worthless protection. With deference to the views of our colleague, Judge HAMMOND, who differs from the majority of court on this point, we do not think that any of the cases relied on by him apply to the one before us. That which, on its face, most nearly resembles this, is *Curlewis v. Broad*, 1 Hurl. & C. 322. The suit was for damages against a process server whom plaintiff had employed to serve a summons according to the procedure act for failing to indorse the writ as required by the act. There was a plea that the defendant was not instructed to indorse the writ as required by the statute, and that he was not retained to do more than serve the writ, and was not requested to make the indorsement. There was a demurrer to the plea, and joinder therein. The section of the statute relied on enacted that "the person serving the writ of summons shall and he is hereby required within three days at least after such service to endorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance to proceed under the act." The plea was held good, and the plaintiff was given leave to reply. There was no formal judgment, but from the remarks of the barons *arguendo* it is to be inferred that the conclusion was founded on the view that the process server was not a public officer charged with certain statutory duties, but was a mere private agent of the plaintiff's attorney, to do what he was told to do; that the measure of the server's duty was his instructions, and not the statutory requirement as to how the writ should be served; that the statute measured the responsibility of the attorney, whose duty it was, through his private agents, selected as he chose, to see that the writ was properly served. The case, in effect, holds that the server would be liable if he had been instructed to indorse the writ and did not do so. How this bears upon the case at bar, it is difficult to see. Under the mode of procedure in the case cited it was the plaintiff's duty, or that of his attorney, to serve the summons; and he might procure the service to be done by any one, —as one of the judges suggests, by a school boy. Under the Ohio statute, the writ must be issued by the clerk, who is not plaintiff's agent, but a public officer; and it must be served by a sheriff, or one of his general or special deputies. Their duties are fixed by statute, not by private agreement. The case of *McRaney v. Coulter*, 39 Miss. 390, is the strongest one for the view of Judge HAMMOND. There the court held it was a want of due diligence in an attorney

not to read the minutes of the clerk to see that he had properly entered an order granting a motion for new trial. As to this authority, we have only to say that, if it lays down a proper measure of an attorney's care, there are few, if any, careful attorneys within the jurisdiction of this court.

We come now to the question of damages. Upon this point we are all agreed, and Judge HAMMOND states in his opinion more fully than it is proposed here to state them the reasons for our conclusion. The defendant deprived the plaintiff of its legal right to contest the question of its liability to another for \$2,130 in a court of error. What is that right worth? Really its value depends on the probability of a reversal, and the successful event of a new trial. Ordinarily, on a proceeding in error, the judgment of the court below is presumed to be correct until it is shown otherwise. Can the clerk who negligently prevented the proceeding in error rely on that presumption to escape being mulcted in damages for depriving the plaintiff in error of the privilege and right of meeting and overcoming it? We think not. There is but one case in point, and that only a *nisi prius* ruling. In *Cohen v. Marchant*, 1 Disney, 113, the action was against a justice of the peace for failing to date properly the appeal bond, whereby the right of appeal was lost. Judge Storer told the jury that they might measure the damage by the amount of the judgment. It is a rule in actions for negligence in issuing execution on a judgment, or for negligence in allowing the escape of one whose body is taken in execution, that the amount of injury is *prima facie* measured by the face of the judgment, and that the burden is on the negligent officer to reduce the recovery by showing the insolvency of the defendant. *Carpenter v. Warner*, 38 Ohio St. 416. As against a public officer who negligently deprives another of his right to be heard in a suit against him, we think the same rule of evidence should prevail, and that the plaintiff should be entitled to recover all that the negligence of the defendant has caused him to pay unless the officer can show that, even if he had not been negligent, the complaining litigant would have had ultimately to pay the same amount. In order to do this, the defendant may be obliged to submit to the court the record in the first case, to decide whether there was reversible error, and also to adduce evidence to show that on a second trial a second verdict of the same or greater amount would have been rendered against the plaintiff. The anomalies will then be presented of having one *nisi prius* court review the errors of another, and of having one jury decide what conclusion another jury would have reached on a given state of evidence; but these anomalies seem inherent in the nature of the controversy, unless it is to be held either that the damages are merely nominal, or that they are fixed at the amount of the judgment. The first alternative is to be avoided, if possible, because it practically gives the clerk complete immunity from what may be most serious and injurious consequences of his neglect; while the second can hardly be adopted by a court, because it would seem to be judicial legislation, fixing a penalty for default, and not the assessment of damages according to the reason or analogy of damages in like cases. We are not, how-

ever, in the case at bar, called upon to state definitely the limits within which the defendant in such cases may introduce evidence in mitigation of damages, because the defendant below introduced no evidence tending to reduce them. Indeed, the learned judge at the circuit found affirmatively that there was reversible error in the record, and there was no evidence tending to show that on a new trial a similar verdict would have been reached. Upon the findings of fact made by the court below, after rejecting the findings of law, which we have found to be erroneous, a judgment should have been entered for the plaintiff for the full amount paid by it on the judgment which it was prevented from reversing on error, together with costs and interest.

The judgment of the circuit court is reversed, with instructions to enter judgment on the findings in accordance with this opinion.

HAMMOND, J., dissents from the views of the court as to contributory negligence, and concurs with the court upon the question of damages.

SWANCOAT v. REMSEN et al.

(Circuit Court, S. D. New York. January 19, 1897.)

1. CORPORATIONS—FAILURE TO MAKE REPORTS—ACTION AGAINST DIRECTORS—PLEADING.

In an action against the directors of a corporation, based on their failure to make the report required by section 30 of the New York stock corporation law, it is not necessary to allege that a judgment has been recovered and execution returned unsatisfied against the corporation. *Manufacturing Co. v. Harriman*, 43 N. Y. Supp. 673, disapproved.¹

2. SAME.

In such an action it is unnecessary to allege that the directors were stockholders during their term of office.

3. SAME—LIABILITY OF DIRECTORS.

Directors of a corporation are not relieved from their liability under section 30 of the New York stock corporation law, for failing to file an annual report, by the fact that a bond of the corporation, which formed one of its debts existing at the time of such failure, contained a provision that no stockholder of the company should be individually liable upon or in respect to it.

This was an action at law by Richard J. Swancoat against Charles Remsen, William Manice, Daniel Kimball, and Thomas W. Moore. The plaintiff's complaint alleged that the Austin Consolidated Coal Company was a stock corporation, organized under the laws of New York for business purposes other than moneyed and railroad; that on July 1, 1885, said Austin Consolidated Coal Company executed and delivered to the plaintiff its 17 coupon bonds for \$500 each, principal payable July 1, 1895, with semiannual interest at 6 per cent., such bonds being part of a series of \$100,000, secured by mortgage of the property and franchises of the corporation. The text of the bonds was set forth in full in the complaint, and it included a provision that no stockholder of the company should be individually liable on the bonds, or in respect thereto. The complaint fur-

¹ See note at end of case.

ther alleged that there was due the plaintiff, prior to January 1, 1896, the amount of the principal of said 17 bonds, and of all the interest coupons, with interest on the several coupons from the date of their respective maturities; that prior to and ever since January 1, 1896, the defendants were the trustees and directors of the Austin Consolidated Coal Company; that said corporation was required by law to make and file an annual report during the month of January, 1896, as of the 1st day of January; that said corporation and the defendants failed to make or file such report, by reason whereof the defendants became jointly and severally liable to the plaintiff for the debt due plaintiff by the Austin Consolidated Coal Company then and now existing, and thereupon judgment was demanded against each and all the defendants for the amount of the bonds and coupons, with interest. The defendants demurred to the complaint.

Section 30 of the New York stock corporation law (Laws 1890, c. 564, as amended by Laws 1892, c. 688) is as follows:

"Sec. 30. Annual Report. Every stock corporation, except monied and railroad corporations, shall annually, during the month of January or, if doing business without the United States, before the first day of May, make a report as of the first day of January, which shall state:

"(1) The amount of its capital stock, and the proportion actually issued.

"(2) The amount of its debts or an amount which they do not then exceed.

"(3) The amount of its assets or an amount which its assets at least equal.

"Such report shall be signed by a majority of its directors, and verified by the oath of the president or vice-president and treasurer or secretary, and filed in the office of the secretary of state and in the office of the county clerk of the county where its principal business office may be located. If such report is not so made and filed, all the directors of the corporation shall jointly and severally be personally liable for all the debts of the corporation then existing, and for all contracted before such report shall be made. No director shall be liable for the failure to make and file such report if he shall file with the secretary of state, within thirty days after the first day of February, or the first day of May, as the case may be, a verified certificate, stating that he has endeavored to have such report made and filed, but that the officers or a majority of the directors have refused and neglected to make and file the same, and shall append to such certificate a report containing the items required to be stated in such annual report, so far as they are within his knowledge or are obtainable from sources of information open to him, and verified by him to be true to the best of his knowledge, information and belief."

This section is, in substance, a re-enactment of section 12 of the act for the incorporation of manufacturing companies (Laws 1848, c. 40), under which a large proportion of the business corporations in New York were organized prior to the revision of the corporation laws in 1890. Section 24 of the stock corporation law is based upon section 22 of the former business corporations act (Laws 1875, c. 611), with material changes.

Albert T. Patrick, for plaintiff.

J. M. Perry and E. V. Abbott, for defendants.

WALLACE, Circuit Judge. The first question which the demurrer to the complaint presents is whether, in an action founded upon section 30 of the stock corporation law of this state (Laws 1890, c.

564, as amended by chapter 688, Laws 1892), it is necessary to allege that a judgment has been recovered and execution returned unsatisfied against the corporation in favor of the plaintiff. That section imposes upon the directors of a corporation which fails to make the annual report prescribed by it an individual liability for all the debts of the corporation then existing. It is urged for the defendants that the case of *Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338, is an authority in their favor, and they rely upon a recent decision by Mr. Justice Russell¹ to that effect. In *Bank v. Dillingham* the court held that an action brought to enforce the liability of directors pursuant to section 24 of the stock corporation law is a suit in equity, and can only be resorted to after the usual remedies against the corporation itself have been exhausted. That section is substantially identical in its terms with statutes which have been construed by the supreme court of the United States, by the courts of Massachusetts, and by the previous decisions of the courts of this state, as intended to create an equitable fund for the equal benefit of all the creditors of the corporation, to be resorted to after the ordinary remedies at law against the corporation itself have been exhausted and reached by a suit in equity in which all the creditors and the corporation itself are to be parties or represented. *Hornor v. Henning*, 93 U. S. 228; *Stone v. Chisolm*, 113 U. S. 302, 5 Sup. Ct. 497; *Bank v. Stevenson*, 10 Gray, 232; *Anderson v. Speers*, 21 Hun, 568; *McClave v. Thompson*, 36 Hun, 365. The section under which the present suit is brought is a reproduction of a statute which has always been construed by the courts of this state as giving to the creditors a several remedy by an action at law against the directors in the nature of a penalty. *Miller v. White*, 50 N. Y. 137; *Jones v. Barlow*, 62 N. Y. 202; *Rector, etc., v. Vanderbilt*, 98 N. Y. 170. And it has never been intimated previously to the decision by Mr. Justice Russell that in an action brought pursuant to this statute it was necessary to allege and prove the recovery of a judgment against the corporation. In *Rose v. Chadwick*, 9 App. Div. 311, 41 N. Y. Supp. 190, the appellate division of the supreme court held that in an action like the present it was not necessary to allege that a judgment has been recovered against the corporation, and that *Bank v. Dillingham* was not an authority to the contrary.

The other points urged in behalf of the demurrer are without merit. It was unnecessary to allege in the complaint that the several directors were stockholders during their term of office. If they were not, and if because of that fact they never became or ceased to be directors, the defendants will obtain the benefit of the fact upon the trial. It is not necessary to allege in the complaint facts showing the eligibility of the directors. The allegation that they were directors is sufficient.

The provision in the bond, the debt upon which the suit is founded, that "no stockholder of this company shall be individually liable on this bond, or in respect thereto," has no effect to relieve the defendants from their statutory liability as directors. It was not intended

¹ See note at end of case.

to provide against liability of that sort; and, if it had been, I cannot doubt it would be void as against public policy.

It is not necessary for the plaintiff to set out the specific consideration of the bond of the corporation on which the suit is founded. The bond itself imports a consideration, as business corporations have the general power to issue bonds; and if, in the present case, the corporation transcended its power in that behalf, that is a matter of defense.

The demurrer is overruled, with costs.

NOTE. *Manufacturing Co. v. Harriman* (decided at the special term of the supreme court of New York, December 31, 1896), 43 N. Y. Supp. 673. The opinion is as follows: "The plaintiffs seek to recover against two of the directors of the Reamer Lumber Company, a corporation, for goods sold to the corporation, without first having obtained a judgment against the principal debtor, and exhausting its remedies against that company. The liability of the directors is based upon section 30 of the stock corporation law (chapter 688, Laws 1892), which makes all the directors jointly and severally liable for all the debts of the corporation in case of failure to file a signed and verified annual report of the condition of the corporation as required by the statute. The court of appeals, in *Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338, has passed upon section 24 of the same act, making the directors personally liable for creating a debt whereby the total indebtedness exceeds the paid-up capital. The court in that case held the liability of the directors to be secondary in its character, and not enforceable until a judgment was first obtained against the corporation. It was also held that the liability of the directors created a fund from which all the creditors, in a proper suit therefor, might, if sufficient, be paid. The distinction in verbiage between sections 24 and 30 is not so marked, within the reasoning of the court of appeals, as to justify a trial court in allowing the prosecution of the liability of the directors under section 30 without first obtaining a judgment against the corporation. The two provisions of the different sections were designed to accomplish a common purpose which was to secure a fund out of which the creditors might be paid in case the directors failed to comply with the statutory regulations devised from considerations of public policy for the protection of creditors dealing with the corporation. In either case the creditors deal primarily with the corporation itself, give credit to the corporation, and should be permitted, in case they find that credit misplaced, to recover of the directors only in case of a demonstrated inability to collect of the corporation itself. A wide distinction must be observed between the reasons for holding stockholders and directors primarily liable for debts incurred before the capital is paid in, or the other steps taken which are necessary to complete the existence of the corporation itself,—for until that period arrives there is no real corporation in existence, which is the principal party dealing with the creditors,—and the cases of credits extended to the corporation itself after it becomes competent to transact business. It is also apparent by the provision of the stock corporation law that it is not designed to enforce any liability against stockholders after the full payment of their stock until judgment is obtained against the corporation itself, and directors must necessarily be stockholders to hold their office. The case of *Bank v. Faber*, 1 App. Div. 341, 37 N. Y. Supp. 423; *Id.*, 150 N. Y. 200, 44 N. E. 779, was decided solely upon the question of the effect of chapter 688, Laws 1892, as an implied repeal of chapter 564, Laws 1890. Judgment is therefore directed in favor of the defendants, sustaining the demurrer on the ground that the facts stated in the complaint do not constitute a cause of action, with costs, and with leave to the plaintiff to amend within twenty days on payment of costs."

TOWN OF DARLINGTON v. ATLANTIC TRUST CO.

(Circuit Court of Appeals, Fourth Circuit. January 14, 1897.)

No. 192.

MUNICIPAL CORPORATIONS—TAXATION—RAILWAY AID BONDS—SPECIAL FUND.

The charter of the town of D. authorized it to levy taxes, without limit, for the use of the town, and also provided that, if it should issue bonds in aid of a railroad, it might levy an additional tax, sufficient to pay the interest thereon, not exceeding 50 cents on the \$100 of taxable property. *Held*, that the special fund which might be created by such additional tax was not the sole fund for the payment of interest on the bonds, but, such bonds and the coupons thereon being debts of the town, the holders thereof were entitled to payment out of the general funds of the town, after exhausting such special fund, and the levy of a tax sufficient to pay such debts might be compelled by mandamus.

In Error to the Circuit Court of the United States for the District of South Carolina.

On January 4, 1896, the Atlantic Trust Company, a corporation of New York, filed in the court below its petition for a mandamus against the town of Darlington, a corporation of South Carolina, alleging that on September 31, 1894, it had recovered in the said court, against the town of Darlington, a judgment for the sum of \$6,873.60 and costs, the said judgment being for certain unpaid coupons due by the said town of Darlington; that demand had been made for the payment of the said judgment on the mayor and aldermen of the town, who failed and neglected to pay it; that there was no corporate property of said town subject to execution; that execution had been returned *nulla bona*; and that the petitioner had been unable to obtain payment of said judgment. The prayer was for a mandamus commanding the said town and the town council thereof to pay the judgment, interest and costs, and, if there were no sufficient funds in the treasury, then to levy a tax sufficient to raise the amount. The town of Darlington, in its return to the petition, for cause why the mandamus should not issue commanding a tax to be levied sufficient to pay the debt, set up that the coupons which were the cause of action upon which the judgment was recovered were interest coupons on bonds issued by the town of Darlington to aid in the construction of the Charleston, Sumter & Northern Railroad, in pursuance of an ordinance of the town passed under authority of an act of South Carolina amending the charter of the town, approved December 24, 1889; and that the town had no power to levy a tax for the payment of this debt, except a tax not exceeding 50 cents on each \$100 of taxable property. The case came on to be heard upon the petition and answer, and the court ordered the mandamus to issue, directing that, at the time of the next annual town tax levy, there should be levied and collected, in the same manner as other taxes, a tax sufficient in amount to pay the judgment, interest, and costs. The town of Darlington then sued out this writ of error.

In entering its decree, the court (Judge Simonton) filed the following opinion (63 Fed. 76), which fully states all the additional facts:

"This is a petition for a mandamus. The petitioner, the Atlantic Trust Company, obtained in this court a verdict against the defendant, the town of Darlington, and entered up judgment in the sum of seven thousand one hundred and ten and 62-100 dollars. 63 Fed. 76; *Id.*, 16 C. C. A. 28, 68 Fed. 849. Execution has been issued, and has been returned *nulla bona*. The officials of the defendant say that there is no money in the treasury to pay this debt. The causes of action on which judgment was obtained were coupons on bonds issued in aid of a railroad company. The plaintiff in execution now prays 'that a writ of mandamus may issue against the said town of Darlington, and against the city council thereof, commanding them to pay forthwith to the petitioner the amount due on said judgment, with interest and costs, and, in the event that there are at the present time no funds in the treasury of the said town of Darlington sufficient for that purpose, that the said town be ordered and directed by said writ to levy a sufficient tax upon the property of the said town for the pur-

pose of raising an amount sufficient to pay said judgment and interest thereon and costs.' This is the proper course in a case of this character, the mandamus being in the nature of an execution. *Chanute City v. Trader*, 132 U. S. 210, 10 Sup. Ct. 67.

"The answer of the defendant in execution sets up several defenses. At the hearing, these were abandoned except one. That is that under its charter the town of Darlington has power to levy but fifty cents on each one hundred dollars of the real and personal property assessed for and liable to taxation to pay interest on bonds issued in aid of railroads. It has been assumed, and it seems conceded, without, however, a statement of the figures, that such a levy would not pay this debt. The sole question in the case, then, is: Is the town of Darlington, by its charter, limited to the levy of an annual tax of fifty cents on each one hundred dollars of taxable property, for the purpose of paying interest on bonds issued in aid of railroads? The charter of this town is found in 18 St. at Large S. C. p. 923. In this act this section occurs: 'Sec. 16. That the mayor and aldermen shall have the power and authority to impose taxes each year for the use of said town, that is to say, not exceeding fifty cents on each one hundred dollars worth of real and personal property being in the limits of said town, except the property of churches, charitable associations and institutions of learning. The value of such real and personal property, for the purpose of taxation, shall be fixed and assessed as hereinafter provided.' The twenty-ninth section of the same act authorized the mayor and aldermen, upon being authorized thereto by a majority vote of the said town, to borrow money for the purpose of internal improvements, and to issue bonds or scrip therefor, at an interest not exceeding 7 per cent. per annum, and payable out of the taxes and income of the town. In 1889 (20 St. at Large, p. 504) this act was amended. In the sixteenth section was inserted a proviso as follows: 'Provided, that if the said mayor and aldermen should hereafter issue bonds for the purpose of aiding in the construction of railroads, then they may impose an additional tax to raise a sufficient amount to pay the interest on said bonds, which additional tax shall not exceed fifty cents on each one hundred dollars worth of real or personal property as above provided;' the concluding words of the sixteenth section, 'The value of such real and personal property,' etc., being retained. The twenty-ninth section was amended also, after the clause permitting the borrowing of money for internal improvements, and the issuing of bonds or scrip therefor, by the insertion of a proviso: 'Said principal of bonds and scrip shall at no time exceed \$5,000, except for the purpose of aiding in the construction of railroads and for that purpose the said mayor and aldermen may issue bonds or scrip in any amount.' Note that this authority to borrow was for internal improvement, limited as to all other modes of internal improvement to \$5,000, without limit as to railroads; thus recognizing railroads as in the class of internal improvements. The bonds to which the coupons in this case belonged were issued after the passage of this amendment. In 1891 this charter was again amended in several particulars. Those only requiring notice are these: Section 16 was amended in a peculiar way. The third section of the act declares: 'In section 16 strike out after the word town on 3rd line the words "that is to say not exceeding fifty cents on each one hundred dollars worth of," and insert instead thereof the words "on all." So that said section as amended will read: "Sec. 16. That the said mayor and aldermen shall have the power and authority to impose taxes each year for the use of the town on all real and personal property being in the limits of the town, except the property of churches, charitable associations and institutions of learning. The value of such real and personal property for the purpose of taxation shall be fixed and assessed as hereinafter provided."' It will be observed that this section is precisely like the original section 16 in the charter, except that the power of taxation is unlimited, and not confined to fifty cents on the hundred dollars. No notice whatever is taken of the act of 1889 and the proviso attached by it to this section. Indeed, the act of 1891 proposes to amend act of 1884, saying nothing of act of 1889.

"If it be concluded that, by the operation of the amending act of 1889, section 16 was eliminated from the act of 1884, and section 16 as amended inserted in lieu thereof, and that, by the operation of the amending act of 1891, section 16 of the charter reads as if in the act of 1891, this would end this question. Under the act of 1891, the town council would have unlimited power of taxation, with no reference to railroads or any restriction thereon. There is

much to be said in favor of this construction. The act of 1889 was intended to authorize the issue of bonds in aid of railroads, and applied to such bonds thereafter issued as an inducement to their purchase. The bonds were issued to an amount which exhausted the constitutional limit. At the time of the passage of the act of 1891 there was no necessity of this kind for the special railroad tax, and this act withdrew all restriction on the taxing power for the use—not the uses—of the town. The twenty-ninth section of the act of 1884 recognizes that bonds in aid of railroads are for the purposes of internal improvement of the town, and makes them payable out of the taxes and income of the town. In addition to this, it will be seen by an inspection of section 16, as amended in the act of 1891, it concludes with the concluding sentence of the acts of 1884 and 1889 complete, leaving out the limitation of the power to tax and the proviso also. But this construction may be doubtful. The act of 1891 does not repeal the act of 1889 in express terms. There are no repealing words in the statute. Repeal by implication is not resorted to except in cases of absolute necessity or patent inconsistency. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255; *Chicago, M. & St. P. Ry. Co. v. U. S.*, 127 U. S. 406, 8 Sup. Ct. 1194.

"It is not unreasonable to suppose that the legislature treated the charter of this town as containing a section 16, changed from its original language by the addition of the proviso with regard to bonds issued in aid of railroads, and that by the act of 1891 its purpose was simply to remove the restriction of the power to tax from fifty cents on the hundred dollars, and to substitute therefor unlimited power to tax; that, this being its purpose, it repeated only so much of amended section 16 as was changed, to show the change. We would then read the section as follows: 'That the said mayor and aldermen shall have the power and authority to impose taxes each year for the use of said town on all real and personal property being in the limits of said town, except the property of churches, charitable associations and institutions of learning; provided that if the said mayor and aldermen should hereafter issue bonds for the purpose of aiding in the construction of railroads, then they may impose an additional tax to raise a sufficient amount to pay interest on said bonds, which additional tax shall not exceed fifty cents on each one hundred dollars worth of real and personal property as above provided. The value of said real and personal property for the purpose of taxation, shall be fixed and assessed as hereinafter provided.' It may be noticed here that this act provides for an annual tax for the use of the town and for bonds in aid of railroads, the money to be raised and expended annually. So the provision clearly is for the annual or current interest. This view is strengthened by the limitation. The constitution limits this power of subscription to eight per cent. on the taxable values of the municipality. Public bonds draw six per cent. interest usually. Six per cent. interest on eight per cent. of taxable value is forty-eight cents on the one hundred dollars. Provision is thus made for the annual necessities of the town. If the provision is not acted upon, and the annual increment of interest is passed, then the past-due interest becomes a debt of the town, not to be provided for by the special annual tax, but by the provision made for raising money for the use of the town, an important use being the payment of its debts.

"The first question is: Is this provision for levy of a tax to pay interest on the bonds in aid of railroads the creation of a fund from which such interest shall be paid, involving the idea that it cannot be paid out of any other funds? There is no such provision in the act, and none can be fairly implied. The language of section 29, Acts 1889 (20 St. at Large, p. 504), is this: 'The mayor and aldermen may for the purpose of internal improvements borrow money, issue bonds or scrip therefor, bearing not a greater interest than seven per cent., payable at such times as they may think advisable, and payable out of the taxes and income of said town,' out of the taxes and income without qualification. Then comes the proviso, limiting amount for all other internal improvements except aid in the construction of railroads to \$5,000, and, for the latter purpose, putting no limit, but making no other change. So, in the proviso to sixteenth section, if said mayor and aldermen should hereafter issue bonds for the purpose of aiding in the construction of railroads, then they may (not shall) impose (not a special tax, but) an additional tax to raise a sufficient amount to pay the interest, etc. It is very clear that, if the taxes and income could pay this interest without resort to an additional tax, such tax need not be levied, or, if such interest could be paid in part without such additional tax, only so much of the additional could be levied to meet the deficiency.

In other words, this additional tax is additional security. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. See *U. S. v. Clark Co.*, 96 U. S. 214.

"*Macon Co. v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. 491, is a case on all fours with the present case. Huidekoper obtained a judgment on interest coupons of railroad bonds against Macon county. It was not paid. Under the mandate of the court, a warrant was issued upon the treasurer of the county for the amount of the judgment. It was presented for payment to the treasurer of the county, and payment refused for want of funds. The act incorporating the railroad company in whose aid the county bonds were issued authorized any city or town or the county court of any county to subscribe to the capital stock of this railroad company, and to issue bonds therefor, and to levy a tax to pay the same, not exceeding one-twentieth of one per cent. upon the assessed value of the taxable property for each year. The law of Missouri authorized the county court to levy and collect annually a tax of fifty cents on the one hundred dollars, in addition to this one-twentieth of one per cent. for the railroad bonds. The one-twentieth of one per cent. could not pay the judgment. The county authorities had not exhausted their power to tax for county purposes. The general tax levy being less than fifty cents on the one hundred dollars, a mandamus was asked for requiring them to levy a tax up to their limit, and to apply the proceeds of the levy, among other things, to this judgment. The court held that, after the application of the special tax of one-twentieth of one per cent. to the amount due on the judgment, the balance due thereon stood on the same footing as any other liability of the county, to be paid out of its general funds. *U. S. v. Clark Co.*, 96 U. S. 211; *Knox County Court v. U. S.*, 109 U. S. 229, 3 Sup. Ct. 131; *Macon Co. v. Huidekoper*, 134 U. S. 336, 10 Sup. Ct. 491. The levy was ordered.

"Accepting, then, the construction of the act contended for by the town of Darlington, it would seem that under the operation of the act of 1889, if the proceeds of the additional railroad tax were not sufficient to pay the sum due on the coupons, the court would order the money to be paid out of the fund derivable from taxes, and, if the town council had not exhausted their power under that act, it would compel them to go to their limit. But under the act of 1891 there is now no limit. The court, then, can order them, in making a levy, to provide for the sum due on this judgment, and this notwithstanding that the act of 1891 was passed after the bonds were issued. *County Court v. Hill*, 118 U. S. 71, 6 Sup. Ct. 951. Let the mandamus issue as prayed."

J. E. Burke, for plaintiff in error.

Augustine T. Smythe, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

PER CURIAM. We are entirely satisfied of the correctness of the reasoning and conclusions of the learned judge of the court below, and that the petitioner is entitled to the mandamus for which it prayed.

By the act of 1891 the mayor and aldermen of the town of Darlington were given power to levy taxes without limitation for the use of the town, so that there is no question of the power to levy the tax directed by the writ. The only question is as to the petitioner's right to have it levied to pay the judgment recovered on the coupons of its bonds. This question is settled by *U. S. v. Clark Co.*, 96 U. S. 211, which was followed in *Knox County Court v. U. S.*, 109 U. S. 229, 3 Sup. Ct. 131, and in *Macon Co. v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. 491, which cases hold that bonds and coupons of the kind sued upon by the petitioner are debts of the towns and counties issuing them, and that the holders are entitled to payment out of the general funds of the town or county raised for general use, after

exhausting the special fund directed to be levied for their payment, and that, where the town or county has the power to levy a tax sufficient to pay such a debt, it may be compelled to do so by mandamus. The judgment is affirmed.

THE PIONEER.

In re SIMPSON et al.

(District Court, N. D. California. February 5, 1897.)

No. 11,226.

1. MASTER AND SERVANT—DANGEROUS APPLIANCES—FELLOW SERVANTS.

A shipwright, at work in the hold, while necessarily going on deck by the forward hatchway ladder for purposes connected with his work, was struck on the head, as he emerged from the hatchway, by a barrel of cement, which was being swung in from the rail to be lowered into the hold, and was knocked from the ladder into the hold, and severely injured. A guy rope attached to the barrel was held by the mate, but he was looking in another direction at the time, and no warning was given. A general warning had been given at the hatchway when the loading began in the morning, but it was doubtful whether the shipwright was in position to hear it. *Held*, that no question of fellow servants was involved, but the case was one of breach of duty by the master to see that the places where his servant was compelled to go in the discharge of his duties were reasonably safe.

2. SAME—DUTY TO WARN OF DANGER.

An employer does not discharge his duty in keeping a place reasonably safe by giving warnings of threatened danger, when the employé charged with the duty of giving the warnings, is so engrossed with other duties that he cannot properly and efficiently give the warnings.

3. DAMAGES—PERSONAL INJURIES.

\$5,000 allowed to a shipwright, 48 years old, in good health, married, and earning \$94 to \$96 per month, for permanent injuries which destroyed the hearing of one ear, impaired his muscular sense, and rendered him incapable of doing any but light work.

This was a petition by A. M. Simpson and others, owners of the American schooner *Pioneer*, for limitation of their liability in respect to a claim by Robert Lynas for personal injuries sustained while engaged as a shipwright in making repairs to the schooner.

Brewton A. Hayne, for petitioners.

C. H. Fairall, for respondent.

MORROW, District Judge. This is the usual proceeding, under sections 4282-4285 of the Revised Statutes and the rules of the supreme court of the United States made thereunder (Gen. Adm. Rules 54-58), to determine and limit the liability, if any there be, of the owners of the American schooner *Pioneer* for certain injuries alleged to have been sustained by one Robert Lynas, while employed on said schooner. Lynas instituted, on November 25, 1895, an action in the superior court of the city and county of San Francisco, state of California, against the petitioners in this proceeding and one G. T. Morse, to recover damages in the sum of \$50,000 for certain injuries alleged to have been sustained by and through the negligence of the petitioners and G. T. Morse. It seems that the latter person was also a part

owner of the schooner, and that he has died since the institution of these proceedings. Thereafter, on January 27, 1896, the petitioners, desiring to avail themselves of the benefits of the limitation of liability act, filed in this court a petition for a limitation of their liability as owners of the schooner. Testimony was taken before the commissioner of the court as to the value of the schooner. The report of the commissioner showed that he found that the appraised value of the schooner, on the 25th day of August, 1894, the date of the alleged accident to Lynas, was the sum of \$12,000, and that no freight was pending on the schooner at that date. This report was confirmed by the court, no objection being made thereto; and subsequently a bond was given in the appraised value of the vessel. The usual monition was issued, directed to said Robert Lynas and his attorneys, and to all persons claiming damages for any and all loss, damage, or injury, caused by or resulting from the accident to said Robert Lynas in said petition mentioned, citing them to appear before Southard Hoffman, United States commissioner, and make due proof of their respective claims, at or before a certain day named in the writ, not less than three months from the issuing of the same, and also at said time to appear and answer the petition. The usual injunction was also issued restraining and enjoining the said Robert Lynas and his attorneys from the further prosecution of said suit in the superior court of the city and county of San Francisco, state of California, and all and any suits against said petitioners, or either of them, in respect to any claim for loss or damages occasioned, incurred or arising out of or in consequence of the accident to said Robert Lynas on the said schooner Pioneer as in said petition and the complaint in said action in said superior court alleged, either in the courts of the state of California, or in the United States courts, or elsewhere. Subsequently, on the 18th of March, 1896, the attorneys for Robert Lynas filed a motion and notice of motion to dissolve the injunction. After hearing duly had, this motion was denied. Thereafter, on June 1, 1896, Lynas filed, in this court, his claim for damages against the petitioners, and, on July 26, 1896, he filed his answer to the allegations of the petition. Upon the issues as thus made, testimony was taken and the case was submitted to the court for decision on November 13, 1896.

The salient facts of the case are as follows: The schooner Pioneer, owned by the petitioners, was lying, on the 25th of August, 1894, in the Bay of San Francisco, alongside a wharf or dock near Fourth and Channel streets, and, at the time the respondent Lynas was injured, was being loaded with barrels of cement or lime. The schooner lay with her port side to the wharf. The respondent Lynas was then in the employ of the owners of the vessel as a ship carpenter, engaged between-decks in making certain repairs in the forward hold of the vessel. These repairs consisted, for the most part, in strengthening the knees of the schooner, and refastening the ceiling, as far as it could be done, with big spikes. While engaged in this labor, with several other shipwrights, it was necessary for the respondent to come up on deck in order to cut pieces of iron into bolts of the desired length. This portion of the work could not be done

conveniently in the hold, on account of the floor being covered to a considerable extent with railroad ties, part of the cargo of the schooner. The pieces of iron referred to were located on the deck forward of the forward hatch. The respondent says they were on the starboard side of the vessel, while the captain states that they were more to the center of the deck. It was while coming up on deck through the forward hatch, on a ladder placed there for that purpose, in order to cut the pieces of iron into bolts of the proper length, that the respondent, just as he was emerging from the hold above the hatch coaming, was struck by a swinging barrel on the side of the head with such force that he was knocked down the hatch, falling a distance of about eight feet, fracturing his spine and skull, and otherwise being severely injured and bruised. The only practical method of getting on deck was by means of the ladder placed in the forward hatch. The size of this hatch was about 11x12 feet, and the ladder was about 18 inches wide, and rested, at the top, against a beam at the after side of the hatch, and was placed rather to the starboard side of the hatch. The beam against which the ladder rested ran across the hatch,—that is, athwartships,—and was about 18 inches below the deck. The respondent testified that the ladder was on the starboard side of the fore hatch; that sometimes it was right close against the starboard hatch coaming and at other times it was probably three or four inches off, or might have been a foot off; sometimes they would have to move the ladder around in the bottom; they used to change it a little, so as to get the barrels to roll around; it had quite a good slant. Witnesses for the petitioners testified on direct examination that the respondent could have reached the deck through the main hatch, but they had to admit, on cross-examination, that egress and ingress through the main hatch was impracticable, and this for the reason that the approach to this hatch was inconvenient and difficult, as there were several tiers of barrels stowed between the forward and main hatches. The first mate admitted that, in order to reach the main hatch, it would be necessary to crawl over the barrels. The evidence on this point shows clearly and beyond any doubt that the ladder in the fore hatch was the only convenient and practicable avenue of egress and ingress from the deck to the forward hold. In the language of the captain of the schooner: "The ladder was put down there to go up and down on. Mr. Lynas and the rest of the crew that were working used that ladder to go up and down on that morning." Upon the morning in question, the loading of barrels of cement had been going on from about 7 o'clock, and, according to the testimony of the second mate, some 30 or 40 barrels had been loaded prior to the accident, which happened about 8 o'clock, probably after 8 o'clock. The loading was being carried on across the port side of the vessel into the forward hatch. It appears from the testimony of the respondent that he had been told by the captain of the schooner, also a part owner and one of the petitioners, that he would not be interfered with in his work in the fore hold by the loading that was going on, and he had been urged to expedite his labors as much as possible so that that part of the hold might be utilized for stow-

ing purposes. The manner of loading consisted in rolling a barrel, on a plank from the wharf, up onto the rail of the vessel on the port side, when a strap was placed around the barrel, and a hook onto it with what is known in nautical parlance as a "single Spanish burton." By this means the barrel was hoisted. A guy rope was also attached to the barrel, the purpose of which was to steady the load, and control the swing of the barrel from the rail to the hatch. The barrel would be hoisted from the rail, and would swing in over the hatch coaming, when it would be lowered into the hold. The first mate and a man who assisted him attended to the loading on deck; the former handling the guy rope, and the latter doing most of the hauling on the burton, to raise the barrel from the rail. The second mate was stationed, as stated, in the hold at the fore hatch, to receive the barrels as they were lowered into the hold. The first mate testified that he often helped the man raise the barrel from the rail, and that when he did so he would make the guy fast to the rail, and, when a barrel had been swung over the hatchway, he would turn and go to the hatch. So far as the evidence discloses, the first mate and the man who assisted him were the only persons on the deck who managed the hoisting and swinging of the barrel over the hatchway after it had reached the rail. The captain testified that he had general supervision of the loading, but that the first mate had immediate charge of it. The dangerous feature of the loading to one coming up the ladder, as developed by the evidence, consisted in the swing of the barrel over the port side of the vessel from the rail to and over the hatchway; that is, it was dangerous to one who had not been warned that a barrel had, or was about to be, swung over and into the hatch. This danger was increased by the further fact that the swing of the barrel could not be stopped immediately. The barrels weighed about 300 pounds. The distance from the rail to the hatch was about 12 feet, while the guy rope was some 25 or 30 feet long. The danger of being struck by a swinging barrel, not only to one coming up the hatch unwarned, but to any one who might happen to be on the deck on the port side, and in the way of the barrel, is established by the testimony of the captain himself. He said: "If you are swinging in cargo over the port side, it is naturally dangerous. * * * When a barrel of cement swings in from the rail, you cannot fetch it up just in a minute, and it is bound to hit him." In reply to the question, propounded on cross-examination: "If you had hold of that guy rope, and were looking towards the hatch, could you not have stopped its swing at any moment?" he answered: "Not exactly; no, sir. Because it would swing in to the edge of the hatch coaming before you could; that is, pretty well in." He further testified as follows: "Q. Do you mean to say that if a man had hold of the guy rope, and from the time the barrel began to swing, that it would not be at all times under his control, so that he could stop it at any moment? A. He could stop it within a few feet. Q. Could he not stop it at any moment he saw fit, if he had perfect control over it? A. No, because it has got to swing off the rail. He could not stop it on the rail after it goes. * * * Q. If you had hold of that barrel at the beginning, could you not ease it

off, and stop it anywhere? A. It is impossible to do it where you are hoisting in cargo like that. When you hook onto this strap your guy does not come right straight with the rail; it has got a slant. A 300 pound barrel of cement is going to swing before you fetch it up. Q. How far will it swing? A. I should say it would swing four or five feet before you can fetch it up. Q. How far would it be from the edge of the coaming of the hatch,—four or five feet? A. That would be ten feet."

Under the above state of facts, two questions are presented to the court for its determination: (1) Whether or not there was any negligence on the part of the petitioners, their agents or servants, in the loading of the barrel of cement which struck the respondent; and (2) whether the petitioners, or any of them, had any privity or knowledge of the negligence, if it should be determined that there was any, which would make them personally liable. It is contended by respondent that the negligence consisted in the fact that he received no warning of the proximity of the swinging barrel which struck him; and, further, that the machinery and appliances used in hoisting and lowering the barrel, which struck him, were negligently and carelessly prepared, handled, and operated. On behalf of the petitioners it is contended that full and adequate warning was given, and that the appliances used for loading were properly prepared, handled, and operated, and that the accident to the respondent arose by reason of his own negligence in attempting to pass forward on the port side of the vessel, across which barrels were swung from the rail to the hatch, and as to which, it is claimed, he had been repeatedly and seasonably warned. I hardly think that the respondent has established that there was anything wrong or defective in the machinery or appliances used in loading. Some testimony was introduced on behalf of respondent for the purpose of showing that there was no guy attached to the barrel which struck the respondent; but this testimony will hardly justify such a conclusion. The witness, who testified that he rushed on deck immediately after the accident and that he did not see any guy rope, admitted that he was considerably excited at the time. On the other hand, the witnesses for the petitioners all agree that there was a guy rope on this particular occasion, the first mate swearing that he handled it himself. This ground of negligence will therefore be dismissed without further consideration.

Before disposing of the other ground of negligence urged, viz. the failure to give sufficient and timely warning, it is important to ascertain where Lynas was at the time he was struck by the barrel. The determination of this fact necessarily involves the question as to whether or not the respondent was guilty of contributory negligence in being in a place in which he should not have been at the time he was injured. In this connection it is claimed by the petitioners that the respondent, when he was struck, had stepped on deck from the hatchway, and, instead of passing directly forward by the starboard side, had taken the longer course by the port side—the dangerous side—of the vessel; and that he

had been cautioned not to attempt to pass on that side while the loading was progressing, in view of the imminent danger of being struck by the barrels as they were swung from the rail, across the port side, over to the hatch. The respondent positively and unequivocally testified that he was still on the ladder when he was struck; that he was going up the ladder; that when he was struck his head and body had emerged about $2\frac{1}{2}$ or 3 feet above the deck; that his feet were still on the ladder. None of the witnesses in the case pretend that they saw the respondent at the time he was struck, although the second mate says he saw him just before he was hit, and several of the other witnesses saw him immediately after he fell into the bottom of the hold. The second mate testified that he was engaged in receiving the barrels as they were lowered into the forehatch; that he noticed the respondent go up and come down once before he was hurt; that he saw him go up the time he was struck by the barrel; that he saw his whole body until he disappeared from the ladder; he saw him step off the ladder, but did not see him step off the beam, against which the ladder rested. He admits that he was not exactly watching the respondent, and that he could not swear where he stepped to. The beam referred to was, as previously stated, about 18 inches below the hatch coaming. So that, assuming that the testimony of this witness is accurate, the respondent would still have had to step from the beam onto the deck, when the second mate last noticed him. The first mate, who was supervising the loading on deck, and personally handled the guy rope, admits that he did not see the respondent when he was hit by the barrel; that he (the first mate) was looking away from the hatch at the time. It appears that he did not even know who it was that had been hit by the swinging barrel until he looked into the hold, and saw the respondent lying unconscious at the bottom. This testimony, in my opinion, is not sufficient to outweigh the positive and unequivocal testimony of the respondent Lynas that he was still on the ladder when he was struck. Besides, the inherent probabilities of the situation tend to support the statement of the respondent that he was on the ladder, and not on the port side of the schooner. In the first place, the pieces of iron, which the respondent had to cut to the proper length, and the place where they were being cut, were forward of the fore hatch, rather to the starboard side. It is conceded that, as the ladder was on the starboard side of the hatch, the shorter distance from the ladder to the spot, where the pieces of iron were, was by going forward on the starboard side of the vessel, and not by the way of the port side. It was further testified that the starboard side was clear. Now, it is highly improbable that the respondent should have taken the longer and more dangerous way around to reach the desired spot forward of the fore hatch; particularly so if he had been warned, as testified to by the first mate, that the port side was the dangerous side. In the second place, it would seem probable that if the respondent, as claimed, was actually passing from the ladder along the inshore or port side of the vessel, he would have noticed this 300 pound

barrel in time to get out of its way. Another significant fact, which tends to show that the testimony of the respondent that he was still on the ladder when struck is true, is that the rail from which the barrel was swung was about three feet above the deck. As testified, the barrel was swung from this rail, and was raised just a trifle to give it a swing. The respondent testified that his head was about $2\frac{1}{2}$ or 3 feet above the deck when he was hit, and that he was struck on the right ear. This would place his head directly in line with the barrel as it swung from the rail to and over the hatchway. On the other hand, had he been struck by the barrel while he was passing forward on the port side of the deck, the injury would have been on some lower part of his person. The petitioners meet this aspect of the case with the theory that the injury, which the respondent received on his head, was not from the barrel, but from the fall into the hold of the vessel; that the swing of the barrel merely pushed him over, and he fell into the hatchway; and that the injury was the effect of his fall head downwards on the railroad ties at the bottom of the hatchway. In my opinion, the serious injury he received was not of such a character as to be satisfactorily explained in that way. The injury was on the right side of the head, indicating a concussion from the effect of a side blow, but not from the effect of a fall, which would necessarily have involved other parts of the body. I conclude, therefore, that the respondent was still on the ladder when he was struck by the barrel, and that, as testified by him, the upper part of his body had emerged above the deck some three feet.

We now come to the question whether the respondent received any warning, and, if so, whether it was an adequate and a seasonable warning. The respondent testified that he received no warning of any sort from the first mate or any one else connected with the loading. It is true that one of his physicians testified that he had an impairment of hearing previous to the accident, and, as a direct result of the injury, he had lost entirely the hearing of the right ear, but it nowhere appears from the evidence that such impairment of hearing, as there was, seriously affected the respondent's ability to hear any warning that may have been given, provided he were within ordinary hearing distance. But, aside from this, the respondent is corroborated by three witnesses, all of whom were shipwrights engaged in working with the respondent in the forward part of the hold that morning. They all testify that they heard no warning. An attempt was made to contradict these witnesses by the testimony of the captain, first and second mates. But their testimony, at the most, simply amounts to this: that a general warning was given by the first mate when the loading commenced, or, to use the words of the second mate, the first mate came to the hatch, and "sang out" for the men in the hold to look out when they came up the ladder. "He did not tell us personally; he sung out to everybody." It is not claimed by these witnesses that warning was given every time a barrel was swung over the hatchway, nor that on the occasion when the respondent was hit by the barrel any warning was then given. The captain admits

that the warning was not given as each barrel was swung across to the hatch. The first mate states that he simply gave a general warning, intended for everybody. The second mate, in testifying about this general warning, stated that he heard the mate's warning but once that morning, and that that was when they had started loading; that the mate was at the after part of the hatch, on deck, when he sang out; that he (second mate) was right under the hatch; that the respondent at that time was working forward. In his direct examination he stated that the mate sang out loud enough for everybody to hear; that it was loud enough to hear 20 or 30 feet off, and that the respondent was within that distance. On his cross-examination, however, he contradicts himself, and states that the respondent was about 50 feet under the deck forward. If this be true, it is clear, according to the testimony of the second mate himself, corroborated by that of the three workmen who were working in the forward hold, that the respondent could not have heard the general warning given by the mate. Another view of this matter may be that the respondent did not hear the warning claimed to have been given by the mate because he was not then on board the schooner. The testimony of the second mate is, in effect, that the mate sang out a warning but once that morning, and that that was when the loading first commenced, which was about 7 o'clock. The respondent testified that he was somewhat late that morning and does not think he reached the schooner until 7:25 o'clock. If this be so, he could not have been in the hold of the vessel when the mate sang out his general warning. This would account for the otherwise irreconcilable conflict between the testimony, on the one hand, of the respondent, and, on the other hand, of the first and second mates. But assuming, for the purposes of the case, that a general warning was given, and that the respondent had heard it, still it is undisputed that no warning whatever was given that a barrel was about to be swung off the rail over to the hatchway the time he was struck. This, under the facts of the case, was negligence and carelessness on the part of those in charge of the loading. A general warning, assuming that the respondent heard it, and repeated cautions by the mate to keep away from the inshore or port side of the vessel, were of no utility or efficacy whatever to one who was passing up and down the ladder. The respondent could not know whether a barrel was about to be swung over the hatchway, unless he were warned. He could not ascertain that fact for himself until his head had emerged above the hatchway, which was just the point of danger. This impending danger required, so long as these shipwrights were at work in that part of the hold, and their work made it necessary for them to come up on deck through the fore hatch into which the loading was going on, that means should have been taken by those in charge of the loading, either to ascertain when some one was coming up the ladder, so that those on deck might be apprised of this fact, and regulate their actions accordingly, or else some one should have been stationed at such a place near the hatch that those coming up might be properly and seasonably warned that a

barrel was about to be swung from the rail over to the hatchway. The employer owes it as a personal duty to his employ  s to furnish them with a reasonably safe place to do their work in. As was said by this court in *Hermann v. Mill Co.*, 71 Fed. 853, with reference to the positive and personal character of this duty:

"It is undoubtedly true that the master assumes the duty towards his servant of providing him with a reasonably safe place in which to work; that this duty is a positive and personal one; and that, if delegated to a subordinate, it remains, nevertheless, in law, the act of the master."

The rule is clearly stated by Mr. Justice Brewer in *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 914, 921, as follows:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employ   in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employ   by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employ  , or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employ  s to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master."

See, also, *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535, and cases there cited; *Eingartner v. Steel Co.* (Wis.) 68 N. W. 664; *Anderson v. Bennett (Or.)* 19 Pac. 765; *McKinney*, Fel. Serv. 73, § 28; *Wood, Mast. & Serv.* 695, § 334; *Shear. & R. Neg.* (3d Ed.) p. 119, § 92; 7 Am. & Eng. Enc. Law, 830, and cases there cited.

Applying this doctrine to the facts of the case at bar, it is evident that the forward hatchway was not a safe place, within the meaning of the rule, when an employ  , while going up the hatchway, in the course of his employment on the vessel, was liable to be struck by a barrel swung over the hatchway, preparatory to its being lowered into the hold. That it was necessary for the respondent, in the course of his employment, to use the ladder in the forward hatch for the purpose of going up on deck and cutting the pieces of iron into bolts of the proper length, is affirmatively established by the evidence; and that those in charge of the loading were fully aware of and appreciated this fact is also clearly established. Some adequate provision should therefore have been made to protect the respondent from the danger that threatened him in the progress of his work. The evidence justifies the inference that not even a

lookout was kept on the hatchway, to see that no one emerged from the hatch while a barrel was being swung over to the hatchway. If the mate was so engaged in supervising and assisting in the loading that he could not personally give proper and timely warnings, another person should have been assigned to perform that function. The employer does not discharge his full duty, in keeping a place reasonably safe by giving warnings of threatened or impending danger, when the employé, charged with the duty of giving the warnings, is so engrossed and busied with his other duties that he cannot properly and efficiently give the necessary warnings. *Hermann v. Mill Co.*, supra; *Cheaney v. Steamship Co. (Ga.)* 19 S. E. 33. The case of *Hermann v. Mill Co.*, supra, while referring to and approving of this doctrine, is to be distinguished, as to the facts, from the case at bar. In the case cited I held that the employer had fully discharged his duty to his servant, so far as a safe place to work in was concerned, when he had furnished a competent person, unhandicapped by other duties, to give the warning signal.

In the view taken by the court, no question of the negligence of a fellow servant can arise in this case. The injury to respondent, under all the facts of the case, arose by virtue of the breach on the part of his employers, the petitioners, of a personal duty which they impliedly owed him, to see to it that the places on the vessel in which he was compelled, in the course of his employment, and by reason of the nature of his duties, to proceed to and from, should be reasonably safe and free from danger; and, having failed to fully and properly discharge this personal duty, it is such negligence as entitles the respondent to recover for the damages he proximately sustained thereby.

As the damages to be allowed will not, in any event, exceed the sum of \$12,000, the appraised value of the schooner *Pioneer*, it is unnecessary to consider whether or not the petitioners, or any of them, had any privity or knowledge of the breach of duty or negligence which would render them, or any of them, personally liable to the respondent.

We come now to the question of damages. The respondent, at the time he was injured, was 48 years of age; was a married man; enjoyed good health; was a shipwright by trade, and earned from \$94 to \$96 a month. He had been continuously employed for the past eight years. He was injured on the morning of August 25, 1894. Since that time he has not been able to work, except to do a little light work for a few hours. That he was severely injured is patent from the testimony of the two physicians who attended him. Dr. William P. Simpson, who was at the Receiving Hospital of the City and County of San Francisco when the respondent was brought there immediately after the accident, testified that "he was brought to the Receiving Hospital in an unconscious condition; hemorrhage from both ears; contusion at the base of the head; and he was unconscious." Dr. William B. Church testified that he was a regularly licensed physician and surgeon of the state of California; that he had practiced about thirty years; that he knew

the respondent for two years before he was injured; that he had been under his care for the past two years or thereabouts; that he saw him on Sunday morning, the next day after the accident; that he had him removed to his sanitarium on Jackson street, Oakland; that previous to the accident he knew the respondent to be a robust, vigorous, sound man; that his physical condition, at the time he testified (November 10, 1896), was one of partial physical disability; that he suffers from a partial impairment of the muscular sense,—that is to say, that sometimes he cannot tell whether he has hold of anything or not; that, by reason of this disability he cannot do work requiring special dexterity or nicety of manipulation; that his nervous condition is impaired; that he cannot control his emotions; that there was some impairment of hearing prior to the accident, but, as a direct result of the injury, he has lost the hearing entirely of his right ear; that he is unable to do hard manual labor, though he can perform light work; that, in the doctor's opinion, he will never be able to perform hard manual work again. To fix the quantum of damages, in cases of this character, is a question always more or less embarrassing. The court cannot arrive at an exact or precise determination; it can fix the damages only approximately. The verdicts of juries take a wide range, and afford but little assistance to the court. The general rule laid down by the text-books and authorities as to the measure of damages is that "in an action for negligent injury to the person of the plaintiff he may recover the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." Shear. & R. Neg. (3d Ed.) § 606; 14 Am. & Eng. Enc. Law, 915. In view of all the circumstances of the case, I shall allow the gross sum of \$5,000 as damages. A decree therefor will be entered, with costs.

HARDY v. SHEDDEN CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 431.

1. MASTER AND SERVANT—DANGEROUS PREMISES OR MACHINERY—KNOWLEDGE OF SERVANT—NEGLIGENCE OF THIRD PERSONS.

A servant has the right to rely on the master's taking due care to give him a safe place and safe instruments with which to do his work, provided, in the exercise of reasonable care on his part, he does not discover any defect himself. But where, in the course of the employment, the acts of third persons, not in the same employment, may increase the danger of the service, and these acts and their character are under the eye of the servant, and, to the servant's knowledge, are not subject to the supervision of the master, the master is not liable if injury results from the negligence of the third persons.

2. SAME.

Plaintiff was employed by defendant as driver of a truck. The officers of a grand army post hired the truck, with driver and horses, for the purpose of erecting on it a superstructure on which a number of young girls were to ride in a Decoration Day procession. The superstructure was built and placed on the truck by the officers of the post, and was not seen by defendant. In

placing it on the truck, a railing intended for the security of the driver was removed, and plaintiff was obliged to sit with his legs hanging over the front of the truck, very near the horses. While driving in this manner, a jolt, occasioned by driving into a rut, caused the superstructure to fall forward upon plaintiff, and throw him under the horses' feet, whereby he was injured. *Held*, that defendant, plaintiff's employer, was not liable for the injury so caused.

8. SAME.

Held, further, that plaintiff, though the general servant of defendant, was in this service the special servant of the grand army post, and it, and not defendant, was liable as master for any negligence in the construction of the superstructure which he was to use in his work.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Jay P. Lee, for plaintiff in error.

L. C. Stanley, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This is a proceeding in error to review a judgment for the defendant entered by the circuit court of the United States for the Eastern district of Michigan in a suit for damages for personal injury. William Hardy, the plaintiff in error, and the plaintiff below, was employed by the Shedden Company, the defendant below, and the defendant in error, as a driver of one of its trucks. The business of the defendant was managed by one William Anderson. On the 28th of May, 1891, two officers of the Grand Army of the Republic post at Lansing visited Anderson, and made a contract with him by which he agreed to let them have for two days one of his trucks, upon which they proposed to build a superstructure of seats, to be occupied by young girls in a Decoration Day procession to be held on the 30th of May following, and further agreed to send two of his drivers, with four horses, to haul the truck, thus loaded, in the procession. The superstructure was erected by mechanics, members of the Grand Army of the Republic post. Anderson had nothing to do either with furnishing the material or with supervising the work, and did not see the structure until after the accident about to be related. On the morning of the 30th, Anderson directed the plaintiff and another one of his drivers to take four horses, and hitch them to the truck, and to draw the truck to and from the cemetery to which the procession was going, under the direction of the executive committee of the grand army. The plaintiff knew that Anderson had nothing to do with the building of the superstructure, and thought correctly, as he says, "that the grand army folks had taken care of that." The superstructure had been placed upon an old truck lent for the purpose by the defendant. Upon the day of the procession the superstructure was changed from the old truck to the one usually driven by Hardy, and the railing or guard which was attached to Hardy's truck as a protection, and something against which he could brace himself, was removed by the G. A. R. men in order to make room for the temporary structure of seats. It does not appear that Anderson knew that this railing had been removed. The size of the structure and the number of young

girls carried required that the two drivers, one driving one team and the other the other, should sit forward on the truck, with their legs dangling very near to the tails of the horses of the rear team. They drove out to the cemetery, taking the route directed by the executive committee. As they came in sight of the cemetery, they drove into a rut in the road of a depth of from 6 to 12 inches. The jolt thus occasioned broke down the superstructure, and precipitated it against the drivers, who were just in front of it, threw them under the horses' feet, and frightened the horses into a run. The plaintiff was very severely injured, and his leg had to be amputated. At the close of the evidence of the defendant, the court below directed a verdict for the defendant on the ground that the defendant's obligation did not extend further than to see to it that the men employed in erecting the superstructure upon the truck were capable and skillful workmen, and that, as all the evidence tended to show that they were of this character, the plaintiff had failed to make a case justifying its submission to the jury.

We are of opinion that the jury was properly instructed, but we do not concur in the reason given by the court. It is well settled that a master is under an implied obligation to the servant to furnish him a reasonably safe place in which to render the services for which he is employed. But this obligation is not absolute, and circumstances may vary it. Where a driver is employed to drive a truck, he has the right to rely on the master taking due care to give him a safe truck, and a safe seat thereon upon which to ride, provided, in the exercise of reasonable care on his part, he does not discover any defect himself. But where, in the course of the employment, the acts of third persons, not employed by the master, may increase the danger of the service, and these acts and their character are under the eye of the servant, and, to the servant's knowledge, are not under the supervision of the master, we do not think the master is liable if injury results to the servant from the negligence of the third persons. For instance, where a servant is directed to take his truck to a distant point, and from there obtain a load of merchandise to be put on by the servants of the third person, and the merchandise is loaded so carelessly that in the return journey the driver suffers an injury from the defective loading, it seems clear to us that he cannot hold his master liable therefor. This is the law, because it is reason. Where the servant has greater opportunity than the master to know and observe the probable results from the acts of the third person, of which the master, to the knowledge of the servant, has had no opportunity to judge, then it is unreasonable to hold that, with respect to such acts, the master has any obligation to the servant. Of course, there are cases where the circumstances necessarily impose on the master the duty of supervising and inspecting the work of third persons which may subject the servant to risk and danger. Thus the loading of cars on a railway line is usually inspected by a railway inspector before it is received. But where there is no such inspection, and where, in the nature of things, there cannot be, the servant cannot hold the master for the work of third persons. The defendant company,

It is conceded, had nothing whatever to do with the materials or the plan of construction of the temporary platform. The company did not supervise it, and it was not intended by the grand army people that it should. The plaintiff below admits that he had no reason to believe that the superintendent of the company had taken any part in the erection or supervision of this structure. How, then, could he rely on an implied obligation that the master would see to it that this structure was not dangerous? He knew that the members of the grand army post were engaged in erecting it, and that he must rely upon their skill and care, rather than upon that of his master. We do not think the case would be different had he been directed to take his truck to the headquarters of the grand army post, and there had taken on board his truck a large number of girls or young women having with them camp stools or chairs upon which to sit. In such a case it is conceivable that the load might be so arranged by the executive committee as to cause an accident similar to the one shown here. The injury resulting would be caused by the members of the executive committee of the grand army post, and to them alone would the injured driver have to look.

We are further of opinion that this case comes within the class of cases of which *Nason's Adm'r v. Railroad Co.*, 22 U. S. App. 220, 9 C. C. A. 666, and 61 Fed. 605, is one. In that case a railroad company had rented to a bridge company its engine, its engineer, and its fireman, and while it was doing the business of the bridge company the plaintiff was injured through the negligence of the engineer. It was held that the railroad company, the owner of the engine, and the original employer of the engineer, could not be held liable for the injury, because, though the engineer was the general servant of the railroad company, at the time he was engaged in the business of the bridge company. A number of cases were cited to sustain this view. *Donovan v. Construction Syndicate* [1893] 1 Q. B. 629; *Rourke v. Colliery Co.*, 2 C. P. Div. 205; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691; *Miller v. Railway Co.*, 76 Iowa, 655, 39 N. W. 188. We do not see why the principle of these cases has not application as well to suits by injured servants against the general master as to suits by third persons against him. In the light of these cases the driver, the plaintiff below, though the general servant of the defendant, the Shedden Company, was doing the business of the grand army post, and was engaged as a special servant in its employ. In so far as the grand army post superintended the construction of that which went to make up the place in which the driver was to discharge his duties, to that extent the grand army post was liable to him for the injury resulting from their negligence, and his general master, the Shedden Company, was not. It is true that it is held in *Little v. Hackett*, 116 U. S. 366, 372, 380, 6 Sup. Ct. 391, in *Laugher v. Pointer*, 5 Barn. & C. 547, and *Quarman v. Burnett*, 6 Mees. & W. 499, 507, that where a man lets out a carriage on hire to another he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. But the present, we think, is clearly distin-

guishable from such a case, because here was not the ordinary hiring of a carriage for a trip, but it was the hiring of a truck to be built upon, so that its nature as a vehicle was changed, and then a separate hiring of the means of locomotion. This did, in our opinion, place the drivers under the control of the executive committee of the grand army post, and made that post, for the time being, the master of the driver. To it, therefore, must the driver look for indemnity for any injury suffered by him through the negligence of the post in altering and loading the truck. The judgment of the circuit court is affirmed.

DILL v. UNITED STATES.

(District Court, E. D. Pennsylvania. February 13, 1897.)

1. UNITED STATES MARSHALS—FEES—ATTENDANCE BEFORE COMMISSIONER.

The marshal is entitled to fees for attendance by deputy at examinations before a commissioner, though the deputy was paid for attendance on the same day on the district or circuit courts.

2. SAME—MILEAGE.

The marshal is entitled to mileage in going to serve warrants of removal and commitment, though he has been paid 10 cents per mile for transportation of the prisoner on the same warrant at the same time.

3. SAME—SERVING WARRANTS OF COMMITMENT.

The marshal is entitled to fees for serving warrants of commitment.

4. SAME—MILEAGE IN SERVING WARRANTS.

A commissioner issued a warrant at Harrisburg, Pa., to be served at Richmond, Pa. There being no deputy at Harrisburg, he forwarded the warrant to the marshal at Philadelphia, and it was served by going by the most direct route from there to Richmond. *Held*, that the marshal was entitled to mileage for this distance of actual and necessary travel, and not merely for travel from Harrisburg to Richmond.

5. SAME—MILEAGE—JURY SUMMONSES.

The marshal is entitled to mileage on each of a number of jury summonses served on different persons at the same time and place.

6. ATTENDANCE ON COURT ON SUNDAY.

The marshal is entitled to a fee for necessary attendance on court on Sunday.

7. SAME—COMPENSATION FOR GUARDS.

The marshal is entitled to be reimbursed for money actually paid for guards for prisoners attending court, where there is no provision for confining prisoners within two miles of the court rooms.

8. SAME—WARRANTS OF ARREST.

If more than one warrant is issued for one individual, the marshal must serve them separately, and is entitled to a fee for each service.

9. SAME—EXPENSES OF ENDEAVORING TO ARREST.

The marshal is not entitled to any sum, though actually expended by him in endeavoring to arrest, beyond the statutory fee of two dollars.

10. SAME—SERVING WARRANTS ON POOR CONVICTS.

The marshal is entitled to fees for serving warrants, etc., on indigent convicts to bring them before the commissioner.

11. SAME—RETURNS OF NIHIL HABET.

A marshal having made a charge of 40 cents each for returns of nihil habet, and it appearing that in the state practice two such returns were treated as equal to a service, *held*, that the charge should be allowed.

Petition of Catharine S. Dill, sole executrix of the last will and testament of Andrew H. Dill, deceased, praying judgment of the court

against the United States for the sum of \$758.16, claimed as due to her for services rendered by Andrew H. Dill as a marshal of the United States for this district.

The respective counsel representing plaintiff and defendant submit to the honorable court the following general statement:

It is agreed that the charges for mileage, expenses and rendition of services set forth in the petition filed are correct; that the expenses were actually paid, and the said services were actually rendered.

It is further agreed that all the items in the petition filed both for expenses incurred and fees earned were embodied in the various accounts of the said Andrew H. Dill, deceased, during the years mentioned in the said petition, which said accounts were examined and passed upon by the then U. S. district attorney and formally approved by this court. The various items of claim set forth in the said petition are grouped in the schedule hereto attached.

(1) Amount earned and not received for attending by deputy at examinations before a commissioner during years 1887 and 1888, \$328.

A United States marshal is entitled to charge for the attendance of himself and his deputies before United States commissioners on the same days on which circuit or district courts are in session and fees for attendance on these courts are charged and paid. *Saunders v. U. S.*, 73 Fed. 792; *U. S. v. Kerns*.

Counsel for the United States contends that said deputies were not entitled to said pay for the reason that on the days for which they charge for attendance before United States commissioners they were actually paid attendance upon the district and circuit court as bailiffs; that duplicate per diems are not authorized, and further that the treasury department has disallowed the charges embraced in this particular item of claim. It is however admitted that similar charges for attendance of deputy marshals under the same circumstances were subsequently allowed to Marshal Dill during the years 1889 and 1890, and have been allowed by the treasury department up to the present time.

(2) Amount earned and not received for travel in going only to serve warrants of removal and warrants of commitment during the years 1887, 1888, 1889 and 1890, \$141.18.

This charge is authorized by paragraph 25, § 829, Rev. St., viz.: "For travel in going to serve any process warrant, attachment or other writs six cents a mile to be computed," etc. If the disallowance is because a charge has been made for transportation of the prisoner this is not a valid reason. Paragraph 20 of section 829 provides: "For transporting criminals ten cents a mile for himself and for each prisoner and necessary guard."

In the case of *Tanner v. U. S.* (decided in the court of claims in 1889) 25 Ct. Cl. 68 (a case in point), Judge Davis said: "It appears that for fifteen years the accounting officers consistently construed the statute as authorizing the payment to the marshal of the two fees,—one for travel in the service of a warrant of commitment; the other for transporting the criminal named in the warrant. The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." The court found as conclusions of law that the claimant recover the sum of \$128.16 fees for mileage.

In the case of *U. S. v. Kerns*, U. S. Dist. Ct., August Sess. 1888, No. 4, this court allowed services for return mileage where marshal has secured or delivered a prisoner pursuant to warrant of arrest or removal. *Harmon v. U. S.*, 43 Fed. 560.

Counsel for the United States contends that this item of claim is unauthorized, as the statutes nowhere allow a marshal six cents per mile in addition to the ten cents per mile for transportation on the same warrant at the same time. The treasury department disallowed this item for this reason.

(3) Serving warrants of commitment in 1887, 1888 and 1889, \$60.

Saunders v. U. S., 73 Fed. 782, 792.

A mittimus for the commitment of a prisoner is a warrant for the service of which on such prisoner the marshal is entitled, under Rev. St. § 829, to a fee of \$2. In these cases writ was served upon the prisoner, not upon the jailer.

In *U. S. v. Kerns*, *supra*, the court allowed defendants charges for fees for

temporary commitments. Also, see *Turner v. U. S.*, 19 Ct. Cl. 629; *Heyward v. U. S.*, 37 Fed. 764; *Hoyne v. U. S.*, 38 Fed. 542.

Counsel for the United States contends that the claim in this item was disallowed by the treasury department, for the reason that the writ was served upon the jailer, and not upon the defendants. This item is composed of charges for service of warrants of commitment upon defendants where there was more than one defendant. The fee allowed by law for executing a warrant of commitment where two or more persons are committed under the same warrant is \$2.

(4) Travel,—deputy marshal in 1887 to serve at Richmond, Franklin Co., 190 miles, at 6 cents, making a total of \$11.40; of this amount \$5.04 allowed, being for 84 miles' travel from Harrisburg, where writ was issued,—\$6.36.

Having no deputy at Harrisburg at the time the warrant was issued the commissioner forwarded warrant to Marshal Dill at Philadelphia. The distance traveled was necessary to serve writ; the route taken was the most direct. The evident intention of congress was to give the officer 6 cents a mile for every mile actually and necessarily traveled by the most direct practical route in going to serve the writ. In *U. S. v. Kerns*, supra, this court entertained a question regarding the services of venires kindred to the above (in principle), and awarded full claim of mileage.

Counsel for the United States states that the original claim was for \$11.40. Of this amount the treasury department allowed the sum of \$5.04, being the mileage from Harrisburg, where the warrant was issued, to Richmond, where it was served, and disallowed the mileage from Philadelphia to Harrisburg for the reason that section 829, Rev. St., only allows a marshal mileage from the place where the warrant is served to the place where it was returned.

(5) Total amount of mileage earned and not received for travel in going only to serve jury summons during 1887–1888, \$24.82.

Section 829, par. 25, before quoted, provides: "For travel in going only to serve any process, warrant attachment or other writ, * * * six cents a mile. * * * But where more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation on only two of such writs." The jury summons in question, were all served upon different persons, and there is nothing in this paragraph restraining or controlling the journeys of the marshal or deputies in performing his duty. The mileage was clearly and legally earned.

Saunders v. U. S., 73 Fed. 783, and *Harmon v. U. S.*, 43 Fed. 560, decide that a marshal may charge for travel upon two or more writs against different persons served at the same time and place. This court allowed this claim in *U. S. v. Kerns*, supra.

Counsel for the United States contends that this is double mileage; that the marshal is only allowed for travel in service of one writ, although there may be a number in his hands and served by him at the same time and place.

(6) Andrew H. Dill claims for attendance as marshal upon the U. S. circuit court for the Eastern Dist. of Penna. on the 16th day of October, 1887, earned but not received, \$5.

This was Sunday and is a claim for actual attendance on court in charge of a jury that was deliberating on a verdict.

Counsel for the United States contends that October 16, 1887, was Sunday; that from the records it appears that the case of *Green v. Pennsylvania R. Co.*, No. 2, April Sess. 1887, was given to the jury on the preceding Saturday, and that on the day in question (October 16th) the jury were still deliberating, and their verdict was received on the following day—October 17th.

(7) Total amount actually paid to guards in charge of U. S. prisoners while in attendance on court during 1887 and 1888, and not received from the United States, \$92.

Section 830, Rev. St., provides that the marshal shall be paid among other items "his expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding courts within this district." During the years 1887 and 1888 there was no cage for the keeping of prisoners during the period of attendance upon court awaiting trial. It was absolutely necessary that the prisoners ordered up from the county prison should be guarded. This item represents money actually paid by the marshal, and the cause for the expenditure is certainly a contingency within the meaning of the section above quoted.

Counsel for the United States contends that no such charge for payment to guards is provided by the fee bill.

(8) Amount earned and not received for serving warrants to apprehend in 1888 and 1889, \$6.

This item represents two cases. In *U. S. v. Mull*, \$2. This was disallowed upon the claim that there were two warrants and defendant was in custody by virtue of the first already executed. There were two warrants issued by the commissioner, and the marshal took the defendant in custody on both of them and so returned the warrants. The defendant might have been discharged on one of the warrants and held on the other; therefore the marshal was entitled as much to the service of one as the other.

In the other case, *U. S. v. Brennan* (\$4), service was made on three persons. Service on one was allowed; service on the other two disallowed. The right of the marshal to receive for each and every person served has already been discussed. Rev. St. § 829, par. 25.

Counsel for the United States states that this item was disallowed by the treasury department for the reason that there were three cases in which the marshal served two warrants at the same time on the same defendants. The department allowed for service of one warrant only in each case, and refused to allow for the other, contending that one warrant was sufficient to apprehend the defendants.

(9) Total amount of actual expenses incurred in endeavoring to arrest, and not received during the year 1889, \$3.30.

The actual expense was \$5.30; all over and above \$2 disallowed. This represents money actually paid out by the marshal in necessary expenses, and this court sustained such a claim in the case of *U. S. v. Kerns*.

Counsel for the United States states that this is a charge for actual expenses incurred in endeavoring to make arrest for which the fee bill provides but the sum of \$2. The department allowed the \$2, but disallowed the \$3.30 as being an excess charge. See "Fee Bill," Rev. St. § 829.

(10) Total amount earned and not received for serving warrants, etc., on indigent convicts, in accordance with section 1042, \$34.70.

Allowance suspended until it is shown that there was a contest and what proceedings were had to constitute a contest. This character of claim is allowed by the court in the case of *Saunders v. U. S.*

Counsel for the United States states that this item was disallowed by the treasury department which contended that there was no necessity for bringing the convict before the commissioner on a warrant as the commissioner could give the indigent convicts hearings while confined in jail. It is however admitted that similar charges were subsequently allowed by the department and are still allowed.

(11) Charge for making 132 returns (at 40 cents) of nihil habet as to defendants in writs of scire facias to revive judgment and continue lien in 1889 and 1890, \$52.80.

Disallowed,—explanation desired as to the amount for each return 40 cents, and as to the meaning of return nihil habet. The government is placed in the same position by two returns of nihil habet as if the writ had been actually served. It is the practice of the sheriffs of the counties of the state to charge the same fees for two returns of nihil habet to a sci. fa. as for one service. This charge of 40 cents was made in conformity to the law of the state. In *U. S. v. Kerns*, supra, the court allowed fees claimed by defendant for services in endeavoring to arrest when no service was made.

Counsel for the United States claims this item was disallowed as unauthorized by the treasury department; and that technically such returns are of course no service upon the defendants. Nevertheless he admits that as upon two returns of nihil habet on the same defendant, the United States was placed in the same position as to such services as if actual services had been made, and for which the marshal would have been entitled to a fee of \$2 for each service.

(12) Total amount earned and not received for the service of subpoenas in 1888, \$4.

These charges suspended to know if prosecution was upon indictment. Certificate of district attorney was attached to the marshal's explanation, and there is no reason why this item should have been disallowed.

Counsel for the United States states that the treasury department disallowed

the same for the reason that the witnesses had already been subpoenaed in another case for attendance upon court for the same days, and therefore there was no need of service of subpoena the second time.

H. Merriam Allen, for plaintiff.

Michael F. McCullen, Asst. U. S. Atty., for the United States.

BUTLER, District Judge. The facts involved are agreed upon by the parties as appears by their statement filed. I will not discuss the questions presented by these facts, at length.

As respects the item of \$328 specified in the petition, "amount earned and not received for attending by deputy at examination before a commissioner during the years 1887 and 1888," I see no room for controversy. The question raised respecting this item, has been repeatedly passed upon by the courts and decided in favor of the plaintiff. Such claims, arising under similar circumstances, were uniformly paid by the treasury, without objection, until in 1887, when some especially astute clerk appears to have suggested a doubt on the subject, in consequence of which, this plaintiff's claims, as well as others, were rejected. After the expiration of a couple of years the treasury department appears to have changed its mind, and has from that time forward paid such claims. This claim, however, having been rejected, the department does not now feel itself warranted in paying it without suit. This item is allowed.

As respects the item of \$141.18, "amount earned and not received for travel in going only to serve warrants of removal and warrants of commitment during the years 1887, 1888, 1889 and 1890," much the same may be said. Such services were uniformly paid without objection, up to the date before stated, and this item in this claim was passed upon by the district attorney and approved by him for the United States, and allowed by the court accordingly, in the marshal's several accounts, as they were presented to the court for approval. The validity of this item of claim is covered fully by *Harmon v. U. S.*, 43 Fed. 560.

As respects the item of \$60, for "serving warrants of commitment in 1887, 1888 and 1889," I feel no hesitation in allowing it. Such services were always allowed prior to the date referred to, and such allowance seems to be fully warranted by the language of the statute and the discussions of the courts, notably *Saunders v. U. S.*, 73 Fed. 782.

As respects the item of \$6.36, "traveling expenses or fees for serving warrants," the charge seems to be proper and should be allowed. The travel here was actually necessary and the claim is clearly within the spirit, if not within the strict letter, of the statute.

As respects the item \$24.82, "for mileage in serving jury summons in 1887 and 1888," nothing need be added to what has already been said in speaking of other items of the plaintiff's claim. See, also, *Saunders v. U. S.*, 73 Fed. 782.

As respects the item of \$5, "for marshal's attendance upon U. S. district court on 16th day of October, 1887," there is no valid

objection to its allowance. The services were rendered, and the charge is in strict pursuance of the statute. It appears to have been stricken out of the account by the department because the 16th was a Sunday. This fact is immaterial. The attendance was necessary, and the marshal was required to perform the service.

As respects the item of \$92, "amounts actually paid guards of the United States prisoners while attending court," it is admitted for the United States that this money was paid for guards at a time when no provision existed for confining prisoners in the court apartments or anywhere nearer than the Philadelphia prison, which is two miles distant, and that the guards were, therefore, necessary. I think a liberal and just construction of section 830 of Revised Statutes covers this item and that justice requires such a construction to be made.

As respects the item of \$6, for "amount earned and not received for serving warrants to apprehend," the objection is founded on the fact that two warrants were served on each of the individuals arrested. The amount claimed for the service of each warrant conforms to the terms of the statute, and as the statute provides this compensation for the service of warrants, without reference to the number which may be issued against the same individual, I do not see any force in the objection. If several such are issued the marshal must serve them separately, and when he does so he is entitled to the compensation provided for each service. This question appears also to have been passed upon in *Harmon v. U. S.*, 43 Fed. 560.

As respects the item of \$3.30, "amount of actual expenses incurred in endeavors to arrest," I think the department is right in disallowing it. The charge was in excess of the sum named in the statute for such expenses and the plaintiff was consequently allowed \$2 as the statute provides. He might possibly have sustained a charge for services and travel in endeavoring to make the arrest, then contemplated, but he has not presented such a charge.

As respects item \$34.70, "amount earned for serving warrants, etc., on indigent convicts," the same is allowed as just and proper and is sustained by *Saunders v. U. S.*, *supra*.

As respects item \$52.80, charged for "making 132 returns (at 40 cents) of nihil habet," I do not find, in the statute, any language which is directly applicable to this subject. If the process had been served the marshal would have been entitled, under the statute, to a charge of \$2. No provision is made for an unsuccessful effort to serve and a return of nihil habet. The practice of treating two returns of nihil habet as equal to a service is peculiar to this state, and the national fee bill does not, therefore, contemplate such cases; but inasmuch as the ineffectual efforts to serve and the consequent returns are treated as equal to a service, and as the marshal must make these efforts and returns without compensation unless he is paid as for a service, it seems allowable and just, so to pay him, and I think therefore, the marshal might have charged \$2 as for a service and return instead of 80 cents, as he has done. Since the rejection of this item, the department, on ex-

planation of the practice in this state and the effect of two such returns here, allowed \$2 for this service and the returns and have continued to do so ever since. The item is, therefore, allowed as charged.

And now, to wit, February 12, A. D. 1897, a judgment is awarded plaintiff in above case for \$754.86, the aggregate of items of claim allowed as above, together with costs.

HAHN v. ERHARDT, Collector.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—PROTEST—SIMILITUDE CLAUSE—PRECIOUS STONES.

When an importer intends to rely upon the similitude clause of the tariff act for the purpose of identifying his merchandise with some enumerated article of the tariff schedules, and means to place his objection to the action of the collector on the ground that the collector has not given due effect to that provision, he should state the fact in his protest; and, if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute. Accordingly, *held*, that a protest, claiming that the articles in question were dutiable under the provision of the tariff act imposing a duty on precious stones, was insufficient to raise the question whether such articles should have been classified as precious stones by force of the similitude provision of the act.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Comstock & Brown (Everit Brown, of counsel), for plaintiff in error.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an action to recover duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon certain importations made by the plaintiff in the year 1889, consisting of cane heads, paper cutters, glove-hook handles, paper weights, etc., composed, some of rock crystal, some of agate, and others of onyx. The articles were classified by the collector and subjected to duty under that provision of the tariff act of March 3, 1883, prescribing that there should be levied, collected, and paid on the importation of "all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of 20 per centum ad valorem." The ground of objection specified in the protest of the plaintiff was that the articles were dutiable under that provision of the act subjecting to a duty of 10 per cent. ad valorem "precious stones of all kinds." Upon the trial the plaintiff offered evidence for the purpose of showing "that the articles in suit were substantially similar in their material, in their quality, in their texture, and in the uses to which they may be applied, or in some one or more of these particulars, to the general class of articles known in trade and commerce at and prior to March

3, 1883, as "precious stones." The court excluded the evidence upon the objection that the protest was insufficient to authorize a recovery under the similitude provision of the tariff act. The ruling was duly excepted to, and its correctness is challenged by the assignments of error.

The case presents the single question whether, under such a protest, the importer could be permitted to claim that the duties were erroneously exacted because his importations should have been classified as precious stones by force of the similitude provision of the tariff act.

The statute which precludes an importer from recovering duties which have been erroneously exacted, unless he has made a protest in writing, "setting forth distinctly and specifically the grounds of objection," has always been construed as requiring the objection to be so distinct and specific as to advise the collector exactly what the error complained of is. "Technical precision is not required, but the objections must be so distinct and specific as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." *Davies v. Arthur*, 96 U. S. 148.

The similitude provision is intended to prescribe the duty to which articles are to be subjected that have been omitted in the enumeration of dutiable articles in the schedules of the tariff laws. It has no application when the imported article can be identified with any of those described in any of the schedules. If the importer asserts in his protest that his merchandise belongs to the category of enumerated articles, he asserts by implication that its dutiable character is not to be ascertained by reference to the similitude provision.

The similitude provision creates a test or criterion for ascertaining whether, although the article is not enumerated, it is nevertheless better capable of identification by reason of similarity in one or more specified particulars with some one rather than with any other enumerated article, and subjects it to the same rate of duty imposed upon the enumerated article which it most resembles. In one sense, it is a rule of construction for the guidance of customs officers; but its application always involves an inquiry of fact,—the determination of the question, depending more or less upon expert knowledge, whether, in material, in quality, in texture, or in the use to which it is to be applied, the article more nearly resembles one enumerated article than another.

The protest in the present case would naturally lead the collector to inquire whether the importations were "precious stones," in the commercial acceptation of that term; and certainly it would not give him notice that the importer intended to claim that, although they were not precious stones, yet, because they were of the same material, or because they were capable of the same use, they more nearly assimilated to precious stones than to any other enumerated article.

We conclude that in all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff schedules, and means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision, he should state the fact in his protest, and, if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute. It follows that the ruling in the court below was correct, and that the judgment should be affirmed.

DIAMOND MATCH CO. v. HANOVER MATCH CO. et al.

(Circuit Court, E. D. Pennsylvania. January 15, 1897.)

No. 33.

1. PATENTS—COMBINATIONS—MATCH-MAKING MACHINE.

The Sisum patent, No. 281,408, for a "machine for bundling match sticks," shows a patentable combination as to claim 1; and, as to claim 10, is to be as broadly construed as its terms will fairly admit, and infringement is to be tested by a liberal application of the criterion of substantial equivalency. These claims, accordingly, held valid and infringed.

2. SAME.

The Donnelly patent, No. 292,474, for a "match-making machine," held to show patentable novelty and invention as to claim 2, and also held infringed.

This was a suit in equity by the Diamond Match Company against the Hanover Match Company and others for alleged infringement of two patents relating to machines for bundling match splints.

Lysander Hill, Prindle & Russell, and B. H. Lowry, for complainant.

Geo. Harding and Geo. J. Harding, for respondents.

DALLAS, Circuit Judge. This is a suit upon two patents, both of which relate to machines for bundling match splints preparatory to dipping them into an ignitable compound.

1. Patent No. 281,408, dated July 17, 1883, was issued to William H. H. Sisum for "machine for bundling match sticks." The first and tenth claims are involved. The first is as follows:

(1) The combination, with a hopper having its front or back, or both, provided with a pivoted lower section or sections, and a roller arranged therein for carrying the match sticks from the hopper, of means for imparting a positive and constant vibrating or swinging motion to said section or sections in a direction transverse to the length of said roller, substantially as specified.

It is contended that this claim is void, but the argument in support of that contention, though presented with much ability, has failed to persuade me that the presumption in favor of the validity of the claim has been rebutted. It is insisted that each of the elements were old; but, if this were conceded, yet, as for a combination, this claim would still be good. I cannot agree that coaction of the several parts is not shown, or that their co-operation to produce a unitary result was not contemplated. The ultimate end in view was the proper delivery of the splints to a device employed at a succeeding

stage of the general process. To facilitate this, their right delivery to, and reception by, the roller forming the bottom of the hopper was of importance, and to this immediate purpose the hopper and the roller were both made to lend their aid. It is said in the respondents' brief that the function of the pivoted section of the hopper is to deliver the match sticks to the roller, and that that of the roller is to deliver them from the hopper; but the fact is that their proper delivery is not a distinctively twofold operation, but is really secured, as a whole, by the combined action of both instrumentalities, which, by reason of their conjoint operation, both contribute to the achievement of the desired object. This is clearly shown and explained by the complainant's expert, from whose testimony I adopt the following: "The combination expressed in claim 1 of the Sisum patent, being for elements combined and co-operating with each other 'substantially as specified' in the specification and drawings, includes not only 'hopper, having its front or back or both provided with a pivoted lower section or sections,' and 'means for imparting a positive and constant vibrating or swinging motion to said sections' of the hopper, but it also includes, as 'a roller arranged' with respect to the hopper 'for carrying the match sticks from the hopper,' such a roller as is shown in the patent, to wit, one which is provided with notches or grooves across its periphery at intervals, and each adapted to receive and carry a single match stick therein. The arrangement referred to in the claim is also substantially the arrangement shown in the drawings in which the periphery of the notched roller forms a part of the bottom of the hopper, and in which arrangement the match sticks contained in the hopper tend by their gravity to enter the notches in said roller. The arrangement of the roller with respect to the hopper, referred to in the claim, further includes—First, the close proximation of the hopper to the roller face, whereby the match sticks have no escape from the hopper except by way of the notches; and, second, the parallelism of the notches in the periphery of the roller with the vibratory lower section or sections of the hopper. In this particular relation of the roller notches with the vibratory side or sides of the hopper there is a special coaction or co-operation of such vibratory side or sides of the hopper with the walls of the notches in the roller, the walls of said notches acting as shoulders in opposition to the approaching side of the hopper, in that one of its movements, so that, by the resisting action of the notched shoulders and the pushing action of the hopper side or sides parallel with said notches, the match sticks thus acted upon from both sides are more effectively distributed in the notches ready to be carried out of the hopper for spaced distribution in the bundle or coil which it is the ultimate purpose of the machine to produce. This combination is nowhere to be found in the prior art of match bundling, or in any analogous art, or in any of the machines belonging to more or less remote arts, and represented in defendants' patent and publication exhibits in this case." The claim is, in terms and in fact, for a combination. The pivoted and vibrating section of the hopper is not, in itself, the entire provision for the proper delivery of the match sticks. That element of

the combination is, it is true, first described in the specification, and it is there said that the swinging section "facilitates the proper delivery"; but delivery and reception constitute a single continuous act, and in its reception of the splints the notched roller, "arranged therein" as shown in the specification and drawings, also plays a part in accomplishing the purposed end; and its function is not, in this regard, a distinct one, but is performed conjointly with that of the peculiar hopper, and it is by their combination—not solely by either—that the single object of the composite organism is effected.

The tenth claim of the Sisum patent is as follows:

(10) In a machine for bunching match sticks, the combination, with a hopper in which the match sticks are placed, of a roller having a notched periphery rotating in the hopper, and fingers normally extending into circumferential grooves in the roller, and adapted to be raised to preclude the entrance of match sticks into the notches of the roller, substantially as specified.

The defense as to this claim is noninfringement; and, as bearing upon that issue, two questions are primarily presented, namely, as to the true date of actual invention, and as to the scope which should be accorded to the claim, in view of the state of the art at that date. The uncontradicted evidence respecting the first of these questions is conclusive. I find that the invention of Sisum was made not later than in the year 1875. Three patents of still earlier date are relied upon, not as anticipatory, but as requiring the limitation of this claim to the specific mechanism described. It is not necessary to discuss these patents in detail. They all relate to different arts, none of which is, in any reasonable sense, analogous to that of the manufacture of matches. One is for a brush-making machine, another is for an improvement in cotton gins, and the other relates to grain bundling. They disclose nothing which could have been successfully applied to the coiling of match splints, or which it is at all probable would ever have suggested to any one a device designed "to preclude the entrance of match sticks into the notches of the roller." *Taylor v. Spindle Co.*, 22 C. C. A. 203, 75 Fed. 301 et seq. Therefore this claim is to be as broadly construed as its terms will fairly admit of, and infringement is to be tested, not solely with reference to absolute identity of parts, but by a liberal application of the criterion of substantial equivalency of the combinations. This view of the matter is decisive; for, notwithstanding the structural differences between the arrangement of the complainant and that of the defendants, they are, so far as is material, the same. The variations may be sufficiently stated in few words. The notched roller of the patent in suit is changed by the defendants into what, in the Moul patent,—which, admittedly, represents the defendants' machine,—is several times designated as a "two-part feed roller," which is also notched; and, for the Sisum "fingers normally extending into circumferential grooves in the roller," there is substituted what is called "a plate," which is placed in the space between the two parts of the roller, and adapted, like the Sisum "fingers," to be operated to prevent, as and when required, the sticks from entering the notches of the roller. That the two contrivances accomplish precisely the same beneficial result is unquestionable, and that they do so in substantially the same way

is almost equally obvious. It is insisted that the respondents' mode of construction is better and less expensive than that of the complainant, and this may be true, but it is still none the less true that the two machines themselves are, in principle, identical. In the open space between the "two parts" of the defendants' roller we have but the "grooves" of Sisum, reduced in number and enlarged in dimensions; and in the "plate" of the defendants we have the two "fingers" of Sisum, so webbed or consolidated as to comprise them both in an apparently single and broader one. To hold that infringement may be avoided by such deviations as these would be to measure the plaintiff's right by a rule more restrictive than any which, in my opinion, is appropriate to this case.

The defense of abandonment cannot be sustained. It was not pleaded, and it has not been proved. It is rested solely on the testimony of Sisum himself; but he has positively denied that actual abandonment was ever intended, and his explanation of the delay which occurred in making his application is neither incredible nor inconsistent with the continuing purpose, which, under oath, he asserts he always entertained of securing a patent. There is no evidence whatever upon which a finding of constructive abandonment could be based.

2. Patent No. 292,474, dated January 29, 1884, was issued to Charles J. Donnelly and John M. Donnelly for "match-making machine." The only claim of this patent upon which a decree is asked is as follows:

(2) In a match-making machine, the combination of a hopper for the splints, a pocketed drum adapted to revolve partially within the said hopper and to remove the splints separately or one by one from the same, and tapes to remove the splints from the said pocketed drum, and at the same time clamp them so that they may be wound into a coil, substantially as specified.

The gist of this claim lies in the combination of the tapes directly with "the pocketed drum adapted to revolve partially within the said hopper," and the omission from the mechanism of the second or supplementary notched drum and of the transferring devices connected therewith, which had previously been deemed essential. The position taken by the respondents is that this arrangement lacked invention and novelty, in view of machines shown and described in certain prior patents; and the complainant's expert, when first examined, undoubtedly supported this view, but subsequently, upon more thorough investigation and consideration, he reached a different conclusion, and testified that, in his more deliberate and better founded opinion, the combination claimed exhibits both novelty and invention. This departure in his testimony has been, not unwarrantably, animadverted upon by counsel for the defendants; but I would not be justified in discrediting the witness merely because of his admission that he had, in the first instance, fallen into error, and, as I entirely concur in the opinion which he finally expressed, that opinion must, of course, prevail. The simplification of the mechanism, and the reduction in the number of its parts, provided for by the invention of the claim in suit, constituted an improvement in match-making machinery of much utility, and none of the patents set up give the slight-

est intimation that any one had ever before devised any means by which this desirable change could be successfully made. The only one that shows anything of the sort is a certain French patent, which, though issued as long ago as the year 1857, has itself never been reduced to an operative machine, nor led to the production of any device which is operative. Indeed, this patent presents a quite persuasive argument in support of the Donnelly patent; for it is pregnant of the fact that although, in 1857, the want now met by the Donnelly invention had been plainly perceived, it was so difficult to meet it that the effort then made to do so turned out to be abortive, and, until the Donnellys took the field, was not renewed. Upon the first and tenth claims of the Sisum patent, and the second claim of the Donnelly patent, decree for complainant.

DUFF MANUF'G CO. v. FORGIE.

(Circuit Court, W. D. Pennsylvania. February 1, 1897.)

PATENTS—INTERPRETATION OF CLAIMS—INFRINGEMENT—JACKING APPARATUS.

The Barrett patent, No. 455,993, for improvements in "lifting jacks," which are also adapted to produce horizontal motion, the said improvement being based on the principle of a yielding, as distinguished from a rigid, tripping plate, construed, and *held* infringed as to claims 1 and 6, by a jacking apparatus designed to produce horizontal circular motion for the purpose of unscrewing oil-well tools, which apparatus, though different in form, in its principle, design, and functional purposes embodies the substance of the invention.

This was a suit in equity by the Duff Manufacturing Company against William Forgie for alleged infringement of a patent. The cause was heard on complainant's motion for a preliminary injunction.

Kay & Totten, for complainant.

W. L. Pierce, for defendant.

BUFFINGTON, District Judge. This motion for a preliminary injunction is based on two patents, viz. No. 455,993, issued July 14, 1891, and No. 527,102, issued October 9, 1894, to Josiah Barrett, assignor to the complainant company. As respondent's answer consents to a decree as to the latter, we confine our attention to the former, patent. It was before this court in *Manufacturing Co. v. Forgie*, 57 Fed. 748, where Mr. Forgie attacked its validity on the ground of prior invention by himself. On the *prima facies* of the patent, priority was adjudged to Barrett, and subsequently thereto an interference proceeding, which was then pending between them, was decided by the patent office in his favor also. In that case it was sought to restrict the claims to a lifting jack. It was, however, held that, though the drawings illustrated "lifting jacks" only, the explanation of that term in the specifications, viz. "by such terms it is, of course, to be understood that the invention includes any device embodying its principle, whether the pow-

er is exerted in a vertical, horizontal, or other line," brought the case within the spirit of the decision in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, and that the use of the device shown in the patent on the stationary, curved, horizontal, toothed track of an oil-well jack constituted infringement, and an injunction was granted. Shortly thereafter, about December, 1893, respondent made application to court stating he intended manufacturing and selling a new form of oil-well jack which he proposed to exhibit to the court, and prayed its opinion whether it infringed the patent. In accordance with its practice in that regard (*Edison Electric Light Co. v. Westinghouse Electric & Manuf'g Co.*, 54 Fed. 504), the court declined to express any opinion, and the application was not pressed. During the three years ensuing Mr. Forgie made no jacks of the proposed type. He has lately done so, and begun their sale; whereupon this bill was filed, and a preliminary injunction prayed for. The validity of the patent having been already sustained, the only question now before us is infringement. *Norton v. Can Co.*, 57 Fed. 929; *Spindle Co. v. Turner*, 55 Fed. 979.

In view of the fact that the entire art of applying a jacking mechanism to oil-well drilling has been developed by Barrett and Forgie, that such art is confined to comparatively narrow limits, and that the whole of it is now before us as fully as it would be on final hearing, we have felt constrained to dispose of this question of infringement at the present time, instead of following our inclination to postpone such action until final hearing. The very fact that respondent has allowed the device now before us to lie dormant and unused for the three years just passed shows that an injunction can do him no irreparable injury, while to remand the complainant, under the facts hereafter noted, to the delay of a final decree, is to put his trade in such shape that the wrong done him in the meanwhile could not be righted even by a final decree in his favor. While, at first view, the case seems involved, the mechanism complicated, and the two types of jacks quite different in form, yet a closer study shows that, stripped of irrelevant matter, the question at issue is a narrow one, the mechanism, when understood, comparatively simple, the difference between the jacks one of form and not of substance, and the consequent right to a preliminary injunction clear. Such being our conclusion, we deem it proper to set forth at some length the reasons thereto moving the court.

The case in hand concerns the application of jacking mechanisms to the drilling of oil and gas wells. A brief account of that art, and the use of such mechanisms therein, will be found in *Forgie v. Supply Co.*, 57 Fed. 742, and *Manufacturing Co. v. Forgie*, Id. 748. From these cases it will be seen that the first mechanism employed was based on the lifting-jack device shown in Barrett's patent of February 17, 1885, No. 312,316. Briefly stated, this jack consisted of a rigid tripping plate provided with lugs. It was adapted to be so changed in position that its lugs were thrown into engagement with two levers. These latter were pivoted on the side of, and connected by intermediate springs with, two pawls,

which were themselves pivoted on different sides of the pivotal point of a hand lever. The unpivoted ends of the pawls were adapted to alternately engage notches in a lifting bar. When the levers, actuated by the motion of the hand lever, engaged the lugs on the rigid tripping plate, they yielded, and stored spring power so as to throw the pawls alternately out of engagement with the toothed lifting bar. The only uses originally contemplated for the device were lifting and lowering. It was designed and constructed with a view to vertical use alone. Although its general features were afterwards employed in its adaptation in a horizontal plane to use in oil-well jacks, yet, as we have said, the device was not structurally designed (and, as subsequent events showed, not mechanically fitted) to meet the full requirements of a use differing from the original conception. The difference between its employment in vertical and horizontal planes was stated by Judge Greene, speaking for the circuit court of appeals in *Manufacturing Co. v. Forgie*, 8 C. C. A. 264, 59 Fed. 775, where he said: "The aim of the one was readily to communicate force; the design of the other was positively to resist force." It is true the application of the general principle of the Barrett lifting jack to oil-well jacks was a decided advance in the art, but use soon disclosed weak points and structural defects. The pressure necessary to lock and unlock joints in a string of tools was enormous, and the strain upon the individual parts of a jack excessive and extreme. Incessant pounding of a heavy string of such tools upon solid rock had a tendency to spring or loosen the joints not drawn to the highest tension. Some conception of the extent of the desired tension may be had from the fact that the weight of the two wrenches used to screw and unscrew the tools was such as to require two men to handle each. The strain of the entire operation largely centered upon the comparatively small jack. Employment in this new sphere soon showed the need of heavier and stronger parts and better mechanical construction. The jacks, moreover, were subjected to rough usage at the hands of the drillers, and, as they were used at points remote from machine shops and facilities for repairs, breaks involved considerable delay.

While the releasing apparatus of this lifting jack was ingenious and meritorious, yet it was constructed in a manner which, mechanically, was at the expense of that strength, simplicity, and compactness desirable in oil-well jacks. In the first place, the levers were pivoted to the pawls, and, to allow space for the intermediate spring, such pivoting was at a considerable distance, and the pivoting had also to be done so as to allow the levers a free, loose motion. The space required in the side by side position of pawl, spring, and yielding lever necessitated a smaller size of pawl than was desirable. The entire shifting or tripping mechanism (except the rigid plate) was connected to and moved with the pawl in each motion. This was objectionable, for, as is well said by respondent's expert, "the pawl being a part which is subjected to very severe duty, it is desirable to have as few parts connected with it as possible." The efforts of both Forgie and Bar-

rett in this line of improvement unite to show that the application of the jacking mechanism to the new sphere demanded other forms of construction. A decided advance in this line was made by Barrett in the patent in suit. While it illustrates and describes the application of this invention to lifting jacks only, yet, as we have noted above, his specification contemplated its use on a horizontal plane, and it was held in the prior case that the patent covered its employment in an oil-well jack. Under the supposed protection of the patent, Barrett, or his assignee, the complainant, has built such a jacking device, and it has gone into extensive and successful use. His affidavit shows, and it is not disputed, that the respondent has cut the price at which this Barrett jack has been uniformly sold, and is now selling the infringing jack, which is of the same general type, at a lower figure. It also avers that unless respondent is enjoined it will permanently affect the trade, and prevent a return to the customary price, even if the respondent were enjoined on final hearing; that such was the permanent effect produced on the trade by respondent's former infringing jack, although it was on final hearing ultimately enjoined.

The new device of Barrett is based on the principle of a yielding, as distinguished from a rigid, tripping plate, adapted to engage with rigid fingers upon the pawls. One specific form of plate shown in detail in the drawings is pivoted at its lower end to the jack frame, and at the other is provided with lugs, adapted, when the plate is thrown into working position by an eccentric button, to engage with the rigid fingers on the pawls. This yielding and unpivoted end of the plate is in engagement with a strong spring seated on the jack frame. When forward or upward pressure is desired, the plate remains out of engagement, and exerts no influence. Starting with the lower pawl in engagement with the notch, and carrying the load, an inspection of the working jack shows the reversing operation is as follows: This pawl, being forward of and below the hand lever's pivot, sinks as that lever is raised, and its pivoted end also moves a trifle inwardly. By the same action the upper pawl, being on the other side of the lever pivot, is forced upward, and its unpivoted end moves inward. This gradually brings it into engagement with a notch on the now descending bar, and by degrees it assumes the load. Meanwhile the downward and inward movement of the lower pawl alluded to has brought its rigid finger in positive engagement with a lug of the tripping plate, and, as the movement proceeds, the lug is forced against the spring until the upper pawl assumes the weight. Then the stored spring power forces the lower pawl from the notch engagement, and the whole weight is shouldered by the upper pawl. The down stroke of the hand lever releases the upper, and engages the lower, pawl in substantially the same way.

It will thus be seen that by this timely-acting, self-adjusting mechanism, the tripping plate, which relieves the pawl of the burden of all reversing appliances, yields and withdraws by the pressure of the to-be-released pawl until the latter is in position to safely surrender, and its fellow to securely accept, the load; where-

upon its stored spring power forces the former from engagement with the notch, and keeps it disengaged until the automatic release of its companion pawl compels its own return. By this device a simple and stronger construction is possible, and the parts reduced in number. The pawls can be increased in size, are relieved from carrying the reversing mechanism, and both levers and one of the springs of the old mechanism are dispensed with. The yielding tripping plate, which is the foundation of Barrett's device, seems wholly new. Nothing in anticipation thereof was cited to the court or by way of reference in the patent office. In addition to the foregoing method of shifting the plate by means of an eccentric, the use of a movable weight is also shown, and, instead of a pivoted plate, the employment of a shifting tripping one, as embodied in Fig. 5 of Barrett's preceding patent, No. 312,316, is suggested. Upon this invention there were allowed, as pertinent to the present case, two claims, which are alleged to be infringed, viz.:

"(1) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever and having fingers rigid therewith, and a yielding tripping plate having lugs thereon adapted to engage with said fingers, and through the same draw the pawls from engagement with the toothed bar, substantially as and for purposes set forth."

"(6) In a jack, the combination of a bar, having teeth on one side thereof, a pivotal lever, a pawl pivoted to said lever and having a finger rigid therewith, and yielding tripping plate mounted on the frame and having a lug adapted to contact with said finger, and through the same draw the pawl from engagement with the toothed bar, substantially as and for the purposes set forth."

In addition to the foregoing, it should be noted there were granted in this patent, or in No. 455,994, which was a divisional application of the subject-matter, combination claims for the specific forms of yielding tripping plates shown in the drawings and specifications. The first claim has five elements, viz. a bar with teeth on one side, a pivotal lever, two pawls pivoted on this lever and provided with rigid fingers, and, lastly, a yielding tripping plate. This plate has the limitation of lugs thereon adapted to engage the pawl fingers, and through them draw the pawls from engagement with the toothed bar. Turning now to respondent's alleged infringing device, we find it embodied in an oil-well jack. It has a pivoted lever, and is mounted on a bar with teeth on one side. Two pawls with rigid fingers are pivoted on the lever. Thus far we have the identical elements of Barrett's claim, and, as suggestive of the source from which the constructive ideas came, we find a reproduction in minor details of Barrett's jack, viz. the similarity of measurement of pawls and handles, a departure from Forgie's prior form of handle and a reproduction of Barrett's, the peculiar horn or second handle on the lower side of the lever socket, and the pawl-disengaging chain extending to the stirrup handle.

His reversing apparatus consists of a sliding iron base plate, in which are seated two stiff brass springs with upwardly projecting ends. When a reverse action is desired, the plate is shifted and held rigid by an eccentric button. This shifting places the ends of the springs in positive, tense connection with the rigid

fingers on the pawls. Starting with the upper pawl in engagement with the teeth notch, and counteracting the pressure exerted by the tool wrench on the jack nose, we find that as the lever is rocked forward this upper pawl, being above the lever's pivot, is drawn forward, whereby an increasing spring pressure is encountered. The result is the pawl seeks to disengage itself from the notch. At the same time the other pawl, being pivoted below the lever's pivot, has been forced backward by the forward rocking of the lever. This movement, and the consequent diminished spring pressure, cause the pawl to drop into the notch, and it assumes the pressure force as the other pawl is released. By the return rock of the lever the lower pawl is drawn forward, encounters increasing spring pressure, and is forced out of engagement with the notch, while by a contrary process the other pawl assumes the burden. The jack is ingenious, different in form from Barrett's, and we are free to say, at first view, seemingly different in substance. But detail examination and an analysis of its elements satisfy us very clearly that its principle, design, and functional purposes are based wholly on the conception of the application to this art of the yielding tripping plate which Barrett suggested. To us it seems that a large part of the ingenuity shown in its structure is a studied purpose to so clearly transpose and rearrange Barrett's elements as to obscure the fact that it embodies the substance of his (Barrett's) invention.

It is contended that it is a wholly different type of structure, in that it has no yielding tripping plate, that its plate is rigid, and is not provided with lugs adapted to engage the rigid fingers on the pawls. If we concede Forgie's iron base plate is his tripping plate, this contention is sound; but such is not the fact. In mechanics, "tripping" consists in releasing or setting free some mechanism, and a tripping plate is one performing that function. Neither in its normal nor shifted position has Forgie's base plate, as a plate, any such capacity. It does not trip, and is therefore not a tripping plate. It only becomes one when means are added by which disengaging or tripping is effected, and this is done by bridging the space between it and the rigid fingers of the pawl to be tripped. For this purpose the stiff brass wire ends extend from their seat in the base plate to the finger of the pawl. These answer the functional purpose of lugs, in that they are means of connection or communication between plate proper and finger, and, indeed, answer to the very definition of a mechanical lug, viz. "a projecting thing against which anything presses." That these stiff wire ends, posts, or lugs are yielding or resilient makes them none the less lugs so long as they are stiff enough not to double on themselves, so to speak, but center their yielding from their base point. Of necessity, in both devices the fingers of the pawls are and must remain rigid, else the pawls would not be tripped or disengaged. If, therefore, the mechanism on the plate and the plate as well remained rigid, it is manifest no tripping would result. Now, both devices provide for such yielding, extra or apart from the fingers. In the words of the claim, they have "lugs there-

on adapted to engage with said fingers, and through the same draw the pawls from engagement with the toothed bar."

Being, then, of the same generic type, is there any limitation in Barrett's claims which frees the later device from the charge of infringing the earlier. We think not. There is no limitation which requires the lug to be in itself rigid and unyielding. Moreover, there is an absence in the claims of a limitation or designation of any specific mechanism by which the yielding character or function is imparted, or of any point from which or where such imparting must be done. The terms employed are comprehensive. The prior art does not necessitate a narrower reading than the ordinary meaning and reading of the terms and words employed would themselves suggest. Considered from a functional standpoint, a yielding tripping plate does not necessarily yield at every point. The yielding desired, and which secures the sought for result is a receding of the lug or connecting medium when it comes in contact with the object to be tripped. Yielding at that time insures tripping as soon as such yielding has stored the necessary spring force. This action constitutes the essence and substance of a yielding tripping plate. Manifestly, if Forgie's device, which accomplishes the same thing as Barrett's, had existed in the art prior to Barrett's, it would have been fatal to Barrett's making the generic claim now in controversy. If, then, Barrett be first, why is not Forgie's device subsidiary to the primary and dominant conception. In pursuance of this theory, a patent was granted to Barrett, he was allowed generic claims in combination, the validity of his patent was sustained by the court, and subsequently his presumptive priority of conception, arising from the issue of the patent, was affirmatively proven in his favor in an interference contest with the present respondent. If these protracted and expensive proceedings insured to him the enjoyment of the mere identical form of his patented device, he has gained a barren victory. But we think he is entitled to both form and substance, and, when the substance and gist of his device are a second time seized by respondent, we are of opinion the time is fitting for the exercise by a chancellor of his power of issuing a preliminary injunction. Let such a decree be prepared.

CLINTON WIRE-CLOTH CO. v. HENDRICK MANUF'G CO., Limited.

(Circuit Court, W. D. Pennsylvania. February 1, 1897.)

PATENTS—INVENTION—COAL SCREENS.

The Phillips patent No. 500,508, for improvements in revoluble coal screens, consisting in providing the woven wire segments with protector plates, to connect them together and cover the joints, the plates also having inwardly extended projections to form tumblers, is void, in view of the prior art, as being the product of mere mechanical skill.

This was a suit in equity by the Clinton Wire-Cloth Company against the Hendrick Manufacturing Company, Limited, for alleged infringement of a patent for a revoluble coal screen.

Lange & Roberts (James H. Lange, of counsel), for complainants.
Dyer & Driscoll (R. N. Dyer and S. O. Edmonds, of counsel), for defendants.

BUFFINGTON, District Judge. This bill is filed by the Clinton Wire-Cloth Company, a corporation of the state of Massachusetts, against the Hendrick Manufacturing Company, Limited, of Carbon-dale, Lackawanna county, Pa., and charges infringement of letters patent. The patent involved, No. 500,508, is for a revoluble coal screen, and was issued June 27, 1893, to the complainants, as assignees of David E. Phillips. Infringement of both claims is charged. The case concerns the use of apparatus for screening anthracite coal. Such screens generally consist of a series of screen segments, bolted to a revoluble circular framework, built upon an inclined axle. The meshes or perforations of the segments increase in size from the upper, or inlet, to the lower, or outlet, end. By this means the smaller sizes of coal pass through the meshes at the upper end. The larger sizes pass on, and gradually leave the screen as their appropriate sized mesh is reached, until the larger sizes find exit at the lower end. Originally the screen segments used were of cast iron, but they were found objectionable for several reasons. Their great weight necessitated more powerful machinery. Where they did not correspond exactly to the contour of the framework, which was often the case from difficulties of casting, they could not be sprung and clamped rigidly to the framework without risk of breaking. Consequently, allowance for play was necessitated. When this was provided for, or the severe action of the mine water affected the bolts and segments to the extent of allowing such play, it is obvious that the slipping of these heavy segments in two different directions, as the screen revolved, had a tendency to increase the extent, and also the severity, of the play. The consequence was the segments separated from each other, and allowed the coal to pass through the longitudinal openings thus made, instead of through the mesh interstices. Twenty or thirty years ago this imperfect screening was not material, for the smaller sizes of coal were not of commercial value, and passed to the culm pile. Of later years they have proved valuable, and the effort has been to effect their separation. For the reasons stated, cast-iron segments were not adapted to do this successfully. To meet these difficulties, wire-woven screen segments were introduced. These consisted of wire, woven to the proper sized mesh, and mounted on rigid segment frame rods, sprung or bent to conform to the curvature of the framework, to which they were, in turn, securely fastened. Obviously, such segments possessed two desirable features, lacking in the cast-iron type,—viz. lightness, and a resiliency which permitted rigid clamping to the framework. They had two weak points, however; one was the rapid disintegrating effect on the individual wires of the sulphur water, which in some regions had to be used to wash coal, and the other was that, by the continuous pounding action of the coal, the wires were liable to be displaced. When such displacement once started, subsequent use of the screen served to still further separate the wires, the desired uniformity of mesh was lost, and imperfectly screened coal re-

sulted. The objections to these two types of screen were overcome by the introduction of perforated steel segments. They united the excellencies of both the preceding forms. Their comparative lightness and resiliency gave them the desirable features of the wire-woven segment, while they preserved uniformity of mesh openings, as well as the cast iron. They had, however, two weak points, which did not exist in the other two types. It is obvious that, as a screen revolved, the heavier pieces of coal would gather to and lie on the bottom, and thus be carried up, and slide back, in the revolution of the screen, in the same position. The result was the mesh surface was thus covered, and the finer portions above, instead of passing through their proper mesh, were carried forward on the screen, and eventually passed out with sizes of coal much larger than themselves. This objection had been overcome in the cast-iron segments by a protuberance cast on the inner surface, which served the purpose of "tumbling" or stirring up the mass as it was carried around, and prevented its merely sliding along, in the way described. These protuberances were cast between the meshes, and did not lessen the screen surface. In wire segments this tumbling was done by the waving, undulating surface of the web itself, caused by the overlapping of the wires. This objection to the steel segment was overcome by the introduction of tumblers, but the pounding or action of the coal upon them, owing to their comparatively light weight, caused them to sag or dip at the joints, and cause openings, through which the coal passed unscreened. Such objection was more particularly present in the earlier days of their introduction. The art was then such that small-sized holes could not be punched in heavy plates,—a difficulty overcome later. This objection was not found in the cast-iron or wire screens. While the former separated and caused longitudinal openings, as we have seen, they were too heavy to sag, and the segment frames of the wire-woven ones were so heavy and rigid they did not sag. It was to overcome these objections to the use of perforated steel segments that Phillips designed the device embodied in the patent in suit. He strengthened the segment joint and prevented sagging by bolting or riveting protector plates to the perforated abutting edges of the segments. These extended along the longitudinal edges of the segments, and covered the joints. To provide tumblers which should not cover the perforations of the segments, and thus reduce screen surface, he riveted a metallic strip upon the protector plates, or made it integral with the plates. Upon this device two claims were granted, as follows:

"(1) In a revolvable screen, a series of screen segments combined with a flat protector plate, secured to and to connect the contiguous longitudinal edges of adjacent segments, and covering the joints between them, and an inwardly extended projection on said plate, to form a tumbler, substantially as described.

"(2) In a revolvable screen, a series of screen segments having imperforate edge, portions of, and to cover the abutting longitudinal edges of, adjacent segments, and intumed projections extended along and secured to each plate, to form a series of tumblers for the screen, substantially as described."

It may be conceded that the screen has overcome the objections noted, has proved satisfactory, and a considerable number of them are now in use. But Phillips was by no means the first to suggest

or practice means by which he accomplished this; and, to accord his patent its just place in the art, we must note what had been done before. In doing so, we confine ourselves wholly to two sources of information furnished by the complainants,—viz. the statements by the patentee and by complainants' witnesses. The patent conceded the use of tumblers was old, the objection to them, however, being their location. Thus:

"In some cases pieces of wood are bolted to the segments, the bolts extending through some of the perforations; but that is objectionable, as the tumblers cover, in the aggregate, a large number of perforations. Angle irons have also been bolted to the inside of the segments, but they are open to the same objection."

It will thus be seen that, by Phillips' own admissions, all he did, so far as the tumbler was concerned, was to remove it from the middle to the edge of the screen segment. It performed no new function in its changed place. Concededly, the only difference was to place it on an imperforate part of the segment, where it would not diminish screen surface. But even this change of position was not new with him, for Hollenbeck, one of complainants' witnesses, referring to the practice prior to Phillips, says:

"We also used strips of wood, that we bolted to the punched plate segments, to tumble the coal. * * * They were placed about the middle of the segment—about the middle of the concave surface of the segment—and extended the entire length of the segment. Our segments on a five-foot screen were about four feet wide, I think, and we would place one of these strips of wood about the middle of these four-foot segments, and another on the edge of the segment. If the four in the center did not answer the purpose, * * * we would put four more about the edge of the segment."

Wood, instead of iron, was employed, as the witness says, "because we had the wood handy; we did not have the metal to answer the purpose just at hand." It is true the witness says they were not placed over the imperforate edges of the segment, but as near them as possible. Obviously, this was not done, because the screen holes were used to pass the bolts through, and thus drilling holes in the imperforate edges was avoided.

Nor was Phillips the first to butt joint the segments, for the witness Missroon says that prior thereto both butt and lap jointing of segments were employed. It would seem that placing a cover over an open joint of a screen, to prevent escape of coal and to strengthen the segments at the joint, was a device patent to a mechanic. W. F. Kloss says, when he went to work at the Morea colliery, in 1890, he found they were, and had been, using a strip of sheet iron an eighth of an inch thick, clamped over the joints of cast-iron segments. Obviously this was simply to prevent escape of coal, since the joints needed no strengthening, but the change to heavier iron and tighter clamping where lighter sheets were used was a patent mechanical expedient. Beddall, another witness, says it was a common practice, from the first introduction of punched segments, to overlap their edges, and secure them by clips and bolts. Hounestine, another witness, says they found that with use one punched plate segment would sag down, and the other stay up, and thus allow an opening for coal to escape, and that it was a common practice to prevent such escape by using a washer on the inside and outside of

the joint, with a connecting bolt through the joint. Finney, another witness, tells of a method employed by him to keep the coal from wedging the edges apart, by an iron plate, about two inches wide by six long, and bolted through the mesh of the segment on either side of the joint. It will thus be seen that attaching the segments together by some mechanical means, to close and strengthen the joint, was a usual practice in screening, and the particular method employed was a matter of mechanical detail and choice.

From this brief résumé, it will be seen that, by accepting complainants' own showing, the idea of tumbling the coal, or of means for doing it, was not original with Phillips, nor was he the first to show strengthening or closing of the segmental joints of coal screens, or means for doing the same. He found these things had been done in the art before, but in what might be called an awkward and unhandy way. This was the necessary result of the methods employed. The segments were furnished by the manufacturer to the colliery, and the tumbler and joint-closing or protecting devices were supplied and attached by the colliery mechanics in such ways as the means at hand allowed. The result was more or less imperfect appliances, insufficient methods of attachment, tumblers made of wood, because it was handy, or, if of angle iron, it was of such size as was found in the scrap heap, and, when a segment was changed, the work of putting in tumblers or connecting joints had to be done again. To the economic or business mind it is obvious that, if these parts could be assembled in a manufactory, and the segment, with a tumbler and a connecting joint plate, brought to the colliery in a completed and combined shape, and if they were so constructed with reference to the frame rim and the next adjoining segments as to permit speedy attachment when new, and as rapid displacement when worn, it would be a much more desirable practice than the old method. The advantages of Mr. Phillips' device in this regard are well summed up by Mr. Livermore, complainants' expert, who says:

"By the construction and arrangement of the protector plate and tumbler bar with relation to the screen segment, said plate and bar are wholly independent of the spiders or main frame of the machine by which the screen segments are carried; and, as there is one plate and bar for each screen segment, it can be securely and substantially permanently fastened to one edge of a screen segment, the other edge of which is adapted to be fastened to the edge of the protector plate belonging to the next segment; and, consequently, when a worn segment has to be removed and replaced by a new one, it is necessary only to unbolt the worn segment from the spiders, and disconnect its protector plate from the adjoining segment at one side, and disconnect it from the protector plate of the adjoining segment of the other side, and substitute the new segment, by making the corresponding connections with the spiders and adjoining segments, when the screen will again be ready for use, with the joints between the segments properly connected, strengthened, and covered, and the tumbler bar in place, ready to perform its function of agitating the coal. This construction and arrangement of the protector plate and tumbler bar, wherein they are secured to the edges of the screen segments, and become a part of the screen wall, as distinguished from the frame of the machine by which the screen surface is supported and operated, is, as I understand, the essential feature of novelty of the structure shown and described in the Phillips' patent."

After careful consideration, we have reached the conclusion that what Mr. Phillips did in the art was purely mechanical. It was a

result which was naturally evolved when the problem was presented for solution to one trained in the mechanics and practice of the art in question. To concede he was the first to do what he claims, does not, of itself, stamp the device with patentable novelty, for to do so would be to make mere mechanical novelty the test of patentability. That Mr. Phillips was an improver structurally; that he made his tumbler of such proportions as to carry coal sufficiently to properly agitate, but not so high as to throw and break it upon the shaft; that he placed such tumbler at a point where it did not sacrifice screen surface,—might be conceded. That he so located the parts that they could be assembled and furnished in a completed form in place on a segment, was an admirable idea, and the same may be said of his riveting the joint plate permanently to one segment, and adapting it for temporary attachment to its abutter, so that it could be quickly clamped to the spider rim and the adjoining segment, and as quickly detached. While all this may be said of his device, yet, to our judgment, underneath and underlying it all is the mere mechanical and commercial conception, and not the original, primary ingenuity or originating inventive faculty which mark the patentee. While he has produced a useful device, while it may have gone into quite extensive use, yet these elements, while often the accompaniments, are not necessarily proofs, of patentability. The different parts—segment, tumbler bar, and protector plates—were cleverly rearranged, adjusted, and assembled, but in their new relations they performed no new function, individually or collectively. The tumbler bar still tumbled the coal in precisely the same manner it did when placed elsewhere; the protector plate performed its individual function of strengthening the joint and preventing leakage. Its presence or absence neither added to nor detracted from the function of the tumbler, and the same may be said of the tumbler in connection with the protector plate. There was no interweaving and intermingling of functions; no new process or result was produced by their contiguity. Each had its independent function, which neither isolation or combination changed.

From the standpoint of complainants' proofs alone, we are satisfied the patent must be adjudged void, as lacking patentable novelty. For this reason we have not deemed it necessary to discuss in detail the large number of alleged prior uses shown in the proofs. But, as corroborating our view that Phillips' device was the natural development of the art as novel conditions and changed requirements called for new appliances, we may refer to the device proved by complainants' witness Stull. He shows that about the time of Phillips' conception, and without any knowledge of it, he devised a joint protector plate, combined with a tumbler, which he says suggested itself to him "as an easy and practicable method of preventing the escape of coal through the joint, and tumbling it, in its passage." His method was this: Over the joint between the abutting edges of two perforated plate segments he placed two angle irons, back to back. These were held in place by U clips or bolts, passed through the screen mesh holes, and secured by washers and bolts. The angle irons came from the colliery scrap pile, were too large, and carried

the coal too high. The device was discarded after a short time on that account, but witness says, and properly, we think, that it prevented leakage, and would have tumbled the coal satisfactorily had the angle irons been smaller. The fact that such a plan was followed is suggestive, however (see *Haslem v. Glass Co.*, 68 Fed. 481), and shows that Phillips' and Stull's devices were the natural mechanical outgrowth of the progress in colliery practice. Let a decree be prepared dismissing the bill.

TRAVERS v. HAMMOCK & FLY-NET CO.

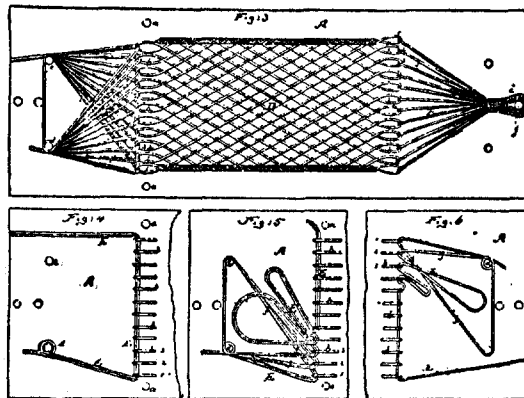
(Circuit Court, E. D. Wisconsin. March 2, 1896.)

PROCESS PATENTS—VALIDITY—MECHANICAL PROCESS.

The Rood patent, No. 296,460, for "the art of making hammocks," which describes a method of forming the ends by drawing a cord straight through the end loops of the hammock body to form the converging strands, which are gathered into the suspension loop or eye, construed as a patent for a process, and as covering mere mechanical operations, so that it is void on its face for want of patentability. *Locomotive Works v. Medart*, 15 Sup. Ct. 745, 158 U. S. 68, and *Glass Co. v. Henderson*, 15 C. C. A. 84, 67 Fed. 935, applied.

This was a suit in equity by Vincent P. Travers against the Gem Hammock & Fly-Net Company for alleged infringement of two patents relating to the art of making hammocks. Defendant demurs to so much of the bill as relates to patent No. 296,460, issued April 8, 1884, to Albert O. Rood, assignor to the complainant.

Figs. 4, 5, and 6 of the drawings accompanying the patent are diagrams showing different stages of progress in the manufacture of hammock ends, and Fig. 3 is a top view of a hammock having one of its ends finished and the other in process of construction.



The specification states:

This invention has for its object to simplify the mode of constructing hammocks, and particularly the ends thereof, which are the parts of hammocks containing the converging threads and the suspension eyes or loops. The invention consists, principally, in forming the hammock-body with loops in the ends thereof in any known manner; in then forming each end of the hammock by drawing a cord, from which

the converging strands are to be made, through the loops at the ends of the hammock-body in a straight line, and in then drawing this thread from between said loops, forming of it the converging strands of the hammock end, and finally uniting these strands into a terminal eye, all as hereinafter more fully described and claimed.

The two claims of the patent read as follows:

(1) The art of making hammocks which consists in forming the hammock-body with loops, b, b, in the ends thereof, in any known manner, then forming each end of the hammock by drawing the cord, E, from which the hammock end is to be made, in a straight line through the end loops, b, b, of the hammock-body, and in then drawing said cord from between said end loops, b, b, forming of it the converging strands of the hammock end, and in finally uniting these strands into a terminal eye, i, substantially as herein shown and described.

(2) The art of making hammocks, which consists in forming the hammock-body with loops, b, b, in the ends thereof, in any known manner, then forming each end of the hammock by drawing the cord, E, in a straight line through the loops, b, b, that are at the ends of the hammock-body, D, in then drawing this cord out from between the end loops, b, and holding it temporarily, in then coiling or winding the outer part of this cord, and in then forming from this coiled or wound portion the eye, i, at the end of the hammock, substantially as herein shown and described.

Winkler, Flanders, Smith, Bottum & Vilas, for complainant.
Benedict & Morsell, for defendant.

SEAMAN, District Judge. The bill of complaint alleges infringement, respectively, of two letters patent, viz.: First, No. 277,161, issued May 8, 1883; and, second, No. 296,460, issued April 8, 1884. Demurrer is interposed to so much of the bill as relates to the latter patent, No. 296,460, on the ground that the patent is for a process, and is void upon its face. This patent contains two claims of similar nature, and each stated as for "the art of making hammocks." I think each clearly states a process under the definitions of the patent law; that it involves merely mechanical operations without any chemical action or the operation of natural elements; and that, therefore, the process is not patentable under the rule held in *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, and *Glass Co. v. Henderson*, 15 C. C. A. 84, 67 Fed. 935. The question is clearly presented upon the face of this patent, and it does not seem to me that aid can be furnished by extraneous or expert testimony. Therefore it is well raised by demurrer, and will thus reach a final determination in the best method for all concerned. The demurrer is sustained.

WELSBACH LIGHT CO. v. COSMOPOLITAN INCANDESCENT GAS-LIGHT CO.

(Circuit Court, N. D. Illinois. January 29, 1897.)

PLEADING IN PATENT SUITS—CROSS BILL.

In an infringement suit, defendant sought to file a cross bill, setting up that, by reason of the expiration of a prior foreign patent, the monopoly of the patent in suit had terminated, and that, knowing this, complainant maliciously sought to injure defendant by distributing circulars, etc., asserting an exclusive right to the invention, and threatening defendant's customers with infringement suits, to restrain which defendant prayed an injunction. *Held*, that the cross bill would not lie, for the expiration of the foreign patent was mere matter of defense, and the alleged malicious acts were independent wrongs, unconnected with the matter of the original bill.

This was a suit in equity by the Welsbach Light Company against the Cosmopolitan Incandescent Gaslight Company for alleged infringement of a patent. The cause was heard on a motion by defendant for leave to file a cross bill.

Wm. Findlay Brown and John R. Bennett, for complainant.
Dyrenforth & Dyrenforth, for defendant.

JENKINS, Circuit Judge. This bill was filed to restrain the alleged infringement of letters patent of the United States No. 438,125, granted to Carl Auer Von Welsbach, for an "improvement in the manufacture of incandescent devices for gas burners." The defendant now moves the court for leave to file a cross bill which asserts, in substance, that under the law of the United States, and by reason of the expiration of a prior foreign patent, the monopoly granted by the patent in suit had come to an end prior to this suit. Notwithstanding which, and with knowledge of such facts, maliciously seeking to injure the cross complainant, and deprive it of the profit and advantages to which it is entitled by the use and sale of the patented article, and with a view to deceive and mislead the public by means of printed circulars distributed through the mail, the original complainant asserts itself to be the owner, under the patent, of the exclusive right to the use of the patented invention, and falsely asserts its right to recover damages from any person buying or using the same unless obtained from it, and threatens the customers of the cross complainant and its intending customers with suits for infringement, and with injunctions, and with suits for damages, in case of their purchase or use of the patented invention, if purchased from the cross complainant or from others than the original company. An injunction is also prayed restraining the original complainant from the distribution of such circulars, and from the continuance of such threats.

If it be true, as asserted (and, for the purposes of the present motions, I assume it to be true), that, by reason of the facts stated, the patent had come to an end, the cross complainant has then a perfect and absolute defense to the suit brought for an alleged infringement of the complainant's patent. That defense required no cross bill for its presentation and assertion. It can be brought to the attention of the court by plea or answer to the original suit as fully and completely as by cross bill.

It is, however, insisted that the cross bill can be maintained upon the ground that the original complainant, by its circulars and its threats, has intimidated customers and intending customers of the cross complainant, thereby inflicting upon it irreparable damages, which cannot be measured in any suit at law, and that, therefore, equity should extend its preventive arm, and stay the threatened injury. It may be assumed, for the purposes of these motions, that an original bill in equity would lie under the circumstances disclosed, but it does not follow that a cross bill can be sustained. In *Tooth-Crown Co. v. Carmichael*, 44 Fed. 350, I had occasion to consider the question under similar circumstances, and came to

the conclusion that a cross bill would not lie, because "the purpose of such a bill is to obtain the discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties touching the matter of the original bill." The defense there alleged anticipation of the patented invention, which, of course, went to the foundation of the complainant's right, and also asserted that the patent, if valid, could not properly be construed to cover the particular forms of artificial dentures claimed in the bill. Here, as there, the cross bill goes to the foundation of the right of the original complainant to his patented monopoly; for whether the invention be in fact anticipated, or the patent has terminated by operation of law, the monopoly granted by the patent is inoperative and ineffectual. It needs no cross bill here to aid in defense of the original bill, nor is there any relief touching the matter of the original bill which is sought by this cross bill. The matters which are complained of as working irreparable mischief are independent torts or wrongs asserted to have been committed by the original complainant upon the false assumption that its patent is valid. The same charge might well be asserted of any patentee seeking to restrain the infringement of his rights, if his patent be as yet unadjudicated by the court. The acts charged are independent, unlawful acts by the owners of the patent, founded upon its assertion of the continued validity of the patent. Whether those acts be lawful or unlawful depends, perhaps, upon the fact whether its patent has expired by virtue of the law; but these acts, however unlawful, do not touch the matter of the original bill, and have no connection with the assertion of any defense to the original bill, and therefore are not within the scope of a cross bill, for the discovery sought, if one be sought, must be for facts in aid of the original bill, or to obtain full and complete relief to all the parties with respect to matters charged in the original bill, not as to independent acts the lawfulness or unlawfulness of which may depend upon the question of right as asserted in the original bill. The acts charged may constitute the subject-matter of an independent suit, but are not, in my judgment, within the purview of a cross bill. I think that these motions are presented through failure to properly distinguish between a cross and an original bill; and, however great may be the wrong complained of in its effect upon the business of the cross complainant, it is not a wrong that can be remedied by means of a cross bill. I have carefully reconsidered my former decision, to which I have referred, and have examined the authorities presented, and am content with my former decision. I could not grant the relief here asked without extending the practice in equity proceedings beyond its prescribed bounds. To do this, however beneficial it might prove in the present instance (assuming the cross complainant to be entirely in the right), would be to work inextricable confusion in equity procedure, and to overturn the settled law of the land. The motions will be overruled.

LOCHMORE S. S. CO., Limited, v. HAGAR et al.

(District Court, E. D. Pennsylvania. January 22, 1897.)

No. 57.

1. ADMIRALTY PRACTICE—CROSS LIBEL—RULE 53.

Admiralty rule 53, requiring security from the respondent in a cross libel for a counterclaim arising out of the same transaction as the original libel, applies to a case in which the original libel was in personam, but the vessel to which the suit relates was attached. The proceeding is then in effect in rem.

2. SAME.

The object of rule 53, requiring security to respond in damages from the respondents in cross libels in certain cases, is not merely to compel an appearance, but appears to be to place the parties on an equality.

This was a libel in admiralty by the Lochmore Steamship Company, Limited, owner of the steamship Kilmore, against Walter F. Hagar and John H. Thompson, trading as W. F. Hagar & Co. The cause was heard on motion to vacate security on the cross-libel.

J. Rodman Paul, for libelants.

Horace L. Cheney, for respondents.

BUTLER, District Judge. Rule 53 reads as follows:

"Whenever a cross-libel is filed upon any counter claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court on cause shown shall otherwise direct; and all proceedings on the original libel shall be stayed until such security is given."

It is thus seen that the language of the rule applies to all cases of cross-libel. In *Refining Co. v. Funch*, 66 Fed. 342, the court questioned the applicability of the rule to cases where the original libel is in personam. That subject need not be considered at this time. While the original libel here is in personam in form, it prays for an attachment; and the vessel to which the charter party sued upon relates, was attached, and the proceeding therefore is in effect in rem. The object of the attachment was not simply to procure the respondents' appearance but to collect the money demanded, from the vessel. Her release could only be effected by entering security for the debt, as in ordinary proceedings in rem. The libelants may have had no lien until they attached the vessel, but thereafter they had; and to realize on this lien was the object of their subsequent efforts. It was unimportant to them whether the respondents appeared or not; the value of the vessel exceeds their claim. The rule must therefore be held applicable to the case. The libelants urge that as they reside here and may be served, security should not be required; that the object of the rule is simply to compel the original libelants (when foreigners) to appear. If such had been the object it could have been attained more readily by providing for service on the proctors of such libelants. Again if an appearance alone was contemplated the security should be for an appearance simply; and the rule would doubtless have so provided. It is more probable that the object was to place the parties on an equality.

If the original libelants in this case had satisfied the court of their ability to pay the cross-claim, as they were afforded opportunity to do, it is possible that they might have been relieved (in the exercise of the court's discretion under the rule) from entering security; but as the case stands there is nothing to warrant a vacation of the order; and the application is therefore dismissed.

THE OTTUMWA BELLE.

MISSISSIPPI COAL & ICE CO. v. THE OTTUMWA BELLE.

(District Court, S. D. Iowa, E. D. February 8, 1897.)

1. **EQUITABLE ESTOPPEL—MARITIME LIENS.**

Claimants, being about to purchase a vessel, and having heard that libelant company had some claim against her for supplies, wrote to it, asking if it had such a claim, and the amount thereof, but without disclosing the purpose of the inquiry. Libelant answered that it had a claim for coal, etc., furnished, amounting to about \$50. Claimants, relying on this statement, purchased the vessel, and afterwards libelant libeled her for \$169.77. *Held*, that libelant was estopped to claim the larger sum; that it was not necessary for claimants to disclose their reason for writing the letter; and libelant, having undertaken to answer an inquiry evidently relating to a business matter, was bound to disclose the truth.

2. **SAME—INTENT TO MISLEAD.**

An active intent to mislead is not essential to an equitable estoppel by a party's statements. If the statements were calculated to mislead, and did actually mislead, another, acting on them in good faith, and in the exercise of reasonable care and judgment, this is sufficient.

In Admiralty.

Upon February 10, 1896, the Mississippi Coal & Ice Company, a corporation, brought its claim into this court for \$169.77 for supplies by it furnished to the steamer Ottumwa Belle, between the dates of April 24 and October 2, 1895, inclusive; said steamer at and between the said dates being duly employed in the business of commerce and navigation between ports of different states of the United States upon the Mississippi river. By due process said steamer was taken into the custody of the marshal. The claimants, S. & J. C. Atlee, by due delivery bond released said steamer, and now intervene, and state: That they are the owners of said steamer. That, about October 11, 1895, said claimants were negotiating for the purchase of said steamer. That they made due examination for maritime liens against her. That, being informed that the Mississippi Coal & Ice Company, libelant herein, had or claimed to have, some demand for coal furnished said steamer, said claimants, for the purpose of arranging to pay and discharge such demand, on the ——— day of October, 1895, wrote to said libelant, asking it if it had any claim against said steamer for supplies furnished, and, if so, the amount of same. That, in response thereto, libelant wrote to claimants, informing claimants as follows: "Replying to your favor of the 9th inst., would say we are furnishing the Ottumwa Belle with coal, ice, tile, etc. They owe us an account amounting to about \$50.00. Since August 8th they have been paying us cash for all goods furnished." That thereupon claimants, relying on and believing said statement to be true, and that libelant's demand was as therein stated, purchased said steamer. Wherefore said claimants allege said libelant is estopped from now making any demand in excess of the amount so by it stated in its said letter to claimants, and claimants bring into court, and have deposited with the clerk, the sum of \$50, with all costs accrued up to date of such deposit, and tender same to libelant in full of said demand, and ask for release and discharge of said delivery bond. The present hearing is on exceptions filed by libelant.

Hughes & Roberts, for libelant.
James C. Davis, for claimants.

WOOLSON, District Judge (after stating the facts as above). The exceptions of libelant are (1) that the facts relied on do not constitute an estoppel, and (2) the amount tendered is not sufficient, even if the estoppel should be held well pleaded.

The first exception is argued by counsel for libelant under two heads, or subdivisions,—one being, that claimants did not disclose to libelant why they wished to have the information, and the other being that it does not appear that libelant had any reason to suppose claimants had any interest in knowing whether libelant had any claim for supplies furnished. As presented in argument, these two points may be fairly stated as declaring (1) that there existed, under the circumstances, no duty or obligation to inform claimants as to the facts concerning which the latter made inquiry, and (2) that, in claimants' pleading, it does not appear that the statements made by libelant were made with the intention that they should be relied on. According to libelant's contention, these two points are essential to an estoppel in pais. The doctrine of such estoppel has, in late years, acquired a much more extended application than formerly. In *Dair v. U. S.*, 16 Wall. 1, 4, Justice Field, in a case where an estoppel was urged as to a contract, says:

"The ancient rules of the common law in relation to estoppels in pais have been relaxed, and the tendency of modern decisions is to take a broader view of the purpose to be accomplished by them, and they are now applied so as to reach the case of a party whose conduct is purposely fraudulent, or will effect an unjust result. It must be conceded that courts of justice, if in their power to do so, should not allow a party, who, by act or admission, has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine that, whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part or injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

The doctrine, while applied, in the case just cited, to a case involving contract, is not materially changed in its wider application to things in action and personal property generally. *Horn v. Cole*, 51 N. H. 287; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Griswold v. Haven*, 25 N. Y. 595; *Sessions v. Rice*, 70 Iowa, 306, 30 N. W. 735; *Ellsworth v. Campbell*, 87 Iowa, 532, 54 N. W. 477; *Paxson v. Brown*, 10 C. C. A. 135, 61 Fed. 874; *Blair v. Wait*, 69 N. Y. 113.

Pomeroy, in his valuable treatise on Equity Jurisprudence, defines an "equitable estoppel," or "estoppel in pais," as follows (2 Pom. Eq. Jur. § 804):

"Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which, perhaps, have otherwise existed, either of property, of contract, or of rem-

edy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

The doctrine is stated by Circuit Judge Sanborn, speaking for the circuit court of appeals for the Eighth Circuit, in *Paxson v. Brown*, 10 C. C. A. 135, 143, 61 Fed. 874, 881, as follows:

"No principle is more salutary, none rests on more solid foundations, than that one who, by his acts or representations, or by his silence when he should speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is salutary, because it represses fraud and falsehood. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him."

The first point of counsel's argument relates to whether an estoppel can exist in favor of one who has not affirmatively disclosed to the party against whom the estoppel is urged the fact of his interest in the subject-matter of the act or representation which works the estoppel. In the case at bar, were claimants, under the law, compelled to disclose, in their letter of inquiry, their interest in the subject-matter of such inquiry? No doubt such disclosure might have caused libelant to make a more careful response. Libelant was not compelled to respond. The law did not impose such duty. But libelant did respond, and undertook to declare the facts concerning which it was requested to inform claimants. Can it now deny the truth of the statements it then made? May it be permitted to prove that what it stated as true was in fact false? The effect, as counsel urge, of a disclosure by claimants as to their interest in making the inquiry, would have been to advise libelant that claimants would probably act upon the response, and that, so far as libelant was advised, the inquiry came from a mere "busybody," or was induced by a desire to obtain "information upon which to place an estimate of the amount of credit the boat or its owners were entitled to." If the latter, then libelant was advised that the response was made as a basis for business action by claimants. But the transaction itself was sufficient to advise libelant that the letter was not a "mere busybody" inquiry. Here was a business firm, in a near-by city, writing a letter which, upon its face, is apparently about a business matter. Is the court to assume that business men write, or that business men receive, such inquiring letters as a matter of mere curiosity, without a desire to use, or a reasonable expectation that use will be made of, the response as a basis for action in business matters? Libelant, while not required to respond, did respond.

In *Ellsworth v. Campbell*, 87 Iowa, 532, 537, 54 N. W. 477, 478, the court says:

"It may be that the plaintiff might have remained entirely silent, and never written the defendants about his sale to Brown; but that is not the case at bar. He did speak. He wrote the defendants touching the transaction between him and Brown, and, when he did so, it was incumbent on him to tell the whole truth about the matter."

There seems no reasonable conclusion, from the circumstances, but that libelant, when writing the response, regarded the inquiry as relating to business matters, and answered it as such. A disclosure by claimants of their reason for writing the letter was not required to impose on libelant the duty of stating the truth in whatever response it made.

Is it essential to an equitable estoppel that the party sought to be estopped by his statements must have intended that they should be relied on? This is the second point presented. The inquiry is pertinent here, why did libelant respond at all, if he had no intention or expectation that his response would be relied on? What other intention or expectation could libelant have reasonably entertained under the circumstances? The authorities are numerous, however, which hold that an intention to have his statements relied on is not essential to an equitable estoppel.

In *Horn v. Cole*, 51 N. H. 287, the supreme court of New Hampshire, speaking through Perley, C. J., say:

"If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them, against any one who has trusted in them and has acted on them."

In the same opinion the court say:

"Where a man makes a statement in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject-matter, would act on as true, and one, using his means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party injured was not the one he meant should act."

Continental Nat. Bank v. National Bank of Commonwealth, 50 N. Y. 575, 582, involving the doctrine of estoppel in pais with regard to the oral declaration of plaintiff's teller that the certificate (afterwards discovered to be forged) was "all right," contains a discussion as to whether the intent to mislead is an essential element in such estoppel. The court, speaking through Judge Folger, cite with approval the language used in *Freeman v. Cooke*, 2 Exch. 654, wherein is explained the decision of the court in the leading case of *Pickard v. Sears*, 6 Adol. & E. 469. In the last-named case the court say:

"Where one, by his words or conduct, willfully causes another," etc.

In *Freeman v. Cooke*, the court say:

"By the term 'willfully,' however in that rule, we must understand, if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon any person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

So, in *Cornish v. Abington*, 4 Hurl. & N. 549, Pollock, C. B., says:

"The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant, and induced him to furnish goods to the defendant, the defendant must pay for them."

In the same case Chief Baron Pollock, commenting on the term, "willfully," as used in *Pickard v. Sears* and *Freeman v. Cooke*, *supra*, construes such word as meaning nothing more than "voluntarily," and holds that, if the representation was made voluntarily, though the effect upon the hearer was produced unintentionally, the same result would follow, and that, if a party uses language which, in the ordinary course of business, and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say that he is not bound, if another, so understanding it, has acted upon it.

"Of course," adds the New York court, "this general language, here extracted, should be read in connection with the facts of the case, to prevent carrying the force of the words too far. But it is shown that 'willfully,' and 'voluntarily,' as used in the definition of 'estoppel,' are convertible."

On page 583, Judge Folger announces the holding of that court:

"We hold that there need not be, upon the part of the person making the declaration or doing an act, an intention to mislead the one who is induced to rely upon it. * * * And it has long been held that, where it is a breach of good faith to allow the truth to be shown, there an admission will estop."

Bank v. Hazard, 30 N. Y. 226, 230, was a case relating to protest of a note, where an indorser, now sought to be charged, set up as his defense that notice of protest had not been given to him. His name was M. Hazard. His signature as indorser was so written that the jury found the notary protesting the note, and unacquainted with the signature, was justified in reading it as A. C. Hazard, and had duly sent notice of protest to that name. The court held that the indorser, by having thus signed his name, was estopped to claim that the notice was not duly given. In the opinion the court say:

"It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and has actually misled another, acting upon it in good faith, and exercising reasonable care and diligence, under all the circumstances, that is enough."

The supreme court of Iowa, in *Tiffany v. Anderson*, 55 Iowa, 405, 407, 7 N. W. 683, 685, had occasion to pass directly upon the point as to whether there must exist, in an equitable estoppel, an intent, on the party sought to be estopped, that the other party should act on his conduct. In that case the conduct charged as estopped was silence,—a failure to declare his interest in property sold in his presence. The court say:

"The court instructed the jury that, in order to create an estoppel by the conduct of defendant, he must have intended that the plaintiff should act upon such conduct. In this, as in all other cases, the acts and language of a party must be interpreted according to his real intentions. But intentions may be inferred when not clearly expressed. And if language or acts would authorize a reasonable person to infer that certain intentions existed, the law will presume their existence, and the party will be bound thereby."

Sessions v. Rice, 70 Iowa, 306, 309, 30 N. W. 735, 737, involved the consideration of estoppel as urged by a surety against the payee of a promissory note who was seeking to hold the surety to payment. The court below found, as a conclusion of law, as to what constitutes an estoppel:

"The conduct must have been with the intention that the other party would act upon it, and the other party must have acted," etc.

The supreme court say:

"We think it probably true, as the court found, that appellee did not intend to release [the surety]. But this fact does not show that the appellee is not estopped. * * * We think, too, that the court erred in its legal conclusion, and that is that an estoppel arises only when the party against whom it is set up intended that his conduct, whether it consists of words or actions, should be relied upon by the other party. The test question is as to whether the party setting up the estoppel was justified in relying upon the conduct of the other party. * * * Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words, and when a person's words are thus reasonably understood and justly acted upon by another, such person cannot be heard to aver to the contrary, as against the other."

In Paxson v. Brown, 10 C. C. A. 135, 143, 61 Fed. 874, 881, the circuit court of appeals for this circuit have substantially excluded from the essential elements of an equitable estoppel an active intent to mislead, or to have the act relied upon by the party who is misled. In that respect intent to mislead and culpable negligence are placed on the same footing. The court declare, as to this estoppel, that:

"It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed in him."

In Union Pac. Ry. Co. v. U. S., 15 C. C. A. 123, 67 Fed. 975, 979, the circuit court of appeals of this circuit reaffirm and expressly approve the doctrine as announced in Paxson v. Brown.

In Dickerson v. Colgrove, 100 U. S. 578, 580, the supreme court say:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

With reference to the significance of the term "fraud" or "fraudulent," as used by various courts in speaking of equitable estoppels, Pomeroy (2 Pom. Eq. Jur. § 803) says those terms, thus used, are virtually synonymous with "unconscientious," or "inequitable," and that "it is in strict agreement with equitable notions to say, of a party sought to be estopped, that his repudiation of his own prior conduct, which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be fraudulent,—would be a fraud upon the rights of the person benefited by the estoppel." And he declares that it would be accurate to describe,

in general terms, an equitable estoppel as "such conduct by a party that it would be fraudulent, or a fraud upon the rights of another, for him afterwards to repudiate, and to set up claims inconsistent with it." This learned author sums up his discussion by saying:

"When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who, by his conduct, acts, or admissions, has rendered the injury possible."

The last exception urged by libelant is, as to tender by claimants made and deposited, that it is insufficient. In my opinion this exception cannot be sustained in the present state of the case. The letter of libelant states the account owing to him as "about fifty dollars." When the evidence is all before the court, and the case submitted for final judgment, this exception may then be presented, if libelant be so advised. Subject to such reserved right, this exception is overruled.

It follows, from the foregoing, that all the exceptions filed by libelant are overruled. Let order be entered accordingly, to which libelant excepts.

THE BOWDEN.

THE DECATUR H. MILLER.

THE BOWDEN v. THE DECATUR H. MILLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 188.

1. COLLISION—STEAMSHIPS IN HARBOR.

A steamship which, on approaching another steamer lying or moving in a narrow harbor channel, fails to get any answer to her signals, should have her attention arrested thereby, and is bound to take every precaution to avoid risk of collision, even from the negligence of the other.

2. SAME.

A steamship without steam up, which has been moved from her dock, and is lying in the channel of a narrow harbor, while her tug is preparing to tow her, is in fault if she fails to maintain a lookout for approaching vessels, so as to apprise them of her helpless condition.

Appeal from the District Court of the United States for the District of Maryland.

Robert H. Smith, for appellant.

William Pinkney Whyte (Daniel H. Hayne and Joseph Whyte on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This is an appeal from the decree of the district court of the United States for the district of Maryland, in admiralty. It is a case of collision growing out of these facts:

The Decatur H. Miller is a steamship of the Merchants' & Miners' Transportation Company. She is 260 feet long, 38 feet beam. Her sides are 20 feet above the water line, and she has houses on deck adding to her height out of water. The docks of this line are in the inner harbor of the port of Baltimore, which at this point is from 900 feet to 1,000 feet wide. She was in her dock on the early morning of the 18th May, 1896, and had discharged all her cargo, with the exception of about 400 tons. Her owners desired to have her moved lower down the harbor, for the purpose of finishing discharge of cargo. To that end, as she had no steam in her boilers, the tug Venus was employed. This tug was owned by the steamship company, and was customarily employed for the purpose of moving its ships under these circumstances. The Miller was lying in her dock, with her starboard side to the wharf. The tug made a line fast to her port quarter, pulled her stern foremost into the stream, her head pointing up the harbor, and then pulled her around until her heading was reversed, pointing down the channel. She was then about 300 feet from the line of wharves. In the meantime the Bowden, a fruit steamer, was coming up the harbor of Baltimore, on the way to her own dock, not far above that at which the Miller had been lying. When she was opposite the quarantine station she had reduced her speed to about seven miles per hour, and as she got near and into the inner harbor she slowed down to about four miles an hour. She was in a bend of the river, and as she reached Shryock's Wharf, at the end of the bend, she ported her helm so as to pass along the front of the wharves. Just before, or perhaps just as, she reached this point, she nearly came into collision with a water boat; starboarding her helm to avoid the collision, and immediately porting it again. As she rounded Shryock's Wharf she came in sight of the Miller, lying as above stated. At that moment the tug Venus had cast off the line to the Miller, blowing a long blast of her whistle as she did so, and had backed, and gone in on the starboard quarter of the Miller. She was completely hidden from the Bowden, and was not seen by any one on that vessel. The Bowden, coming in sight of, and when about 1,200 feet away from, the Miller, blew one blast of her whistle, indicating that she would pass to port between her and the wharves. No response whatever came from the Miller or from the tug Venus, and it appears that this signal was not heard either on the tug or the steamer. Having no response, the Bowden kept on her way without slacking or stopping until she was within 300 feet of the Miller, when, observing that the Miller was gradually approaching her, the Bowden put her helm hard a-port, and reversed at full speed. Her momentum was not checked, nor her direction changed, and she struck the Miller on her port side at an angle of 45°, making an incision about 12 feet from top to bottom, and about 3 feet wide. The Miller was towed to her wharf, where she filled and sank about 20 minutes after the collision. At the time of the collision the Miller, without steam herself, and not yet fastened to the tug, had no headway on her. She must, however, have been in motion, sagging under the influence of the wind, a light breeze, on her starboard side, and perhaps under the mo-

mentum of the turn given to her by the tug in changing her heading from up to down the stream. There was no tide. Notwithstanding this, the Miller had not diminished the space between herself and the wharves less than 150 or 175 feet. The Bowden was 27 feet beam. She steered badly, and did not readily yield to her engines when reversed.

The court below, after hearing the witnesses, was of the opinion that there was sufficient space for the Bowden to pass between the Miller and the line of wharves, and that the disaster was due in great measure to the fact that the pilot on the Bowden had gone too near to the Miller without porting sufficiently, relying upon the Miller to get out of his way; that he thus lost his head, and, when he reversed his engines, found that the Bowden would not obey her helm. This finding of the fact by the court below has great weight with this court. *The Lucy and The Spring Garden*, 42 U. S. App. 100-104, 20 C. C. A. 660, and 74 Fed. 572. And a careful review of the testimony leads us to the same conclusion. It is clearly not a case of inevitable accident, which must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident, and when the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels apart. *The Maybey and Cooper*, 14 Wall. 215; *The Grace Girdler*, 7 Wall. 196. In these narrow channel ways, the utmost care and precaution are required, not only to prevent collision, but to avoid the risk of collision. There is no room for theory. The rapid succession of facts must be closely observed, and must govern. The Bowden may have concluded that the Miller was under way. But when she gave her whistle and received no response, nor observed any movement on the part of the Miller, her attention should have been arrested, and it was her duty to have taken every precaution to avoid the result of negligence, even, on the part of the Miller. Instead of doing this, she pursued her course unchanged, notwithstanding her defect in steering, until it was too late either to change her direction, or to reverse and back in time to prevent the collision.

But was the Miller wholly without fault? She had the right to do as she did,—to be towed out into the stream. This, it seems, was the custom with all the steamers of her line. But absolutely helpless as she was when she reached the midchannel, in a narrow seaway, the entrance and exit of all vessels using the inner harbor, it behooved her to take and exercise every precaution possible. While elaborate rules have been adopted, intended to prevent the risk of collision, still so important is it that every possible precaution should be taken, that these same rules themselves provide that nothing contained in them shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. *The Sunnyside*, 91 U. S. 208. "The rul-

ing principle of the court is that an obligation rests on all vessels found in the avenues of commerce to employ active diligence to avoid collisions." *New York, etc., Co. v. Calderwood*, 19 How. 246; *The Maria Martin*, 12 Wall. 31. The *Miller* on this occasion had no one whatever on the lookout. Her acting master and her crew were all busily engaged in duties which occupied all their attention, precisely as if she were tied to a wharf. Not only was the blast of the approaching steamer not observed; it was not even heard by any one on her deck. True, she could not have responded either with one blast or two blasts, for that would have asserted that she was proceeding either with a port or a starboard helm, while in truth she could have done neither. But she could have blown the danger signals, indicating her own helpless condition. *The Roslyn*, 22 Fed. 687. Had there been a lookout, or had her acting master realized his duty, signals could have come from the tug, or the tug itself have been put in motion and the disaster averted; for, according to all the testimony, a slight change of direction would have prevented the collision. Certainly an early indication to the *Bowden* would have removed her mistake. It is manifest that the indifference and negligence of the crew of the *Miller* contributed to this accident. Great care is required of a large steamer, leaving her dock, to see that no damage is done to other vessels near her. *The City of Paris*, Fed. Cas. No. 2,767, 14 Blatchf. 531. The position of the *Decatur H. Miller* was closely, if not wholly, analogous to a sailing vessel in stays, and there is no doubt that it was the duty of other vessels to keep clear of her. But even in such case it is the duty of those on board to take a due look around beforehand to ascertain that no ship is in the neighborhood, likely to come on them. *Mars. Mar. Coll.* 447, and note. See, also, *The John Fenwick*, L. R. 3 Adm. & Ecc. 500. In *The American Eagle*, 27 Fed. 465,—a case closely resembling this in some, but not all, respects,—a steamer, the *Eagle*, collided with a tug engaged in making up her tow in East River, New York Harbor, and, while so doing, helpless to get out of the way of other vessels. In that case the court says:

"Being in full view of all approaching vessels, and at a sufficient distance to enable them to keep away from her by getting her tow in readiness to move, the pilot of the tug had no reason to suppose the *Eagle* would not go on one side or the other of him. When he saw the *Eagle* coming towards him, he hailed her to keep off. There was nothing he could do more, since he could not safely move forward or backward."

There was no such effort on the part of the *Miller*, no action or precaution whatever, and consequently she also was in fault. Under these circumstances, the damages should be apportioned. Let the case be remanded to the district court, with directions to take such order therein as will be in accordance with this opinion.

THE MEXICO.

In re COMPANIA TRANSATLANTICA.

(District Court, S. D. New York. February 10, 1897.)

1. COLLISION—STEAMERS—PORTING WHEN GREEN TO GREEN—FAULT.

The Nansemond, on a course N. N. E., crossed, from port to starboard, the course of the Mexico, bound N., 70° W., at least a half mile or a mile away, and brought the lights green against green. The N. then "ported a little," "ported a little more," and when several points on the M.'s starboard bow, less than a minute before collision, "hard a-ported," showing her red light, and soon collided with the M.'s starboard side. *Held*, the N. was in fault for porting when the vessels were green to green, her last order being one of extreme recklessness.

2. REVERSING GEAR CLAMPED—FAULT.

The N. had the reversing gear of her engines clamped fast to the rock arm, so that from one to five minutes was required to release it after notice to reverse. In consequence, the master's signal to reverse his engine could not be obeyed. *Held* a gross fault.

3. OMISSION TO STOP AND REVERSE—SITUATION IN EXTREMIS.

On seeing the green light of the N. suddenly change to red off the starboard bow, and less than a minute before collision, the M. hard starboarded, and kept on at full speed, as the only chance of avoiding collision. *Held*, the situation was in extremis, caused by the faults of the N.; and, whether the course taken was actually the best possible or not, the M. was not in fault for the result.

4. FAULT OF ONE BEING CLEAR, PROOF OF CONTRIBUTORY FAULT MUST BE CLEAR AND CONVINCING.

Where the faults of one vessel are clear, the evidence of contributory negligence on the part of the other should be clear and convincing. Any reasonable doubt of the propriety of her navigation should be resolved in her favor.

This was a petition for limitation of liability filed by the Compania Transatlantica, owner of the Mexico, for damages amounting to \$158,226.31, caused by the total loss of the steamship Nansemond and her cargo, in a collision with the Mexico, off the coast of Venezuela, and near the Island of Oruba, on December 21, 1895. The value of the Mexico and of her pending freight was fixed in the limitation proceeding at \$60,754.88.

Convers & Kirlin, for petitioner.

Butler, Notman, Joline & Mynderse, Carter & Ledyard, and E. L. Baylies, for damage claimants.

BROWN, District Judge. The above petition was filed to limit the liability of the petitioning company, owner of the steamship Mexico, for damages occasioned by a collision between her and the steamer Nansemond at about half past 2 a. m. of December 21, 1895, to the southward of Oruba Light, near the Gulf of Venezuela, through which the Nansemond and her cargo became a total loss, and her master and others of her crew were drowned.

The Mexico was an iron vessel of 1,359 tons register and 331 feet long, bound from Puerto Caballo to Savanilla, and until shortly before the collision was on a course of N., 70° W. The Nansemond was a wooden steamer, from Wilmington, Del., 165 feet long and of

223 tons net register. She was bound from Maracaibo to Curaçoa, with a cargo of coffee. The night was dark, and at such times her usual course was N. E. by E. until passing Oruba Light, when the course was changed to the southward for Curaçoa. Libels were filed by the owners of the Nansemond and by underwriters on her cargo for the damage, and thereupon the present petition was filed, praying for a limitation of liability, and at the same time denying that there was any negligence on the part of the Mexico, and averring that the accident was solely through the fault of the Nansemond. Much testimony has been taken as to the faults occasioning the collision. The loss of the master of the Nansemond, and the fact that only two persons survived who were on deck at the time of the accident, and that these are of but very moderate intelligence, make the Nansemond's account of the collision very imperfect. It is certain, however, that the mast headlight of the Mexico was seen, when at least a couple of miles distant, more or less on the Nansemond's starboard bow; that the boatswain soon after went to the cabin and called the master, who looked at the light with glasses, and afterwards gave an order to port a little. From the testimony of the Mexico's officers that the Nansemond's green light was first seen about five degrees on the Mexico's port bow, it is probable that the red light of the Mexico may have been the first colored light seen by the master of the Nansemond, or possibly both of her colored lights; but it is further certain from the testimony on both sides that the Nansemond soon crossed the line of the Mexico's course from port to starboard, so as to bring the green light of the Mexico into view, against the green light of the Nansemond. Lendeborg, the wheelman on the Nansemond, did not see either of the side lights of the Mexico until just before the collision; but Hellburg, the boatswain, who had called the master, and who afterwards stood outside near the pilot house, persistently adhered to, and several times repeated, his statements, that the green light of the Mexico was visible when he heard the master give the order to port; and from his testimony it appears that this was a considerable time before the collision. Lendeborg says that the master gave three different orders: First, "port a little," then "port a little more," and finally "hard a-port"; the latter, when the vessels were very near; and that all of these orders were obeyed. The last order was probably less than a minute before collision. The repeated statements of Hellburg (except as to the Mexico being only one and a half points on his starboard bow, which could not be true at the last), agree in general with the testimony of the officers of the Mexico, who say that the Nansemond drew across the bow of the Mexico, when at a considerable distance, from port to starboard, and that she continued to show her green light alone until she was several points on their starboard bow; and that when near, and well off to starboard, the Nansemond showed her red light, as if to cross again, from starboard to port, so as to double up on her course, thus threatening immediate collision; and that as the only means of escaping colli-

sion, the Mexico's wheel was starboarded, and full speed continued, so that her course was changed three points to W. S. W. at the time of the collision, or a little after. Hellburg, the boatswain of the Nansemond, makes the angle of collision about a right angle; the other witnesses make the angle from four to eight points; that is, between the starboard side of the Mexico and the port side of the Nansemond, showing that the Nansemond changed her course from ten to thirteen points.

The above general account of the Nansemond's navigation, incredible almost as it may seem, is so clearly established by the testimony on both sides, that it must be held to be substantially true. I can find only two suggestions in the testimony for even a partial explanation: First, that the master had been drinking, as appears from the testimony of his engineer, who says, "I smelled it off him that night in the engine room door;" and next, the fact that it was near the time for the usual change of the Nansemond's course to southward, and that the master might, therefore, have thought that he would haul off to the southward, across the course of the Mexico, even after the vessels were showing green to green, so that their courses had become entirely safe, and all danger of collision from the original crossing courses had ended.

But these suggestions do not afford the least justification to the Nansemond. Having crossed the Mexico's course from port to starboard, certainly at a distance of from half a mile to a mile, and showing green to green, it was the Nansemond's plain duty to continue green to green until the vessels had passed each other. The final order, "hard a-port," very shortly before collision, was one of extreme recklessness, and was at the Nansemond's sole risk.

The testimony of the engineer of the Nansemond shows still another gross fault on the Nansemond's part, which made reversal impossible when reversal was necessary, for the reversing gear had been made fast by a clamp to the rock arm, which would require from one to five minutes to release after notice to reverse. In consequence of this clamping, the signal of the master of the Nansemond to reverse his engine could not be obeyed.

I do not see how any fault can be imputed to the Mexico. As the hull of the Nansemond could not be seen from the Mexico in the darkness, and the vessels were showing green to green for a considerable time, there was no reason for any apprehension on the part of the Mexico, and therefore no reason for her slackening speed until the red light of the Nansemond suddenly appeared but a few hundred feet distant, broad off on the Mexico's starboard bow. So extraordinary and unaccountable a maneuver might well be bewildering. From a position of apparent absolute safety, collision within less than a minute was suddenly threatened. Whether in this sudden emergency the course taken by the Mexico's officers was actually the best possible or not, she is not responsible for the result. The Nansemond was then so near that it was apparently impossible for the Mexico to avoid her by stopping and reversing. Her only possible chance of escape seemed to be by doing what

her officers testify was done, viz., putting the wheel to starboard, and keeping on as fast as possible. It was a situation in extremis, brought about by navigation so extraordinary and so culpable that the testimony of the Nansemond's boatswain clearly indicates that he recognized it was wrong, though he could not interfere. The language of Mr. Justice Brown, in the case of *The City of New York*, 147 U. S. 85, 13 Sup. Ct. 216, is peculiarly applicable:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

And see *The City of Paris*, 9 Wall. 634; *The John L. Hasbrouck*, 93 U. S. 405; *The Maggie J. Smith*, 123 U. S. 349, 8 Sup. Ct. 159; *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711; *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516; *The Ludvig Holberg*, 157 U. S. 60, 70, 15 Sup. Ct. 477; *The E. A. Packer*, 49 Fed. 92; *The Bywell Castle*, 4 Prob. Div. 219.

The counsel for the claimants has presented many ingenious suggestions for holding the Mexico partly to blame. But in the light of the principal faults as to the navigation of the Nansemond, which are clearly shown by her own witnesses, I see no sufficient ground for holding the Mexico in fault. The story of her officers seems to me in every way consistent, natural and probable; there is no reason to discredit its general correctness. The fault of the Nansemond is clear and gross; and it seems clear to me that when the Nansemond's red light appeared the situation was in extremis.

A decree should be entered finding that the Mexico was without fault.

CONSOLIDATED TRACTION CO. v. GUARANTORS' LIABILITY & INDEMNITY CO. OF PENNSYLVANIA.

(Circuit Court, D. New Jersey. February 13, 1897.)

REMOVAL OF CAUSES—RIGHT TO SPEED FILING OF RECORD.

After a party has filed his petition and bond in the state court, the opposing party may file a copy of the record in the federal court before the expiration of the time limited for the removing party to do so; and the court may then require the latter to plead. *Arthur's Adm'r's v. Insurance Co.*, Fed. Cas. No. 565, 7 Reporter, 329, followed.

Vredenburgh & Garretson, for plaintiff.
Depue & Parker, for defendant.

KIRKPATRICK, District Judge. This suit was commenced by summons in the supreme court of the state of New Jersey on October 22, 1896. The time for the defendant to plead expired January 1, 1897. On the 30th December, 1896, the defendant filed its petition and bond for the removal of the cause to this court. The time within which the defendant would be obliged to file the record in this court would not expire until the first day of the next term, viz. March 23, 1897. On the 16th January, 1897, the plaintiff filed a copy of the record in this court, and gave notice thereof to the defendant, who, failing to plead, was, by order of this court dated February 2d, required to do so within 15 days thereafter. The motion now is to set aside as improvidently granted this order to plead. While there seems to be a difference of opinion among the judges as to the status of cases removed from state courts between the time of filing the petition and bond in the state court and the first day of the next term of the United States court to which the case has been removed, I find the question determined in this circuit. In *Arthur's Adm'r's v. Insurance Co.*, 7 Reporter, 329, Fed. Cas. No. 565, McKennan, J., says:

"The state court ceases to have jurisdiction upon the proper filing of the petition and bond in cases where the act of congress gives jurisdiction in the cause to the court. The result is that the cause from that time is in theory in this court, and the only question is whether, where the party who has the right neglects to file the copy, to the detriment of the other party, the latter cannot do it for him. I have no doubt that he can."

The rule so laid down has been followed in practice in this circuit, and orders have been granted to speed the cause before the expiration of the time limited to the removing party for filing a copy of the record in this court. The motion will be denied.

BRYAR et al. v. BRYAR.

(Circuit Court, W. D. Pennsylvania. February 5, 1897.)

1. FEDERAL AND STATE COURTS—CONCURRENT SUITS—JUDGMENT IN STATE COURT.

The wife of a bankrupt brought a bill in equity in the United States district court against the bankrupt and his assignee, claiming to be the equitable owner of the undivided one-half of land the legal title to which was in the bankrupt. C., the purchaser of the land at assignee's sale, intervened as defendant. There was a decree in favor of the wife, and an appeal there-

from to the United States circuit court. Pending this appeal the wife brought ejectment in a court of the state (Pennsylvania) against C., upon the same equitable title which was the foundation of her pending bill. The ejectment was tried upon the merits, and resulted in a verdict and judgment against the wife. *Held*, that she and her heirs were thereby concluded in the pending suit in the circuit court.

2. SAME—FOLLOWING STATE DECISIONS—RULE OF PROPERTY.

It being a rule of property in Pennsylvania that, in ejectment upon an equitable title, one verdict and judgment are conclusive of the title, equally binding effect is to be given to such a verdict and judgment in the federal courts.

This was a bill in equity filed by Jane Bryar, in the district court, against James Bryar, a bankrupt, Thomas Campbell, and others, she claiming to be equitable owner of an undivided one-half of certain lands the legal title of which was in the bankrupt. The district court rendered a decree for the complainant, and the opposite parties took an appeal to this court, where the cause has since been pending.

W. B. Rodgers, for appellants.

L. C. Barton, for appellee.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. Pending this appeal, in the year 1880, Jane Bryar brought an action of ejectment in the court of common pleas No. 1, of Allegheny county, Pa., against Thomas Campbell and others, to recover the land here in controversy. That case was tried before a jury, and a verdict rendered in favor of the defendants in the action. Judgment upon the verdict having been entered, Mrs. Bryar sued out a writ of error, and, after argument, the supreme court of Pennsylvania affirmed the judgment of the court of common pleas. 30 Pittsb. Leg. J. 12. In that ejectment Mrs. Bryar set up against Thomas Campbell, as the basis of her right to recover, the same equitable title which was the foundation of her bill in equity in the United States district court, and which her heirs now assert against Campbell in this court. These facts, which have been brought upon the record by proofs and a written stipulation, are decisive, we think, against the heirs of Jane Bryar, the now appellees. Mrs. Bryar elected to have her rights determined in the state courts, and Campbell was compelled to defend in the state forum. Whether or not Campbell could have set up the pendency of the bill here in abatement or in bar of the action in the court of common pleas we need not inquire. It is enough that he did not attempt to do so, and the action proceeded in the state courts upon the merits to final judgment. As an adverse decision there against Campbell would have concluded him, so the decision in his favor concluded Mrs. Bryar and her heirs. The ejectment brought by Mrs. Bryar was upon her equitable title,—a procedure allowable in the courts of Pennsylvania, where an equitable ejectment is the full equivalent of and substitute for a bill in equity,—and it is well settled that in ejectment upon an equitable title one verdict and judgment are conclusive of the title. *Peterman v. Huling*, 31 Pa. St. 432; *Winpenny v. Winpenny*, 92 Pa. St. 440. This being an established rule of property

in Pennsylvania, an equally conclusive effect is to be given to such a verdict and judgment in the courts of the United States. *Miles v. Caldwell*, 2 Wall. 36. A complete defense to this bill is therefore shown, and that defense is available here under the present pleadings, supplemented by the stipulation of counsel.

BUFFINGTON, District Judge, concurs.

PER CURIAM. This cause, having come on for final hearing upon the pleadings, proofs, and a written stipulation, was argued by counsel; and now, February 5, 1897, upon consideration, the decree of the district court is reversed, the costs in that court, however, to be paid by Thomas Campbell; and it is further ordered, adjudged, and decreed that the bill of complaint be, and the same is, dismissed, without costs in this court.

LOUISVILLE, N. A. & C. RY. CO. v. LOUISVILLE TRUST CO. et al.

(Circuit Court, D. Kentucky. February 9, 1897.)

CERTIORARI BY SUPREME COURT TO CIRCUIT COURT OF APPEALS—EFFECT AS TO TRIAL COURT.

The effect of a certiorari, when awarded by the supreme court in a cause decided by the circuit court of appeals, is to suspend any action that might be taken by that court, or by the trial court in obedience to its mandate; but it does not restore jurisdiction to the trial court, nor give such court authority to set aside orders legally and properly made, in obedience to the mandate of the circuit court of appeals, before the writ of certiorari was awarded.

George W. Kretzinger and Pritle & Trabue, for complainant.
St. John Boyle and Swager Sherley, for defendants.

BARR, District Judge. The Louisville, New Albany & Chicago Railway Company obtained a judgment against the Louisville Trust Company and others in this court, which declared that a guaranty which was indorsed upon certain coupon bonds issued by the Richmond, Nicholasville & Beattyville Railway Company by said Louisville, New Albany & Chicago Railroad Company was ultra vires and invalid, and which directed that the guaranty thereon should be canceled, and the injunction which was originally granted, preventing the transfer of said bonds with the guaranty thereon, was made perpetual. From this judgment the Louisville Trust Company and others, holders of said bonds, appealed with supersedeas bonds to the circuit court of appeals, and that court reversed the judgment of this court, holding that the guaranty was invalid as to the appellants, and directed by mandate that the bills filed by the Louisville, New Albany & Chicago Railway Company should be dismissed, with costs. 22 C. C. A. 378, 75 Fed. 433. The mandates of the circuit court of appeals in the several cases were dated October 8, 1896, and filed in this court on November 14, 1896, and on the same day, pursuant to and in obedience to said mandates, on motion of the appellants, an order was entered by this court dismissing the bills, with costs in favor of the several appellants except the Louisville

Banking Company, the Kentucky National Bank, and W. W. Jenkins. On the 1st day of December, 1896, the Louisville, New Albany & Chicago Railway Company filed the affidavit of its counsel, together with a copy of the order of the supreme court of the United States, granting a writ of certiorari to the United States circuit court of appeals for this circuit in the cause, and moved this court to set aside the order of dismissal entered on the 14th day of November, 1896. This affidavit was accompanied with a copy of said order as stated, attested by the clerk of the supreme court of the United States, showing that the writ of certiorari was granted on the 16th day of November, 1896, to the circuit court of appeals of this circuit. It also appeared from the statement of said affidavit that notice of the fact that an application would be made on the 9th day of November, 1896, to the supreme court by the Louisville, New Albany & Chicago Railway Company for a writ of certiorari was accepted by counsel for defendants on the 12th of October, 1896, and that such motion was made on the 9th of November, 1896, to the supreme court of the United States, and granted on the 16th day of November, 1896. When the original bill was filed against the several parties an injunction bond was executed by the complainant, the Louisville, New Albany & Chicago Railway Company, to the several parties who were then defendants, the condition of which was that the obligors therein would pay to the obligees, or such of them as might be damaged by the injunction then granted, such damages as they, he, or it might sustain by reason of the issuing of said injunction, if it be finally decided that said injunction ought not to have been granted; and when the bill was amended, bringing in other parties, another injunction bond was executed by complainant with security, conditioned as in the first bond. On the 2d of February, 1896, the defendants the Louisville Trust Company and others, obligees in the said injunction bonds, moved the court to refer the case to a special master to hear and determine as to what damage, if any, said obligors of said bonds shall pay to said obligees therein, and report the same to the court for action thereon. Both of these motions have been submitted.

It will be seen from this brief statement of the facts that the writ of certiorari which issued from the supreme court was issued to the circuit court of appeals, and not to this court; nor has that court made any order on this court in regard to its action. The motion of the Louisville, New Albany & Chicago Railway Company to have this court set aside the order entered on the 14th of November, 1896, is upon the theory that this court still has control over the judgment then entered, as the motion to set it aside was made during the same term, and that the effect of the certiorari issued by the supreme court of the United States upon the circuit court of appeals is to set aside the action of the circuit court of appeals and the action of this court thereunder, and leave the cause as if it had gone up upon appeal directly to the supreme court. We have been unable to find any ruling of the supreme court or any established practice in regard to the effect upon the trial court of a writ of certiorari granted as in this case. The act of March 3, 1891, provides that:

"Whenever on appeal or writ of error or otherwise, a case coming directly from the district court or existing circuit court shall be reviewed and determined in the supreme court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination."
"Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be taken in pursuance of such determination."

And it provides in another section:

"That in any such case as hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court."

And in another provision:

"Whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the supreme court the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination."

Thus the acts of congress give the circuit courts of appeals in those cases over which they have appellate jurisdiction and can enter a final judgment plenary power to remand the case to the inferior court, with such direction as they might determine. This mandate thus entered must be obeyed by the inferior court, unless it has been suspended or superseded by a certiorari from the supreme court for the purpose of review or determination. This statute, while it gives full power to the supreme court to remand to the trial court for such proceedings as may be proper to carry out the final judgment of that court, is silent as to what should be done in the interim between the adjudication by the circuit court of appeals and the final adjudication by the supreme court. It must, of necessity, be still a pending suit, and the parties must, by the terms of the act of 1891, be subject to the final adjudication of the supreme court. Here we have an injunction granted originally by the trial court, and the relief granted upon final hearing, the case taken to the circuit court of appeals, and there an adjudication reversing the case, with a mandate issuing from that court directing this court to dismiss the bill, and with it the injunction, with costs; and the inquiry is whether this court can now, while the case is pending in the supreme court, set aside this order entered under the mandate of the circuit court of appeals.

At common law the writ of certiorari is used for two purposes: First, as an appellate proceeding for the re-examination of some action of an inferior tribunal; and, second, as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication. It is for the latter purpose that the writ has been usually employed by the supreme court. The removal of a proceeding by a writ of certiorari at common law might have been both before and after final judgment. Here, by the terms of the statute, the supreme court has the same authority over a cause removed by certiorari as if it had been carried there

by appeal or writ of error. The authorities at common law seem to differ somewhat as to whether, in addition to the writ of certiorari, an order of supersedeas should be issued to or by the inferior court. Perhaps the better authorities are that the certiorari, when awarded, and notice thereof given, was in itself a supersedeas. We think this is the effect of the certiorari granted under this act of 1891 by the supreme court.

In the case of *Ewing v. Thompson*, 43 Pa. St. 377, Judge Strong, afterwards Justice Strong of the supreme court, in discussing the effect of a writ of certiorari, speaking for the Pennsylvania supreme court, says:

"Very many English as well as American authorities are collected in *Patchin v. Mayor*, etc., 13 Wend. 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be, in effect, a supersedeas. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is said to be void, and punishable as a contempt. They all, however, assert no more than the power of the tribunal to which the writ is directed is suspended by it, that the judicial proceedings can progress no further in the lower court."

In *McWilliams v. King*, 32 N. J. Law, 23, it is held that at common law a supersedeas was issued by the inferior court after the certiorari was awarded, but the New Jersey practice was for the superior court to issue the supersedeas. And the court, in the course of its opinion, said:

"But it is to be remembered that the writ of certiorari is of itself and proprio vigore a supersedeas. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular, but absolutely void; and the parties doing such acts are trespassers."

See, also, 2 Hawk. P. C. pp. 400-416; 1 Bac. Abr. "Certiorari," G; Com. Dig. "Certiorari," G.

It would seem from this view that after a certiorari was issued by the supreme court the authority and power of the circuit court of appeals over the proceedings was at least suspended. I find in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 593, 16 Sup. Ct. 1184, this language used by the supreme court in noticing a point which had not been raised in the circuit court, nor assigned for error to the decree in the circuit court of appeals, viz.:

"It is admitted that the point is raised for the first time in this court. We have to determine in this appeal whether in our judgment the circuit court of appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the circuit court in reviewing the action of the court of appeals upon it, and under the statute our mandate goes to the circuit court directly; but it is, notwithstanding, the judgment of the circuit court of appeals that we are called upon primarily to review. It will be seen then that the judgments of the circuit court of appeals should not ordinarily be re-examined on the suggestion of error in that court in that it did not hold the action of the circuit court erroneous, which was not complained of. We will, however, make a few observations on the point thus tardily presented."

In this case there was an appeal from the circuit court of appeals.

In the case of *Telfener v. Russ*, 162 U. S. 170, 16 Sup. Ct. 695, a writ of certiorari was issued by the supreme court to the circuit court of appeals, and the case brought there in that way. In that

case the judgment of the circuit court was affirmed by the circuit court of appeals, and reversed by the supreme court. The order is that "the judgment of the circuit court of appeals should be reversed, and the judgment of the circuit court should also be reversed, and the cause remanded, with directions to set aside the verdict and grant a new trial." It does not appear from the report of the case whether the mandate went to both the circuit court of appeals and circuit court, or only to the circuit court.

We conclude, in the absence of any ruling or decision of the supreme court that the effect of a certiorari, when awarded in a cause decided by the circuit court of appeals, is to suspend any action that that court may take, or any action that might be taken by the trial court in obedience to the mandate of the circuit court of appeals after the certiorari is awarded; but it does not restore jurisdiction to the circuit court, nor does it give to that court any authority to set aside orders legally and properly made before the writ of certiorari is awarded. It, however, suspends any further action by the circuit court of appeals, or by the trial court in obedience to the adjudication of the circuit court of appeals after the writ has been awarded, or at least when the court is notified of the issuing of the writ of certiorari by the supreme court, and its service upon the circuit court of appeals. It may be that in this case the original complainants may suffer loss and inconvenience by the condition in which this record is, and it might be desirable for some rule to be established by the supreme court or the circuit court of appeals by which the judgment of the circuit court might be suspended upon proper conditions when there is to be an application for a writ of certiorari to the supreme court; but we are strongly inclined to the opinion that this court, in the present condition of the record, cannot grant the order to set aside the judgment entered dismissing the complainant's bill. We will not, however, overrule the motion, but leave it undisposed of until the question is definitely settled as to the power of the court.

The fact that notice for an application for a writ of certiorari was accepted by the counsel for defendants on the 12th of October, 1896, and the motion had actually been made in the supreme court before the order of dismissal was entered, does not, we think, affect the question of the court's authority now to set aside such order.

The motion of the defendants of the 2d of February to refer these cases to have the damages ascertained must, for the reason already given, be overruled, and for the further reason that by the terms of the injunction bond damage was only to be recovered if it be finally decided that the injunction ought not to have been granted; and in this case it has not been finally decided, but is still pending in the supreme court. We do not now express any opinion as to whether or not damages could be ascertained in the mode suggested by this motion. This motion of the defendants will be overruled, and no order made in the other motion at present.

HAMLIN et al. v. TOLEDO, ST. L. & K. C. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 430.

1. APPEALABLE FINAL DECREES—DENIAL OF RIGHT TO INTERVENE.

Certain unsecured creditors of an insolvent railroad company filed a bill against it to wind up its affairs. A suit for foreclosure of a first mortgage on the road was afterwards brought, and was consolidated with the creditors' bill. Certain holders of preferred stock of the company then petitioned the court to be made defendants, and for leave to file an answer and cross bill. This application was granted, subject to the right of the complainants to move to strike out the answer and cross bill. Complainants did so move, and upon the motion an order was entered denying the petitioners the right to intervene, or to file an answer or other pleading. From this order an appeal was taken. *Held*, that while the allowance or denial of an application to intervene rests in the discretion of the court, and no appeal could have been taken from the original order letting the petitioners in, yet as their application to come in had been granted, and they were thereby made parties, the order subsequently made, which in effect determined that the answer and cross bill presented no defense and no ground for affirmative relief, and dismissed the parties from the cause, was appealable as a final decree.

2. PARTIES TO RAILROAD FORECLOSURES—PREFERRED STOCKHOLDERS.

Certain holders of securities of an insolvent railroad company, upon the reorganization of the company and the organization of a new corporation, received preferred stock of such new corporation, the certificates of which recited that the holders were entitled to shares of the preferred, nonvoting capital stock of the company; that the stock constituted a lien on the property and net earnings of the company next after the first mortgage; that after January 1, 1888, the stock would carry interest at 4 per cent., payable only out of the net earnings of the company; that such interest should not accumulate, and coupons representing unearned interest must be surrendered on payment in whole or in part of a subsequent coupon; that after January 1, 1891, the certificates might be converted into common stock, and, if not so converted, would become converted 4 per cent. noncumulative stock; and that the company would create no lien on its road, other than the first mortgage, except subject to the lien of the certificates, without the consent of the holders of two-thirds of the preferred stock. *Held*, that the holders of such certificates were not creditors of the corporation, but were stockholders entitled to a preference over the holders of common stock, both as to dividends and capital, and as such, having an interest antagonistic to the common stockholders, they were proper parties to a suit for the winding up of the corporation and the distribution of its assets.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

The Toledo, St. Louis & Kansas City Railroad Company is an insolvent railroad corporation. In May, 1883, certain unsecured creditors filed a bill in the circuit court of the United States, at Cleveland, Ohio, for the purpose of winding it up and distributing all of its assets justly among its creditors. This first bill was a general insolvent bill, and was professedly filed for the benefit of all creditors, secured and unsecured. A number of other general creditors subsequently joined the original complainants, and were admitted as complainants. Under that bill a receiver was appointed by the circuit court, who took possession of the railroad within the state of Ohio, and engaged in the operation of the same, pending the sale which it was the object of the suit to bring about. Like bills, ancillary in character, were filed by the same complainants within other jurisdictions, and the same receiver was appointed within each jurisdiction. Neither the holders of bonds nor their trustees were made parties to that bill. Subsequently, however, the Continental Trust Company and John M. Butler, claiming to be trustees under a mortgage made by the said company to secure an issue of some \$9,000,000 of first mortgage bonds, filed their original bill in the same circuit court for the purpose

of foreclosing said mortgage. The creditors who had filed the original insolvent bill, and such others as had made themselves parties thereto, were made defendants. By leave of the court, Samuel R. Callaway, the receiver in possession of the railroad by appointment under the original creditors' bill, was also made a defendant. This bill was filed December 13, 1893. Thereupon the said Callaway was appointed receiver under this second bill, and an order made consolidating the two suits and ordering that they proceed under the style of "The Continental Trust Company et al. v. The Toledo, St. Louis & Kansas City Railroad Company et al." 72 Fed. 92. After answers had been filed by the company and by the general creditors who had been made parties, but before any decree adjudicating any claim or ordering foreclosure, the appellants presented an application to the court to be allowed to become parties defendant, with leave to file an answer and cross bill. This application was granted, and leave given to file the answer and cross bill accompanying the petition, subject, however, to the right of the complainants to move the court to strike them from the files, or to modify same by striking out every averment putting in issue the validity of, or consideration for, the mortgage bonds secured under the said mortgage. This reservation, as shown by an opinion filed with the record by the district judge, was due to the fact that the mortgagee complainants had not fully examined the said answer and cross bill, and desired time to do so. Complainants availed themselves of this leave thus granted, and subsequently gave notice that on the 26th of October, 1895, they would move the court to strike from the files the answer and cross bill theretofore filed, or move the court to modify said answer and cross bill by striking therefrom every averment raising an issue as to the validity of the mortgage bonds, or the consideration upon which they had been issued. The appellants were also notified that these motions would be supported by certain affidavits of persons whose names were set out therein. These motions, with the affidavits filed in their support, were taken under advisement until February 21, 1896, when an opinion was placed on the files denying the claim of appellants to be creditors of said railroad company, or that, as preferred stockholders, they had any lien valid as against creditors, or any right or interest in or to the property of said company antagonistic to the corporation or to the class of common stockholders. Instead, however, of directing the pleadings to be taken from the files or amended, an order was entered, as on motion of complainants' solicitors, denying appellants the right to intervene or file an answer or other pleading. This decree was not finally entered until May 14, 1896, and from it an appeal was prayed and allowed. At the June session of the last term of this court, a motion was made to dismiss this appeal, which, without an opinion, was overruled. The case is now before us for decision of the questions raised by the errors assigned by complainants upon the decree.

John H. Doyle and Benjamin Harrison, for appellants.

E. C. Henderson and C. N. Fairbanks, for appellees.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The allowance or denial of the application of a stranger to be admitted as a party defendant to a pending suit in equity rests in the sound discretion of the chancellor. The denial of such an application is not such a final decree as is the subject of appeal, under section 692 of the Revised Statutes. Such an application is a mere motion in the case, made by one not a party, and is not of itself an independent suit in equity, appealable here. *Ex parte Cutting*, 94 U. S. 14; *Toler v. Railway Co.*, 67 Fed. 168; *Lewis v. Railroad Co.*, 10 C. C. A. 446, 62 Fed. 218. It follows, therefore, that if no other order had been made in reference to the application of appellants to become parties than that of May 14,

1896, no appeal would lie, and the motion to dismiss should have been sustained. But that is not the situation. The order of October 19, 1895, when properly construed, made the appellants parties defendant, with the right to answer and file a cross bill. The reservation of a right to require that the answer should present only pertinent and material defenses was an unnecessary precaution, inasmuch as it is always the duty of a chancellor, upon proper exception taken, or at the hearing, to see that nothing shall be suffered to remain in an answer which is not called for by the bill, nor material to the defense. Beach, Mod. Eq. Prac. § 408. Such a reservation did not suspend the application of the petitioners, nor leave their motion to become parties undecided. The reason given for this reservation in an opinion filed by the court August 5, 1895, was that the complainants had not had an opportunity of examining the answer. If the court had continued the motion until the pleadings had been examined, and then denied leave to intervene because the answer made out no substantial defense, the denial would not have been ground for an appeal. But this was not what was done. The motion to be allowed to become parties defendant was not held in suspense or continued, but was decided and granted. From the date of that order they were treated by appellees and by the court as parties, and were from that time affected by any decree made in the cause. The reservation of a right to determine, on motion of complainants, if they saw fit to make such motion, how far the answer and cross bill so filed contained matter pertinent to the character of the suit, did not operate as a suspension of the motion to be admitted as parties, or give the court any right to summarily dismiss them as parties. The notice given by complainants under the reservation referred to involved a recognition that appellants were parties, and was a concession in that regard. The questions to arise on that motion concerned the pertinency of the answer and cross bill, and it was error in the court to involve that question with a trial of issues of fact or law dependent upon ex parte affidavits. The questions arising upon these motions so set down upon formal notice for October 26, 1895, were not decided by the court until February 21, 1896. 72 Fed. 92. At that time an opinion was filed upon the merits of the claims asserted in the answer and cross bill, holding that appellants were neither secured nor unsecured creditors, and that, as preferred stockholders, they had no interest which was not represented by the corporation.

The decree then entered, when construed in connection with the decree admitting appellants as parties, should be interpreted as one denying appellants any relief, upon the ground that neither their intervening petition nor their answer and cross bill showed any such interest in the subject-matter of the case as entitled them to maintain their cross bill, or present any issues or set up any rights by answer. This is the construction we placed on the decree at the former term, and, thus construed, the decree was one upon the merits, and appealable as a final decree. If this view of the rights and interests of these appellants had been taken be-

fore they were admitted as parties, and if, as a consequence of such opinion, the court had refused leave to intervene as parties defendant, no appeal would have been permissible. Appellants could have asserted their rights through an original bill, and would not have been concluded by the refusal of the court to allow the assertion of such rights in a cause to which they were not parties. But if, as in this case, the court concludes, upon inspection of an answer or a cross bill filed by one already a party to the cause, that the pleadings are impertinent and show no substantial defense, or no interest which would justify affirmative relief, and for this cause dismisses the pleading and the party from the cause, the action of the court is subject to review. The distinction is material, and is the point upon which we denied the motion to dismiss this appeal. The general rule as to an answer is that nothing should be suffered to remain in it which is neither called for by the bill nor material to the defense. Beach, Mod. Eq. Prac. § 408; Woods v. Morrell, 1 Johns. Ch. 105; Stafford v. Brown, 4 Paige, 88. In Stafford v. Brown, cited above, Chancellor Walworth said that:

"When new matter not responsive to the bill was stated in the answer, if such matter was wholly irrelevant and furnished no sufficient ground of defense, the complainant might except to the answer for impertinence, or might raise the question on the hearing." "Facts not material to the decision are impertinent, and, if reproachful, they are scandalous."

In Woods v. Morrell, supra, Chancellor Kent said that the best rule to ascertain whether matter be impertinent is to see "whether the subject of the allegation could be put in issue or be given in evidence between the parties." He adds:

"The court will always feel disposed to give the answer a liberal consideration on this point of matter irrelevant, and to consider whether it can have any real or proper influence upon the suit."

If the answer and cross bill show in fact that appellants presented no ground for being suffered to appear and defend this consolidated suit, and no interest in the subject-matter of the suit which could not be properly represented by the corporation, then no wrong was done in dismissing them from the case. If, on the other hand, they are creditors of the corporation, secured or unsecured, or have any such peculiar interest as cannot be properly represented by the trustee under the mortgage, or by the corporation which is a defendant, then the case should be remanded and regularly heard. It is not clear that the court permitted the affidavits filed by complainants in opposition to the merits presented by the appellants to influence its action. They were improperly filed, and will not be regarded upon this appeal. Appellants' case must stand or fall upon the averments made by their petition, answer, and cross bill, and upon such exhibits as were filed by them. The case made by the petition, answer, and cross bill was substantially this: They and those acting in concert with them are owners and holders of certificates of preferred, nonvoting stock issued by the Toledo, St. Louis & Kansas City Railroad Company. The total issue of these certificates was \$5,805,000, and, of this total, appellants and those represented

by them hold about \$2,000,000. They claim that these certificates are money obligations of the railroad company, secured by a lien next after the existing first mortgage bonds of said company. They aver that, though no mortgage was executed and registered to secure said certificates, they constitute a valid equitable mortgage, binding upon the corporation, and upon all creditors who become such with notice of this equitable lien. These certificates are in form alike, and were issued simultaneously with the execution of the first mortgage sought to be foreclosed herein, and were registered by the trustee under said first mortgage. We here set out one of these certificates, and one of the coupons attached:

Toledo, St. Louis & Kansas City Railroad Company.

No. ———, Preferred Capital Stock. 10 Shares.

This is to certify that James M. Quigley or bearer is entitled to ten shares, of one hundred dollars each, of the preferred, nonvoting capital stock of the Toledo, St. Louis & Kansas City Railroad Company. This stock constitutes a lien upon the property and net earnings of the company next after the company's existing first mortgage. It does not entitle the holder to vote thereon. After the first day of January, 1888, it is entitled to and carries interest at the rate of four per cent. per annum, payable semiannually, represented by interest coupons attached to this certificate. Such interest is only payable out of the net earnings of the company after the payment of interest upon its existing first mortgage bonds, and the cost of maintenance and operation. A statement showing the business of the company for the half of its fiscal year next preceding shall be exhibited at the office of the company in New York to the holder of this certificate, at the maturity of each interest coupon, and the net earnings applicable to such interest shall be reckoned for such period. Such interest is not to accumulate as a charge, and coupons representing unearned interest must be surrendered and canceled on the payment in whole or in part of a subsequently maturing coupon. At any time after the first day of January, 1891, and before the first day of January, 1898, this certificate may be converted into the common capital stock of the company. If not converted, then to become a converted four per cent. noncumulative stock. The company will create no mortgage of its main line, other than its first mortgage, nor of any part thereof, except expressly subject to the prior lien of this certificate, without the consent of the holders of at least two-thirds of this stock, present at a meeting of which reasonable personal notice must be given to each registered stockholder, and by publication for at least three successive weeks in two leading daily newspapers published in the cities of New York and Boston. One-third of the entire issue of this stock, present in person or by proxy, shall constitute a quorum. Nor will the company increase the issue of these certificates of stock without consent obtained as above. This certificate of stock shall be transferred by delivery, or by transfer on the book of the company in the city of New York, after a registration of ownership certified hereon by the transfer agent of the company.

[Countersigned]

American Loan & Trust Company,

By ———,
Secretary.

New York, June 19, 1886.

———,
President.

———,
Secretary.

Shares \$100 Each.

(Coupon.)

The Toledo, St. Louis & Kansas City Railroad Company.

Will pay to bearer on the first day of January, 1898, upon the surrender of this warrant at its office or agency in the city of New York, any amount that may be due hereon under the conditions set forth in the certificate of stock to which this is attached, not exceeding the sum of twenty dollars. Coupon No. 20. No. ———.

Isaac White, Secretary.

Appellants do not strengthen their claim by the lengthy statement of the terms of the reorganization scheme under which their certificates were issued, and to which they were parties. They were originally holders of first mortgage bonds in a corporation which was the predecessor of the present company in the title. They foreclosed, and caused the property to be bid in by Sylvester H. Kneeland, as trustee, for their use. This was done in pursuance of a reorganization plan by which the property foreclosed was to be conveyed to a new corporation. This new corporation was to issue common stock and first mortgage bonds, both of which were to be expended under a contract with Kneeland in the conversion of the old narrow-gauge railroad into a standard-gauge line, and in its extension, and in the purchase of new rolling stock. They say that, during the negotiations between the committee which represented the senior foreclosing bondholders, it was at one time determined that second mortgage bonds should be issued ratably to the said foreclosing bondholders, but that it was finally deemed unadvisable to take that course, and it was therefore agreed that "preferred, nonvoting stock" should be issued to said original holders of bonds of the old corporation; "said preferred stock to be a second lien on all the property of said corporations, subject only to lien of said first mortgage bonds." The certificates exhibited are in precise accordance with the reorganization agreement as stated in the pleading. Whatever their former relation to the property now owned by the defendant railroad company, their present rights must depend upon the interpretation and legal effect of the language contained in the certificates issued in lieu of their bonds. They have received precisely what they bargained for. That they are holders, by virtue of these certificates, of certain interests in the capital stock of this corporation, is to our minds very clear. That is the plain declaration contained on the very face of the certificates themselves. The language is, "that the bearer is entitled to ——— shares of the preferred, nonvoting capital stock," etc. That these shares are declared to carry "interest at the rate of four per cent. per annum, payable semiannually, represented by coupons attached," is not conclusive that they are debt obligations. By calling a dividend "interest," the essential nature of the thing is not changed. We must look deeper. When we do so, we find that this "interest" is to be paid only out of "the net earnings" after paying interest upon the first mortgage bonds, "and the cost of maintenance and operation." We further find that this so-called "interest" is "noncumulative." The net earnings of each year are to be ascertained. If there are none, after paying interest on the first mortgage bonds and operating expenses and expenses of maintenance, no "interest" is to be paid; and when, at any time, such a happy state of affairs is found to exist as a surplus, so that anything can be paid upon the current year's "interest," all past-due coupons for "unearned interest" are to be surrendered. Thus, this "interest" has all the characteristics of a preference, in dividends to the extent of four per cent. per annum, over the common

stock, and none of the marks of interest proper. The agreement that "the company will create no mortgage * * * other than its first mortgage, * * * except subject to the prior lien of this certificate, without the consent of the holders of at least two-thirds of this stock," etc., is entirely consistent with an intent to give to these preferred stockholders a preference over the common stockholders, not only in relation to dividends, but a preference over them in the ultimate distribution of the capital stock. The clear purpose of the provision making this stock a lien second only to the existing first mortgage is to secure to it a preference over the common stock, not only in respect to a limited dividend, but in the ultimate return of capital to those who contributed to it. In the absence of charter regulation or prohibition by the law of the state under which a corporation is organized, a corporation, at its organization, may classify its stock, and provide for a preference of one class over another in respect of both capital and dividends. Cook, Stock, Stockh. & Corp. Law (3d Ed.) §§ 266-278; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789; Lockhart v. Van Alstyne, 31 Mich. 76; Kent v. Mining Co., 78 N. Y. 159; McGregor v. Insurance Co., 33 N. J. Eq. 181; Miller v. Ratterman, 47 Ohio St. 163, 24 N. E. 496. In providing for the lien of this stock upon the "property" of the company next after the company's existing first mortgage, "property and net earnings" are coupled together. This is significant. The lien given upon "net earnings," is the same kind of lien given on the "property" of the company. In such case it is a preference over the usual rights and interests of another, but subordinate, class of stockholders. Neither do we think that the provision that this stock shall "become preferred four per cent. noncumulative stock," in the event the holder fails to avail himself of the privilege of converting it into common stock within the time allowed, is indicative that it was not preferred stock before the rejection of the option to become common stock. Before that it was a non-voting, noncumulative, preferred stock, with the option to become common stock. After that time this option is lost, and with it the privilege of sharing equally with the other class of stock in the control of the corporation and in the distribution of dividends, without the limitation prescribed as to the amount of such dividend. That seems to be the only result of rejecting the option. There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789; Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 271. The chance of gain throws on the stockholder, as respects creditors,

the entire risk of the loss of his contribution to capital. "He cannot be both a creditor and debtor by virtue of his ownership of stock." *Warren v. King*, *supra*. If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. *Cook, Stock, Stockh. & Corp. Law* (2d Ed.) §§ 270, 271; *Chaffee v. Railroad Co.*, 55 Vt. 110; *McCutcheon v. Capsule Co.*, 19 C. C. A. 108-115, 71 Fed. 787; *Morrow v. Steel Co.*, 87 Tenn. 262, 10 S. W. 495. If that was the purpose of this arrangement, most doubtful language was employed. There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well-understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders, and recover as for an unlawful diversion of assets.

Appellants say that it was originally contemplated that the new corporation should pay them for their interests in the foreclosed railroad, and, for that purpose, should issue to them its second mortgage bonds. If that plan had been carried out, there would be no doubt as to their attitude. They would have become creditors. Under it their relation would have been one of no doubt, and notice by registration would have put all who dealt with the corporation on guard. That plan was abandoned. They agreed to take, and did take, the relation of stockholders towards the new company. They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy. They thereby gave some additional value to the common stock. The latter was the exclusive voting stock, and that was worth something, as railway management now goes. The surrender of the right to vote does not make them creditors. They bargained for preferred shares of stock,—preferred as to dividends and preferred as to capital. For this advantageous position they surrendered the first intention, by which they were to have become secured creditors. If they intended to become creditors, and not stockholders, they adopted a most singular method of defining their relation. We will not presume that their purpose was to adopt a device by which they might withdraw their contribution to the capital stock and leave creditors unpaid. If they intended that, they have not made it plain, and, if it was plain, the device would be invalid as to creditors.

Although appellants were not creditors proper, yet they show a case, on the face of their certificates, entitling them to a preference over common stockholders in relation to both dividends and

capital. Ordinarily preferred stock is entitled to no preference over other stock, in relation to capital. But where there is an expressed agreement giving such a preference, not prohibited by local law nor the charter, we see no reason why it is not a valid contract, as between the corporation and such preferred stockholders, and binding upon the common stockholders. *Cook, Stock, Stockh. & Corp. Law*, § 278; *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789; *Chaffee v. Railroad Co.*, 55 Vt. 110; *In re Bangor & P. S. & S. Co.*, L. R. 20 Eq. 59; *Lockhart v. Van Alstyne*, 31 Mich. 79; *Kent v. Mining Co.*, 78 N. Y. 159. Such a preference would not be inconsistent with their relation as stockholders and would not affect creditors. This relation to the corporation and to its common stockholders, in view of the nonvoting provision in this arrangement, makes it eminently proper that these preferred stockholders should be represented by a reasonable number standing for the class, with the right to stand for and defend in respect to their own rights. *Bronson v. Railroad Co.*, 2 Wall. 283-302.

If it be true, as alleged, that the officers and directors of this corporation hold their places through the grace and at the will of those who hold both the common stock and the first mortgage bonds, it furnishes a fair reason for suffering these stockholders to be represented in the defense. We have not considered the questions made by counsel which are based upon the *ex parte* affidavits touching the actual reorganization agreement. We have undertaken to dispose of this case upon the facts stated in the answer. Neither shall we undertake to decide how far the defenses suggested in the answer and cross bill, against the first mortgage bonds, are available to these stockholders, or to what extent the action of the corporation or the trustees, or committees acting for the preferred stockholders, has concluded them. These are all questions proper to be decided upon a demurrer to the cross bill, or upon final hearing. What we decide is that, although appellants are not creditors, they are entitled, on the averments of their answer, to a preference, in relation to the capital of this corporation, over common stockholders, and that, upon the averments of their answer, they were at least proper parties defendant, having a substantial interest antagonistic to the common stockholders, and therefore not to be properly represented by the corporation. It is a case in principle like that of a common trustee in conflicting mortgages. Such a trustee cannot represent antagonistic rights of contending classes of lienors. When that is the case, each class should be allowed representation. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 66 Fed. 169-176; *Toler v. Railroad Co.*, 67 Fed. 168-174. The effect of dismissing appellants from the case after admitting them as parties was to deny them the preference over common stockholders, and was such a decree as was final, and therefore appealable. *Ex parte Jordan*, 94 U. S. 248. For this error the decree will be reversed, and cause remanded to be heard in regular course. Costs of appeal will be paid by appellees.

O'BRIEN et al. v. WHEELOCK et al.

(Circuit Court, S. D. Illinois. February 10, 1897.)

1. FINAL JUDGMENT.

An act of a state legislature providing for the construction of a levee and the issuing of bonds to pay the cost of construction, and also providing for the collection of assessments upon the lands bordering on the improvement "in the same manner as state and county taxes," was declared by a judgment of court to be unconstitutional and void in so far as it provided for that mode of collecting the assessments. Thereafter, in an action by the holder of certain of the bonds issued pursuant to that act against the commissioners appointed under the act, asserting a lien upon the lands benefited by the improvement for the amount advanced by him to the commissioners, the master reported, under a reference to him for that purpose, the amounts advanced by plaintiff and others who came into the suit, and the court made an order adjudging that the amounts thus reported were due the several complainants, and giving them liberty to file a supplemental bill against the owners of the lands benefited, to compel them to contribute to the payment of the amounts thus reported. *Held*, that this was not such a definite and certain adjudication as to be final and binding, and that the landowners against whom a supplemental bill was filed were not precluded from denying their liability.

2. LACHES.

As it was thirteen years after the act was declared to be unconstitutional, and nine years after leave was given to file the supplemental bill, before any step was taken against the present defendants, except those who were commissioners originally, there has been such laches as precludes the complainants from having the relief sought by the supplemental bill; the condition of the property and the relations of the parties having in the meantime greatly changed.

3. PURCHASER OF BONDS—SUBROGATION.

The purchaser in open market of the bonds, being a mere volunteer, is not subrogated to the equity of the contractors.

4. SAME—ESTOPPEL.

The purchaser of the bonds cannot set up any use made of the loan after he obtained his bonds as creating any estoppel, as his equities must be determined from the condition of things existing when he obtained the bonds.

5. JURISDICTION OF FEDERAL COURTS AS TAX COLLECTORS.

While the federal courts will, in a limited class of instances, compel the agents of a state to set in motion machinery existing under state authority for the collection of taxes, these courts will themselves neither create the machinery nor invest any person with the power to use the same.

John M. & John Mayo Palmer and Henry M. Duffield, for complainants.

Green & Humphrey, Thomas Worthington, Orr & Crawford, and Mathews, Wike & Higbee, for defendants.

ALLEN, District Judge. The long-extended litigation in this cause followed the act of the general assembly of the state of Illinois approved April 24, 1871, entitled "An act to provide for the construction and protection of drains, levees and other works." At that time a body of land of an average width of 3 to 5 miles, extending for more than 50 miles from the mouth of Fall creek, in Adams county, to Hamburg Bay, along the east bank of the Mississippi river, and between it and the bluffs, or high-water mark of the river, containing 110,000 acres, was subject to periodical overflows of the Mississippi river. These bottom lands were sparsely populated, but the owners agitated the project of protecting and

reclaiming them, with a view of their becoming productive, and of greatly increased value. A supplemental act of the legislature was approved April 9, 1872, providing for the registration of bonds, and declaring that, when a court found that any work authorized by the act was a public benefit, "the same should be deemed a public work," and extending the powers of the commissioners, etc. Acting under these acts of the legislature, certain parties filed at the August term, 1871, of the county court of Pike county, a petition praying for the appointment of commissioners in the premises, and at the September term, 1871, the county court of Pike county appointed William Dustin, George W. Jones, and John G. Wheelock such commissioners, who accepted, qualified, and organized. In November, 1871, the commissioners filed a report to the county court, with a surveyor's estimates, including a map of the district, and a profile of the work to be done. At the December term, 1871, this report was approved, and a jury impaneled to examine the land, assess the damages and benefits, and make an assessment roll, which, it seems, was done, and the report of the same spread upon the record. The court directed that the assessments be paid in 10 annual installments, commencing in 1872, with interest from the 1st day of October, 1872. Copies of this order for Pike, Adams, and Calhoun counties were made to the commissioners, and were recorded in said counties on or before December 18, 1872. The commissioners proceeded to acquire title to the lands for the site of the levee, and contracted for the construction of the same, issued bonds, and disposed of the same to contractors for the levee work, and from these contractors complainants' testator purchased more than \$200,000 of said bonds. Afterwards the commissioners filed another petition to raise an additional sum of money, and proceedings similar to the first were had therein, resulting in assessments amounting to \$148,500. Upon the second assessment the commissioners issued, under the authority of the county court, \$148,500 of bonds, and sold the same to the contractors engaged in the construction of the levee, and these bonds were also purchased by complainants' testator. The commissioners attempted to collect installments of interest under the provision of the act for the collection of assessments "in the same manner as state and county taxes." Certain of the landowners resisted this effort on the part of the commissioners, and the supreme court of the state of Illinois refused to enforce collection by the tax collector by means of extension on the tax books, holding that the sections of the act of 1871 providing for such collection were unconstitutional and void. After this decision a number of landowners provided a fund for repairing and protecting the levee by conveying to such commissioners by deed of trust about 30,000 acres of land, and authorizing them to make assessments on the land in each year in such amounts as were deemed necessary to keep said levee in repair. Money was raised under these deeds of trust, and from different sources, and expended on the levee, for its protection and reconstruction. On the 4th day of May, 1878, Francis Palms, the complainants' testator, filed a bill on behalf of himself and others in this court against the commis-

sioners. Said bill is the original bill to which the bill in this suit is the supplement. In it complainant Palms prayed, among other things, for a decree for an accounting of the moneys which he claimed to have advanced to the commissioners, and the interest thereon; that he have for such an amount a lien upon the levee and the works and the lands acquired by the commissioners for the site thereon, and upon the assessment and interest thereon upon the other lands described in Exhibit A; that the commissioners be ordered to proceed to collect said assessments and interest under the order and direction of the court; for the appointment of receivers to take charge of said levee, and all books and papers of said commissioners, and to collect, under the direction of said court, said assessments and interest; and for other and further relief. The commissioners answered the bill, setting up the action of the supreme court in holding the act of 1871 unconstitutional; denying that they were then, or ever had been, in the actual possession of any part of said levee except for the purpose of constructing, maintaining, and repairing the same; and claiming, among other things, that because of the registration of said bonds with the auditor of public accounts of the state of Illinois the bond owners had thereby elected the mode prescribed by the supplemental act of 1872 for the collection of interest on said bonds, and that they, said commissioners, were by said election relieved from the duty of looking after the same; that certain landowners had at all times opposed the proceedings which subjected their lands to assessments for benefits on account of said levee, and had refused to pay interest accruing on said assessments; and because of this other landowners, otherwise inclined to pay their assessments, saw the futility of doing so unless payment could be enforced against all alike, which resulted in a return by the township collector of all, or nearly all, of said landowners as delinquents. On the 13th day of March, 1879, the case having been set down for hearing upon bill and answer, the court passed an order or decree "that defendants (commissioners) retain the right of way, levee, and other works, and keep and preserve and protect the same under the order and control of this court for the benefit of complainants and all other persons interested therein; that complainants and all other persons who may have advanced money to the defendants for the right of way for the construction of said levee and other works, or who may be the holders of any of said bonds issued by the defendants to raise money for the purposes aforesaid, who may come into this suit, and contribute their proper proportion for the expenses thereof, have liberty to go before the master, and produce their bonds and coupons, and make proof of the amount due them of their principal and interest." The cause was referred to John A. Jones, master in chancery, to take proofs upon proper notice of the amounts due complainants and other parties, and to make report to the court, with such proofs of the amounts found due by him to each and every party who appeared before him, with the grounds of the several findings. The order or decree then proceeded as follows: "That, after the making of said report and the approval thereof by the court, the said complainants or other persons

have liberty to exhibit and file their supplemental bill or bills against any or all of the present or former owners of the land alleged in said bill to be benefited by said levee; to compel contribution of the payment of the amounts found due as aforesaid, and for such other and further relief as they may be advised they are entitled to. That complainants are at liberty to use the name of the defendants in such supplemental bill, if they are advised it is necessary for them to do so, upon tendering sufficient indemnity." It is also alleged in the present bill that after the rendition of the foregoing decree certain persons named therein went before the master, and made proof of their several holdings of bonds, and that on the 7th day of July, 1880, another order or decree was rendered in the original cause, which was, in substance, that the master had filed his report, together with certain exceptions of the defendants thereto; that such exceptions were overruled and the report confirmed, the court decreeing as follows: "And the court does further order, adjudge, and decree that there is due to the several complainants upon their respective coupons produced and proved before said master, and for interest upon the amount of such coupons up to the 1st day of July, 1880, as reported by said master, the following sums; that is to say, * * *—making an aggregate sum so found due to the complainants as aforesaid of \$304,908.26. The above amounts are found to be due without prejudice."

It is fairly inferable from the entire bill that counsel for complainants treat the steps taken in this court before the present bill was filed as an adjudication, at least as to certain of the assessments described in Exhibit A, and as to the lands of some of the defendants. Certain orders or decrees made March 13, 1879, and July 7, 1880, are referred to as supporting this view. It will be observed that the original bill named as defendants only the commissioners Dustin, Jones, and Wheelock, and the first order refers the cause to the master to ascertain the sum due complainants, and it was also ordered that complainants or other persons have liberty to file supplemental bill or bills against the present or former owners of said lands, "to compel them to contribute, and ask for such further relief as complainants are advised they are entitled to." In the second order, July 7, 1880, the master to whom had been referred the question of amounts due complainants having reported, the court overruled certain exceptions of the defendants to such master's report, without prejudice, and permitted complainants, in their own names, or in the names of the commissioners, to proceed in this court against the lands of the landowners. Tested by the rules usually applied in ascertaining whether an order of court is a final and binding adjudication of the rights of persons and of property, these would seem to be wanting in some essential qualities. One of the first requisites of a valid, final adjudication is that it shall be definite and certain. Now, is it at all certain from these orders that it was supposed by complainants or counsel, or contemplated by the court, that the orders were binding upon any one other than the commissioners in their official capacity? Had it been thought that the former proceedings concluded the defendants, and sub-

jected their titles to the assessment in controversy, the present steps would probably not have been taken. Complainants, by their supplemental bill, have brought in by name over 1,000 defendants as having some interest in the property sought to be affected by the decree prayed for, and yet the logic of their contention seems to be that these defendants, in court for the first time, are precluded, by what is claimed to be a final adjudication, from raising the very questions on which the alleged liability depends. Probably these orders or decrees were only intended to be provisional, enabling complainants to ascertain the sum due, and get authority to bring in parties interested, with such interlocutory relief as they may have been entitled to, and this view is strengthened by the qualification "without prejudice" in the order confirming the master's report. It is further claimed by counsel for complainants that the commissioners were trustees for the landowners to the extent of binding the latter in litigation. No evidence in the nature of deed or other instrument declared such trust or gave such power. Ordinarily, no one can be bound by the act or representation of any trustee or agent, where the effect or validity of the act on which the right of representation depends is itself a matter of dispute. One of the first difficulties in the way of complainants to obtaining the relief sought by their bill is that of laches. The Webster Case,¹ declaring the act of 1871 unconstitutional, was decided by the supreme court of Illinois, January term, 1876, and from that time forward until May 4, 1889, neither Francis Palms, nor his representatives, nor any of the complainants attempted to take any step against the present defendants, except those who were commissioners originally. The original bill to which this is a supplement was filed against the said commissioners May 4, 1878, and no other landowners were made parties defendant. On July 7, 1880, the last order was entered in the original cause, and from that time forward, for almost nine years, no one moved. In the meantime the land embraced in the original Sny district was bought and sold and passed by succession and mortgage. Should it be conceded that the former orders or decrees had the force of solemn judgment, that force would have ceased long before the filing of the supplemental bill, for no effort or attempt was made to enforce these orders or decrees until the expiration of their lives as statutory liens. In Illinois neither a judgment at law nor a decree in chancery has any force against the parties after the lapse of seven years from its rendition. 2 Starr & C. Ann. St. p. 1386, c. 77, § 6. And a court of chancery generally follows the law in applying the statute of limitations, and where there are exceptions a sufficient equitable excuse should be alleged in the bill, and proved, to account for and justify the delay. Walker v. Ray, 111 Ill. 319, 320. But equity goes further than the law, and refuses relief on the ground of laches in many cases where there would be no bar to an action at law, usually founded upon some change in the conditions or relations of the parties or the subject-matter of the suit. Galliher v. Cadwell, 145 U. S. 372, 373, 12 Sup. Ct. 873. Francis Palms had leave July 7, 1880, to file an amended or supplemental bill. He lived till November 24, 1886,

¹ Unpublished.

and according to the testimony attended to his business until the day before his death. Neither he nor his executors took any steps whatever against the old commissioners until the present bill was filed, May 4, 1889. No excuse is alleged in the bill or shown by the testimony for this delay. In the meantime the condition of the property and the relations of the parties have greatly changed. But few of the parties connected with the original enterprise were living, or owned land in the district, when the supplemental bill was filed; and their holdings represent but a small fraction of the whole. It appears from the proof that, relying upon the decisions of the Updyke¹ and Webster Cases, and usually in ignorance of the case of *Palms v. Wheelock*, they expended large sums of money in rebuilding the levee, or in constructing a new one in part, and in making improvements and repairs on their land. An amount of money in excess of the amount expended by the original organization has been paid out as an absolute necessity for repairs and protection. It is, however, now insisted in a general way by complainants that *Palms*, the purchaser in open market of the bonds, was subrogated to the equity of the contractors. This position does not seem to be sound, when tested by authority. It was held in *Suppiger v. Garrels*, 20 Ill. App. 625, that:

"Subrogation in equity is confined to the relation of principal and surety and guarantors where a person, to protect his own junior lien, is compelled to remove one which is superior; and the cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer."

And Justice Miller, in *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, after quoting approvingly the syllabus in *Suppiger v. Garrels*, supra, says:

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who, in this instance, is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market, without anybody's indorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action."

If there was no subrogation, it seems clear that *Mr. Palms* or his representative cannot set up any use made of the loan, even after he obtained his bonds, as creating any estoppel whatever, and this view renders unnecessary any discussion as to whether any landowner was bound by estoppel. The equities of *Mr. Palms* must be determined from the condition of things existing when he obtained the bonds, as those alone would influence his action, and upon those alone could he rely.

Another question pressed upon the attention of the court is important, because jurisdictional. Suppose defendants did consent to the act of 1871, and did thereby render the law valid in all particulars except the provision empowering and requiring ministerial officers to collect the assessments; and let it be admitted for the purposes of the argument that the defendants were bound to bear the burdens imposed by the law, without regard to the receipt or nonreceipt of the benefits thereof,—still the question arises, what has

a court of equity of the United States to do with the matter? On what ground is the jurisdiction of the court sought to be maintained? There is no need to invoke the aid of equity if the act of 1871 is binding upon the defendants in all its parts. That act and the registration law provide all necessary machinery through the agency of the public officers. If the law failed as to any of its provisions for the assessment or collection of taxes, then will equity for that reason take jurisdiction? In a word, will the absence of any and all other effective remedies render it incumbent on the court to act or invest it with power so to do? It is not to be denied that a federal court will sometimes compel the collection of a tax. When a court of the United States renders a judgment, and there is an officer invested with power to collect taxes wherewith to discharge such judgment, and it is the lawful duty of such officers to make such collections, the United States courts will compel the discharge of such duties by writ of mandamus. But, in the absence of such officer or officers so empowered by state authority, the United States courts will not perform the duties of tax collectors. *Walkley v. City of Muscatine*, 6 Wall. 481; *Rees v. City of Watertown*, 19 Wall. 107; *Heine v. Commissioners*, 1 Woods, 246, Fed. Cas. No. 6,325, approved in *State Railroad Tax Cases*, 92 U. S. 575; *Barkley v. Commissioners*, 93 U. S. 265; *Thompson v. Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140. In the foregoing authorities upon this question of jurisdiction it seems to be substantially settled that when the machinery for the collection of taxes is in existence under state authority, the federal courts will, in a limited class of instances, compel the agents of the state to set the machinery in motion; but those courts will neither themselves create the machinery, nor invest any person with official power to use the same. Complainants are not entitled to the relief prayed for, or to any relief in this court, under the pleadings and proofs in this cause.

COCKRILL v. BUTLER et al.

(Circuit Court, E. D. Arkansas. February 15, 1897.)

1. STATE STATUTES OF LIMITATION—FEDERAL COURTS.

State statutes of limitation apply to proceedings, at law or in equity, in the federal courts, based upon federal statutes, state statutes, or common law. *Campbell v. City of Haverhill*, 15 Sup. Ct. 217, 155 U. S. 610, followed.

2. ACTIONS ON THE CASE—SUIT AGAINST NATIONAL BANK DIRECTORS.

The right of action against the directors of a national bank, for violation of the provisions of the national banking act, given by Rev. St. § 5239, is for a tort, and comes within the common-law definition of actions on the case.

3. LIMITATION OF ACTIONS—ARKANSAS STATUTE.

The Arkansas statute of limitations, providing that all special actions upon the case, for criminal conversation, assault and battery, and false imprisonment shall be brought within one year, applies to all special actions on the case, and not only to the three classes of actions specially mentioned; and it governs an action brought against the directors of a national bank, under Rev. St. § 5239.

4. SAME—FORMS OF ACTIONS—CODE OF PRACTICE.

The provision of the Arkansas Code of Practice that "the forms of all actions and suits heretofore existing are abolished" did not abolish the distinctions in the character of actions, and the statute of limitations governing "special actions upon the case" was not thereby abrogated.

Cockrill & Cockrill and J. M. Moore, for plaintiff.

Rose, Hemingway & Rose, M. M. Cohn, J. M. Rose, E. M. Kimball, and John McClure, for defendants.

WILLIAMS, District Judge. This is a suit in equity, brought by the plaintiff, as receiver of the First National Bank of Little Rock, against the defendants, charging that they were directors of the said bank for a period of years, and seeking to fix a liability upon them as such directors under the provisions of the acts of congress and by the rules of equity. The bill, after reciting various losses sustained by the bank during the time in which the defendants were directors thereof, charges:

"That when said bank failed its liabilities, resulting from the mismanagement of its affairs, exceeded its resources to such an extent that it became necessary for the comptroller to make an assessment of 92 per cent. on the stockholders for the purpose of paying its debts, and it is doubtful if the fund raised from such assessment will be enough to pay off and discharge all of the liabilities. Plaintiff avers that under the provisions of the acts of congress, as well as by the rules of equity, the defendants are liable for the losses ensuing from their wrongful acts and from their neglect and failure to perform their duties, and he alleges that the bank was injured and sustained loss to a very large amount, to wit, three hundred thousand dollars, by the aforesaid misconduct and neglect of the defendants. During all the time of the said illegal and wrongful acts the defendants, or some of them, were the directors of the bank, and constituted a majority of the board, and no suit could be brought by the corporation by reason thereof. Wherefore plaintiff prays that process issue against the defendants, requiring them to appear and answer the allegations of plaintiff's complaint, but not under oath, which is hereby waived; and upon a hearing of said cause that the defendants be required to make good all the losses sustained by said bank by reason of their misconduct and neglect to perform their duties, and that he have judgment against them, and each of them, for such sum as they may be respectively liable for, and for such other and further relief as may seem meet."

The original complaint in this case was filed and writ issued on May 22, 1894. Various amendments have been made from time to time to the original bill, to meet objections raised by demurrers which have been heretofore passed upon by the court, and to which it is not now necessary to further refer. The bill alleges that the First National Bank was placed in the hands of a receiver by the comptroller of the currency on the 3d day of February, 1893, and that the causes of action recited in the bill all occurred prior to that time. The defendants interpose a demurrer to the bill as it now stands with its various amendments, by which demurrer they interpose the defense of the statute of limitations of the state of Arkansas, claiming that by said statute the cause of action is barred after the lapse of one year. The demurrer raises four propositions: The first is, does the state statute of limitations apply to proceedings in the federal courts, at law and in equity, whether the cause of action be based upon federal statutes, state statutes, or common law? Second, does the cause of action in this case come within the provisions of the statute of limitations of the state of Arkansas, which is claimed to have been in full force and effect in the state of Arkansas from the year 1838 to the present time? The statute mentioned is in the following language:

"The following actions shall be commenced in one year after the cause of action shall accrue and not after: (1) All special actions on the case, for criminal conversation, assault and battery and false imprisonment; (2) all actions for

words spoken, slandering the character of another; (3) all words spoken whereby special damages are sustained." Sand. & H. Dig. § 4823.

Third, is the above-quoted statute of limitations in full force and effect in the state of Arkansas, or has it been repealed or abrogated?

It is unnecessary to take up much time in the disposition of the first proposition, i. e. does the said statute of limitations apply to proceedings in the federal courts, in law or equity, whether the cause of action is based upon federal statutes or state statutes or the common law? This court has heretofore held that this action is based upon a federal statute, to wit, section 5239 of the Revised Statutes, which is in the following language:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

This having been settled, so far as this court is concerned, the inquiry arises, does the state statute of limitations apply to this proceeding? In *Carroll v. Green*, 92 U. S. 509, which was a suit in equity in the United States court brought by the creditors of an insolvent bank against its stockholders to recover an amount for which they as stockholders became liable under the charter by reason of its insolvency, the state statute of limitation was interposed as a defense. The court held that it applied, using the following language:

"If a claim like that of the appellees, sued at law, would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authority to support it."

The circuit court of appeals of the Eighth circuit, in *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60, applied the statutes of limitation of the state of Nebraska to a suit in equity brought by the receiver of an insolvent national bank to recover from stockholders the amount paid to them in dividends improperly declared. Judge Sanborn, speaking for the court, said:

"It goes without saying that the national courts, sitting in equity, act or refuse to act in analogy to the statute of limitation of the state in which they are sitting, and that if the analogous action at law against this defendant would be barred under the statutes of Nebraska this suit must be dismissed as against him."

But the matter has been definitely settled beyond controversy by the supreme court of the United States in *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217. The court in that case refers to the division among the circuit courts upon the question, and reviews the arguments against the applicability of the statutes, and, in summing up, Judge Brown, speaking for the court, says:

"The truth is that statutes of limitation affect the remedy only, and do not impair the right, and that the settled policy of congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states."

So it was decided that, in a patent case, the state statute applied, although the cause of action arose out of a federal statute, and was cognizable only in the federal courts. It may well be said, therefore, that the first proposition raised by the demurrer is definitely settled.

The determination of the second question involves the consideration of two propositions: First, the nature or kind of action under which this may be classed; and, second, the intent, meaning, force, and effect of the statute of Arkansas quoted, and which it is contended governs in this case. As to the kind of action this is, Justice Miller and Judge Thayer, in the case of *Stephens v. Overstolz*, 43 Fed. 465, 466, say:

"The statute [referring to the statute under which this action is brought] says, you shall not do that, and if you do you shall be liable to all persons injured by your wrongful act. The extent of the liability incurred is the amount of the damage you have inflicted upon others. The terms 'wrongful act,' 'liability incurred,' and 'damages' would seem to leave no doubt that the foundation of this class of actions is a tort."

Mr. Chitty says:

"Actions on the case are founded on common law or upon acts of parliament, and lie generally to recover damages for torts not committed with force, actual or implied." 1 Chit. Pl. 133.

He further says that "the injuries may be by nonfeasance, misfeasance, or malfeasance"; and that "these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law or the particular rights or duties of the parties." Id. Again Mr. Chitty says: "Wherever the statute prohibits an act, and provides for a recovery of damages caused by its violation, the remedy is an action on the case." Id. 142. Mr. Stephen says that an action on the case lies where a party sues for damages for any wrong to which trespass will not apply. Steph. Pl. § 52. Judge Bliss says that trespass lies for a wrongful act committed with force, and where the injury is direct; that where the injury is not the direct result of force, but grows out of the wrongful act of defendant, the action is trespass on the case, often called "the case." Bliss, Code Pl. § 9, subd. 2. Then it would seem that the right of action of the receiver, as outlined by Justice Miller in the case cited (*Stephens v. Overstolz*), comes within the distinction of action on the case, even if there were no other authorities upon the subject.

The next proposition, then, is as to the intent and meaning of the statute of the state of Arkansas heretofore quoted:

"First, all special actions upon the case, for criminal conversation, assault and battery and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken whereby special damages are sustained."

In the compilation of what is known as "Gantt's Digest of the Statutes of the State of Arkansas," the clause "all special actions on the case" was omitted, and the act as digested reads as follows:

"The following actions shall be commenced within one year after the cause of action shall accrue and not after: First, all actions for criminal conversation, assault and battery and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken whereby special damages are sustained." Section 4121.

The question is, did the original act cover all special actions on the case, or only all actions for criminal conversation, assault and battery, and false imprisonment? It may be that the latter would be the natural reading if these three kinds of actions had been special actions on the case, but they were not actions on the case, but were actions of trespass, so that the only construction of the provision is that it was intended to cover all special actions on the case, and also the three kinds of actions of trespass specially mentioned. The question of its interpretation was presented to the supreme court of the state of Arkansas in *Patterson v. Thompson*, 24 Ark. 70, where it was held that it applied to all actions on the case, and that an action for seduction, not mentioned, but coming within it, must be brought within one year. The court in that case used the following language:

"It is insisted here for the appellant, the defendant below, that the first specification of the section should be construed as if it read: 'All actions on the case, all actions for criminal conversation, all actions for assault and battery, and all actions for false imprisonment;' and the inference is then made that this, being a special action on the case, is included within the statute; while the argument for the plaintiff maintains that, as no mention is made of an action for seduction, this suit falls within the provision for unenumerated actions, for which the period is five years. If the statute were written as the defendant would have it construed, it would provide with consistency for similar classes of cases, in forcing an early legal inquiry into initiating causes of action, or in wisely committing to legal oblivion such as should not be made the subjects of prompt complaint, while the literal and technical construction of the plaintiff would keep the door open for vexatious controversies longer than is allowed for actions of trespass upon lands, for taking or injuring goods, for libels, and for actions upon the case founded on a contract or liability, thus reversing the whole policy of our limitation law. And if the construction should be that the clause under consideration only embraced special actions on the case for the wrongs specified in it, there would be the incongruity of different periods of limitation for the same causes of action when prosecuted in the different forms allowed by the common law; as, one year for actions on the case for batteries and false imprisonments, and five years when the same acts were complained of in actions of trespass. Doubtless, the obvious and natural, and therefore the first, construction of any writing, is that of its literal expression; but in construing a statute, unless its terms are entirely free from ambiguity, regard must be had for its known object, to the mischief intended to be provided against, to its general spirit and intent. The limitation law of the Revised Statutes, in all its sections, is to be construed as one law. All its parts should be harmonized into one consistent whole. Its object was to provide a limit for the beginning of all common or important actions, although there is a provision for unspecified ones; and its undoubted policy is to close the courts early against actions that embrace or engender personal strifes and embittered feelings, destroy the peace of families, and disturb the repose of society; and it should have such sensible construction as will accord with its spirit and promote these objects. We therefore hold that an action seeking to recover damages for seduction must be begun within a year from the time the cause of action accrued."

This, in the opinion of the court, disposes of the proposition as to the intent and meaning of the statute of the state of Arkansas referred to, and that it embraced all special actions on the case.

The next question for consideration is whether the statute quoted was abrogated by the Code of Practice adopted by the legislature of the state of Arkansas in 1868, which provides that "the forms of all actions and suits heretofore existing are abolished." The statute referred to was never directly repealed by any act of the legislature of the state of Arkansas, so it must be of full force and effect,

unless it was abrogated by the adoption of the Code of Practice in 1868. The language of that Code of Practice, which provides that "the forms of all actions and suits heretofore existing are abolished," is common to all Codes of Practice. It is a well-settled rule that the repeal of statutes by implication is not favored, and that statutes of limitation should be considered as being of full force and effect unless they are repealed directly or abrogated in some manner; for the tendency of all modern legislation is in this respect uniform and progressive. It shortens the time previously given for the bringing of suits of all kinds, and the contention of counsel for the plaintiff in this case, that the adoption of the Code changed the statute, requires strong argument and well-considered precedents to support and uphold it. Judge Bliss, in his excellent work upon the Code, speaking upon this subject, says (section 5):

"But it is only the form and name of the action that is abolished. Distinctions between the character of different actions necessarily arise from the nature of the wrong which is suffered and of the relief which is sought, and these cannot be abolished."

Again (section 6):

"Although the names and forms of actions have been thus abolished, it must not be supposed that the time spent in learning the distinctions indicated by them has been spent in vain. The mere formulas are of little present practical consequence, but, aside from the importance of knowing our legal history, including the history of the law of procedure, most of these names will be in constant requisition, as indicating the nature of the grievance, the evidence required, and the measure of relief. The whole case often clusters around the name, and an action is just as much an action of trover or of replevin or of ejectment as though so called in the pleading. When the statute says that there shall be but one form of action, form, and not substance, is spoken of. Without classification there is no science. Such distinctions as exist in the nature of things must be recognized, and they are equally recognized whether a specific name be given to the suit or action with a corresponding formula or whether they arise from and are known only by the nature of the grievance and the character of the relief." Bliss, Code Pl. §§ 5, 6.

Much light is thrown upon this question by the adjudications of the courts in what may be termed the "Code states," such as New York and Kentucky. In the case of *Austin v. Rawdon*, 44 N. Y. 71, the court says:

"Although the form of all actions at law and suits in equity, and all the forms of pleading existing before the Code, were thereby abolished, and it is sufficient to state in a plain and concise manner the facts constituting the cause of action, yet the substantive distinctions between actions on contract and those founded on tort still exist."

In *De Graw v. Elmore*, 50 N. Y. 1, the court says that:

"Notwithstanding forms of actions are abolished, the law will not permit a recovery upon tort, where the evidence shows a right to recover upon contract."

In *Turnpike Co. v. Rogers*, 7 Bush, 532, the court of appeals of Kentucky says:

"Forms have been abolished, but the substance of the common-law rules of procedure remains, except where they conflict with the spirit of our statutory regulations upon the subject of pleading and practice. Since the distinction between actions has been abolished by our Code, a petition which goes for a forcible injury should state such facts as would be equivalent to an action of trespass at common law. If the trespass be waived, and the petition go for negligence or

want of skill, it should state facts which are equivalent to an action in case, according to common-law principle."

In the state of California there is but one form of action under the Code. In *Railway Co. v. Laird*, 17 Sup. Ct. 120-122, Laird, who was injured while a passenger, brought suit in the United States court for damages. The case went to the supreme court of the United States, where it was contended that the action was changed by amendment from an action on tort to one on contract; that the amendment was not made until four years after the injury, and therefore it was barred. The supreme court in that case recognized the existence of the distinctions between actions arising upon contract and from tort. The opinion in that case was delivered by Justice Peckham, using the following language:

"The doctrine is very clearly expressed in *Kelly v. Railway Co.* [1895] 1 Q. B. 944, where the court of appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company while he was traveling upon their line was an action founded upon tort. In reading the judgment of the court in that case, A. L. Smith, L. J., said (page 947): 'The distinction is this: If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rights to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from the relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.'"

But we are not left without light upon this subject from the highest tribunal in this state, the supreme court of the state of Arkansas. In *Chrisman v. Carney*, 33 Ark. 316, Carney brought suit against Chrisman on two counts, on the first for false imprisonment, and on the second for malicious prosecution. It was objected that the two causes could not be joined. The court said:

"The first was at common law an action of trespass, and the other an action on the case. The form of action being now abolished, they may be joined under the class of injuries to the person, but the requisites to constitute the injury, and the proof necessary to be made to sustain either paragraph, are the same as formerly."

In *O'Connell v. Rosso*, 56 Ark. 603, 20 S. W. 531, the court said it was not plain whether the plaintiff intended to state a cause of action for a breach of contract or a tort in the nature of trespass; that, if the former was intended, a charge as to exemplary damages was improper, because the circumstances attending a breach of contract could not affect the amount of a recovery, but, if the latter, it was proper, and, as the defendant made no objection to the complaint because of its uncertainty, the court was correct in charging upon either aspect of it. In *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967, which was an action by a passenger for failure to let him off at his station, and for insulting and abusive language on the part of the conductor, it was objected upon demurrer that a claim for breach of contract to let the plaintiff off at his station could not be joined with a claim for damages sustained by abusive and insolent treatment, but the court said:

"Under the reformed procedure courts regard the substance rather than the form. As was said by the supreme court of Mississippi in a very similar case: 'The character of the action must be determined by the nature of the grievance rather than the form of the declaration.' *Railroad Co. v. Hurst*, 36 Miss. 660."

The supreme court of Arkansas held that the action was in its nature *ex delicto*, and that there was no misjoinder.

So it is apparent that the supreme court of the state of Arkansas recognizes the distinction between actions for torts and upon contract as existing since the adoption of the Code as completely as that distinction existed before the adoption of the Code; and I am unable to see any good reason for the proposition that the statute referred to has been in any manner changed, repealed, or abrogated by the adoption of the Code of Practice of the state of Arkansas. A statute of limitation must be treated as any other statute, because, as held by Justice Brown in *Campbell v. City of Haverhill*, 155 U. S. 617, 15 Sup. Ct. 217, such statutes are now considered highly meritorious, and should be upheld and enforced by the federal courts in cases where they are applicable. The argument that, because the statute of limitations applies to actions on the case, and the provisions of the Code abolish all forms of actions, therefore actions on the case are abolished, and the statute of limitations has nothing to which it can apply, is, in the opinion of the court, not tenable. The term "actions on the case" was not indicative of any form of action, but of a substantive class of actions of many different species that took their name from the fact that they were not included within any of the common forms of writs issuing from chancery, but were begun by writs setting out the particular circumstances of the case. Mr. Blackstone says of it:

"This action of trespass, or transgression on the case, is an universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ." 3 Cooley, Bl. Comm. (3d Ed.) 122.

So it would seem that the term is not only not indicative of a form of action, but that it applied to a class of actionable wrongs for which there was no appropriate form of writ, but a special writ issued, setting out the circumstances of the case. Mr. Stephen, in his work on Pleading, says:

"The new writs have received accordingly the appellation of 'writs of trespass on the case,' as being founded on the particular circumstances of the case thus requiring remedy, and to distinguish them from the old writ of trespass, and the injuries themselves which are the subjects of such writs are not called 'trespasses,' but have the general name of 'torts,' 'wrong,' or 'grievances.'" Stephen, Pl. § 52.

In *Carroll v. Green*, 92 U. S. 509, Mr. Justice Swayne says:

"The forms of the writ were as diverse as the wrongs they remedied, and the action of trespass on the case comprised many species."

The statute of limitations of the state of Arkansas was not designed to operate upon actions because of their name or form, but because of the wrongs they were brought to remedy. If the name "action on the case" had been changed, the statute would still have applied. It was aimed at the substance, and not at the name or

form, of the action, and it were folly to hold that its effect was changed merely because the name or the form of the action had been changed, so long as the same class of wrongs was entitled to the same remedy upon allegations substantially the same. And the fact that an act might give rights to two different kinds of action, to which different statutes of limitation would apply, is not an argument that the one-year statute of limitations is inoperative. It seems to me that the wrongs complained of in this case gave a remedy by but one action at law, an action on the case; and if the plaintiff has invoked the equity jurisdiction of this court in order to prevent a multiplicity of actions, or to have an accounting, and for these reasons alone, or for any other reason of like character, the essential nature of the action is unchanged, and equity only gives a different forum for the same cause of action, and there is no different cause of action, whether it be in law or in equity. *Morawetz*, in discussing the right of a shareholder on behalf of a corporation to sue the directors for damages occasioned by their misconduct, says:

"A suit of this character is brought to enforce the corporative or collective rights, and not the individual rights, of the shareholder. It may therefore be properly regarded as a suit on behalf of the corporation. The essential character of a cause of action remains the same. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action as to limitations, etc., because the shareholder brought suit in equity." 1 *Mor. Priv. Corp.* § 271.

And the same was virtually held in *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60; *Carroll v. Green*, 92 U. S. 509.

I am clearly of the opinion that the operation of the state statute is not defeated by the provisions of section 1047 of the Revised Statutes of the United States, because, in my judgment, this federal statute is not applicable. Whether the bill be regarded as seeking to recover for damages caused by a breach of duty at common law, in equity, and under the statutes of the United States, as it distinctly avers, or merely for a breach of duty under the statute, this is not a suit for a penalty, but for damages. The statute does not give a liquidated amount by way of penalty, but provides for exact compensation to whoever is damaged by its breach. In *Stephens v. Overstolz*, 43 Fed. 465, the question whether the statute was penal or remedial was presented and decided. There Justice Miller held that the statute was remedial, and not penal, since the extent of the liability is the amount of the damage. It follows from these views that the demurrer to the bill should be sustained; and it is so ordered.

TOWLE v. AMERICAN BUILDING, LOAN & INVESTMENT CO.¹

(Circuit Court, N. D. Illinois. January 4, 1897.)

BUILDING AND LOAN ASSOCIATIONS—POWER TO ACCEPT DRAFTS—NEGOTIABLE INSTRUMENTS.

A building and loan association is not liable upon a draft fraudulently accepted by its vice president, even at the suit of an innocent holder, since such associations have no power to accept drafts.

In Equity. Suit by Marcus M. Towle against the American Building, Loan & Investment Company. A receiver having been appointed, the firm of Grommes & Ullrich filed a petition praying that the receiver be directed to pay them the amount of a certain accepted draft.

Winston & Meagher, for petitioners.
Collins & Fletcher, for receiver.

GROSSCUP, District Judge. The hearing under consideration is on the petition of Grommes & Ulrich, co-partners, the answer of the receiver thereto, and the stipulation entered into between the petitioners and the receiver respecting the facts covering the case. From these pleadings and the stipulation it appears that on the 4th of October, 1893, the American Building, Loan & Investment Company, through its vice president, purported to accept a draft, at 60 days, for the sum of \$1,608.47, drawn upon it by one George Montgomery, in favor of the petitioners. Like drafts had been previously drawn by the same Montgomery, and accepted by the vice president of the society, in the name of the society. Upon inquiry by the petitioners, the vice president informed them that Montgomery was a creditor of the society, and the draft presumably accepted in the payment of such credit. As a matter of fact, no indebtedness existed to Montgomery. The arrangement was, unquestionably, a device between the vice president of the society and Montgomery, under which Montgomery, on the credit of the society, would obtain credit from the petitioners and others.

So far as the facts disclosed by the pleadings and stipulation go, both the society and the petitioners are involuntary victims to this fraud, and one or the other must bear its pecuniary loss. Corporations act through their officers, and will not be heard to deny such officers' authority in a given instance where such instance is within the general field of their authority. In other words, the public dealing with a corporation, through its officers, is not required to know such officers' authority for the special transaction in hand; it is enough to know that such transaction is presumably under the general authority conferred. The corporation extending the authority, not the public dealing upon the face of it, must suffer the loss if there is any abuse of it by the officer in the particular transaction in hand. This rule is founded upon the essential conveniences of commercial and corporate life, and is only holding that party liable

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

for losses growing out of abuses of power who has it easiest in hand to prevent such abuses, either by the employment of none but honest agents, or the creation of a system of counterchecks or inspection that will speedily disclose any disposition to abuse their trusts. But corporations are not bound by the abuse of its officers when such act of abuse is wholly and clearly outside the field of the corporation's power. Neither the president nor the directory of a corporation can do such acts as the corporation itself has no power to do. The law of estoppel does not enlarge corporate power, and, in consequence, corporate liability. Where the powers of the corporation stop, the powers of its officers also stop, and that point of limitation the public are bound at their peril to know.

The acceptance of the draft under consideration is nothing more nor less than a promise to pay, at a future date, the sum named. Has the society the power, under the law, to execute promissory notes? It is not a commercial nor a banking institution, with the general powers incident to such concerns. It cannot borrow money, nor loan money, except such as is paid in by its members in the manner pointed out by the law, nor engage in any general business transactions. Its sole function is to consolidate the small savings of the many, and, by a system of unified loans, secure advantages to each contributor that he could not, perhaps, individually obtain. To this process of consolidation, and of loaning out the gatherings thereof, and their collection again with the interest thereon for redistribution, with such incidental powers as are necessary to make the process effective, the authority of the corporation is strictly confined. The usefulness of such corporations and their safety depend upon such strict limitation. To grant them, by judicial implication or intendment, a wider amplitude of power, would destroy the only safe assurance on which they are granted. What phase of this process demands or justifies the execution of promissory notes, or other evidences of indebtedness? Money actually obtained by such corporation can, of course, be recovered back on the equitable doctrine of money had and received. But, in view of the purposes for which this corporation was organized, what phase of its duties demands that it should have the right to execute promises to pay in the future? Of course, if a loose rein is to be given to their management, occasions may be easily pointed out when the creation of indebtedness by the execution of promissory notes might become advantageous. But the loose rein is the very thing the legislature intended to prohibit, and a tight rein is the only safe conduct the courts can adopt. This, the public dealing with them, or their officers, must either know or find out. My opinion is that the society itself had no power, in law, to execute the acceptance under consideration, and that, therefore, the act of the vice president is *ultra vires*. The decree will be against the petitioners.

GRAND TRUNK RY. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. February 10, 1897.)

LEASE OF RAILROADS—PROVISION FOR PAYMENT OF NET EARNINGS TO BONDHOLDERS—RECEIVERSHIP.

Where the lease of a railroad provided for the payment of the net earnings to mortgage bondholders, who were creditors of the lessor, that agreement between the lessor and lessee, having been assented to by the bondholders, operated as an irrevocable assignment to them of the net earnings. And, while the lessee was obligated to pay out of the gross earnings certain prior claims before paying anything to bondholders, yet, the holders of those claims having let payment be made to the bondholders first, they became common, unsecured creditors of the lessee, and, a receiver having been appointed, they are not entitled, as against the bondholders, to have their claims paid out of earnings accruing after the appointment of the receiver; there being nothing to show that the gross earnings prior to the receiver's appointment—out of which no net earnings have ever been paid to bondholders, and which are still in the hands of the lessee—are not sufficient to pay their claims.

Wager Swayne and William B. Hornblower, for Charles Parsons, petitioner.

Alric R. Herriman, for three banks, petitioners.

Louis Hasbrouck, for Ogdensburgh & L. C. R. Co.

Thomas Spratt and Frank Loomis, for New York Central R. Co., second bondholders.

Benj. F. Fifield, for Central Vermont R. Co.

Charles M. Wilds, for Grand Trunk Ry. Co.

WHEELER, District Judge. When the receivers in this case were appointed, March, 20, 1896, the Ogdensburgh Railroad, as a leased line assigned to the defendant, passed into the hands of the receivers. Afterwards, on petition of Charles Parsons, holder of mortgage bonds of that road dated April 1, 1880, the net earnings were directed to be set apart to be disposed of according to the rights of those interested therein. Since then about \$11,000 of earnings before the receivership, collected by the receivers after, and about \$125,000 net earnings since the receivership, have been so set apart. Now those interested in those funds have been heard as to the disposal of the same. The lease or agreement of the Ogdensburgh road provided, among other things (article 2):

"All of the gross receipts, including rents of its lands and buildings, of or from the business and traffic of or upon the said railroad and other property of said party of the first part during the continuance of this agreement, embracing all such gross receipts heretofore earned by and due the said party of the first part, but not yet received by it, shall be received and collected by said party of the second part, and shall be disposed of by it, as hereinafter stated."

By article 3, the lessee was to keep the road and rolling stock and property in good order and condition, pay taxes, expenses of meetings of directors and stockholders; "to assume, conduct, and pay the expenses of any and all litigations now pending, wherein the said party of the first part is a party or interested, and to pay any and all judgments that may have been, or may ultimately be, recovered against said party of the first part therein"; to assume all obligations of the party of the first part that might thereafter be incurred, either by statute or common law, as common carriers, warehousemen, or

otherwise. And by article 5 the lessee, or party of the second part, agreed that:

"All the gross earnings, income, and receipts of or from the business, traffic, and rents of said railroad and other property, and referred to in art. II. of this agreement, shall in each year, and annually during the continuance of this agreement, be applied and disposed of by the party of the second part as follows: First. To the purposes, payments, and discharge of the obligations mentioned and specified in art. III. of this agreement, and to the other expenses in the maintenance, operation, use, development, and improvement of the said railroad and other property of the said party of the first part hereby transferred to said party of the second part, and the payment of the floating indebtedness now due from said party of the first part, mentioned and specified in the schedule hereto annexed, marked 'Schedule B.' Second. To what has been retired, and is not now material. Third. To the payment punctually when due, and in full, of the interest on the bonds issued and to be issued by the party of the first part, * * * which interest is at the rate of six per centum per annum, and is payable semiannually on the first days of April and October in each year, * * * not exceeding said limit of \$3,500,000 in amount, and the interest thereon, not to exceed the rate of six per centum per annum."

Parsons is a holder of a large part of these bonds. Schedule B specifies, among other things, "all accounts of supplies of every kind furnished for said railroad." What have purported to be the net earnings under this lease have been paid over to those bondholders to October 1, 1895, and none have been paid over since that time. One note of the lessor of \$15,000, guaranteed by the Central Vermont Railroad Company, was made to the Ogdensburgh Bank, and another of \$10,000 to the Farmers' National Bank of Malone, said to have been given for the purpose of paying the expenses of litigations which the lessee assumed under article 3, and a like note of \$10,000 to the Welden National Bank, said to have been given for the payment of supplies under Schedule B, have not been paid, and are in judgments against the Ogdensburgh. Many claims against the Central Vermont Railroad Company for operating expenses prior to the receivership, amounting to about \$15,000, are now outstanding; also, large claims, which have been made for liabilities as common carriers and warehousemen, are still outstanding, and one has, in October, 1896, gone into judgment. The principal questions made now are as to whether these claims, or any of them, are to be provided for out of this fund so set apart by the receivers, on the petition of Parsons, before payment is to be made to him therefrom.

The obligations by which the Central Vermont Railroad Company, as assignee of the lessee, became bound to pay these claims now said to be prior to the claims of the bondholders, were absolute on the part of that company, and became at once its debt, to be paid fully, without reference to the amount of earnings which might be received from the Ogdensburgh road. No payment to the bondholders was to be made, or obligation to them incurred, except as to and from what should remain of the gross earnings after paying these prior claims. A suggestion has been made that the lessor and the lessee could at any time control the disposition of these earnings, without reference to the claims of bondholders, because the bondholders were not parties to the instrument of lease, but acquired their rights under the mortgage. As to this, however, the lease or agree-

ment provides that these net earnings are to be paid to the bondholders who were and are creditors of the lessor, and this agreement would clearly operate as an assignment of the accruing net earnings to these bondholders, which they have assented to, and made thereby irrevocable, and to whom these earnings have, as of their right, under this assent, been paid. Therefore neither the lessor nor the lessee, nor both, could so control these net earnings as to take them away from the bondholders. The Central Vermont Railroad Company had the right, and by the lease was obligated, to pay off these prior existing claims mentioned, before paying anything to the bondholders; and the creditors in these claims probably had the right to insist upon the payment to them of these claims before anything should be so paid. They did not insist upon this, but let payment to the bondholders be made first, and let themselves remain creditors of the Central Vermont Railroad Company. It does not appear but that the gross earnings received prior to the several payments over of net earnings were sufficient to pay off all of these claims that had then severally accrued, nor is it anywhere alleged but that those received out of which no net earnings have been paid to bondholders have been sufficient to pay all of these claims and leave the net earnings which have been set apart under the order of the court clear for the bondholders. The Central Vermont Railroad Company would have no right to say that these subsequent earnings should be applied to the payment of its debts, when it already had in its hands funds sufficient, and applicable, with which to pay these debts; and these creditors would not have any right to insist that their debts which they had allowed to become and stand as debts of the Central Vermont Railroad Company should be paid out of these net earnings, except under and through that company. They, by their proceedings, became common creditors of the Central Vermont Railroad Company, unsecured, before the receivership, and have so remained ever since, while the bondholders, who may also have become such creditors as to gross earnings out of which they had not received any net earnings before the receivership, now appear to be entitled to these net earnings, without reference to whether the prior claims which the Central Vermont Railroad Company was under obligation to pay before paying over prior net earnings have in fact been paid. To allow these creditors to have a lien upon these funds paramount to the bondholders would be to place those who have by their action become general creditors, before the bondholders, who are secured creditors, under the lease. A suggestion was made that these matters should be referred to a master to ascertain the facts with reference to these claims, and was at first apparently acquiesced in by all; but this acquiescence has been now withdrawn, and the necessity or propriety of a reference for this purpose denied. This could only be necessary or proper when the amount of the claims, and the facts upon which they could become, in any view, a charge on this particular fund, against these objections, should be in dispute, so far as present purposes are concerned. According to the statements of the claimants, as they are understood, and about which the parties do not seem to differ, these prior claims are mere claims which the

Central Vermont Railroad Company has all the while been and is under obligation to pay, and for the payment of which it must have had gross earnings that have not been reduced to net earnings which have been in any way paid to the bondholders, sufficient and applicable for all. If the gross earnings for the time after October 1, 1895, to the receivership, during which no net earnings have been paid over, which have not been shown here, equal in amount the corresponding earnings for the preceding years, they will be largely in excess of what would be necessary to pay off all these claims, and leave the earnings after the appointment of receivers clearly free to be applied first to the operating expenses of the road belonging to the time of the receivers, and then to go to the bondholders, according to the terms of the lease. The claims which have been mentioned as accruing against the Central Vermont Railroad Company as a common carrier or warehouseman are understood to be operating expenses, and to be paid as such, as of the time when they become fixed, like the other ordinary expenses of running the road. None of the liabilities have been established, with respect to those claims, within the time for which these net earnings have been set apart; and so none of them are to be considered in determining how much of this fund should now be paid over, any more than any other claims for operating expenses should be. The about \$11,000 collected by the receivers for earnings before are not net earnings, but gross earnings, and should go into those before to be disposed of accordingly. According to these considerations, the net earnings set apart since the receivership seem to be free of all claims prior to that of the bondholders, and to be properly payable over to them. As the figures upon which these views rest have not all been made to appear, or been brought within reach, in this connection, but are probably readily ascertainable from the receivers, no final order for the payment over of these net earnings by the receivers should be made, without an opportunity to make the exact figures appear, if they would influence the result. It is stayed till next term, which is as soon as such a final order, which may be as to this a final decree, can properly be made, with leave to any party meanwhile to bring forward, by report of the receivers, such exact sums of gross earnings received and net earnings paid as it may be advised. Petition granted accordingly.

PEIRCE v. VAN DUSEN.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 375.

1. RAILROAD RECEIVERS—INJURIES TO EMPLOYEES—CONSTRUCTION OF STATUTE.

The Ohio act of April 2, 1890, for the protection and relief of railroad employes (Laws Ohio 1890, p. 149), providing that railroad or railway corporations or companies shall not make certain contracts for exemption from liability to their employes, shall not use defective cars, etc., and that in actions against such companies for personal injuries to employes the rule as to fellow servants is to a certain extent abrogated, applies to suits brought against a receiver of a railroad corporation operating its road.

2. SAME—STATE STATUTES—FEDERAL COURTS.

Said statute is not applicable alone to railroad corporations of Ohio, engaged in the domestic commerce of the state, but to all railroad corporations doing business in Ohio. It does not encroach upon federal authority, nor upon the jurisdiction and powers of the federal courts, and is binding upon those courts, and upon receivers appointed by them.

3. SAME—CONSTITUTIONALITY OF STATUTE—UNIFORM OPERATION.

The third section of said statute, altering the rule as to the liability of an employer for the negligence of fellow servants, as it applies to all railroad corporations operating railroads in the state, and to all of a given class of railroad employes, is not repugnant to the provision of the constitution of Ohio that all laws of a general nature shall have uniform operation throughout the state. *Shaver v. Pennsylvania Co.*, 71 Fed. 931, distinguished.

4. SAME—NEGLECT OF FELLOW SERVANTS.

The negligence of a fellow servant for which the employer is made liable by said statute is not merely negligence in the performance of a duty imposed on the master personally, but negligence in the performance of work pertaining to the negligent employe and others in the same work.

5. SAME—EVIDENCE—RES GESTÆ.

Where a railroad employe has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, are admissible, on the trial of an action for such injury, as part of the res gestæ.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Clarence Brown, for plaintiff in error.

Orville S. Brumback and Charles A. Thatcher, for defendant in error.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

HARLAN, Circuit Justice. This action was brought by Edward Van Dusen against R. B. F. Peirce, as the receiver of the Toledo, St. Louis & Kansas City Railroad Company, a corporation organized under the laws of this state.

The order appointing Peirce as receiver was made by the court below in the case of Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co., 72 Fed. 92. It directed the receiver to operate the railroad, and do all things necessary to carry on the business of the company. He was so engaged on the 26th day of February, 1895, when the plaintiff, a yard brakeman, in the employ of the receiver, was so seriously and permanently injured while in the discharge of his duties—being himself without fault—that he lost entirely the use of his right hand. These injuries, it is alleged, were caused solely through the carelessness and negligence of one Bartley, a conductor employed by the receiver, and under whose control and direction the plaintiff was placed at the time of his being injured.

The defendant denied the allegations imputing negligence to him, and denied that the plaintiff was without fault.

A verdict was returned in favor of the plaintiff for \$5,500 in damages. A motion for a new trial having been made and overruled, judgment was entered upon the verdict.

The principal question before us is whether the statute of Ohio passed April 2, 1890 (Laws Ohio 1890, p. 149), entitled "An act for the protection and relief of railroad employes; forbidding certain rules, regulations, contracts and agreements, and declaring them unlawful; declaring it unlawful to use cars or locomotives which are defective, or defective machinery or attachments thereto belonging, and declaring such corporation liable, in certain cases, for injuries received by its servants and employes on account of the carelessness or negligence of a fellow-servant or employe,"—is applicable to cases against the receiver of a railroad corporation, especially one acting under the orders of a federal court.

The first section of the act provides that:

"It shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate a railroad in whole or in part in this state, to adopt or promulgate any rule or regulation for the government of its servants or employes, or make or enter into any contract or agreement with any person in or about to engage in its service, in which, or by the terms of which, such employe in any manner, directly or indirectly, promises or agrees to hold such corporation or company harmless, on account of any injury he may receive by reason of any accident to, breakage, defect or insufficiency in the cars or machinery and attachments thereto belonging, upon any cars so owned and operated, or being run and operated by such corporation or company, being defective, and any such rule, regulation, contract or agreement shall be of no effect. It shall be unlawful for any corporation to compel or require directly or indirectly an employe to join any company association whatsoever, or to withhold any part of an employe's wages or his salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require either as a condition precedent to securing employment or being employed, and said railroad or railway company shall not discharge any employe because he refuses or neglects to become a member of any society or organization. And if any employe is discharged he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge, and said railway or railroad company shall thereupon furnish said reason to said discharged employe in writing. And no railroad company, insurance society or association, or other person shall demand, accept, require or enter into any contract, agreement or stipulation with any person about to enter, or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever, and all such stipulation and agreements shall be void, and every corporation, association or person violating or aiding or abetting in the violation of this section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500) to be recovered in a civil action."

By the second section it is made—

"Unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employe of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or in the machinery or attachments thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear at the trial of any action in the courts of this state, brought by such employe, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation."

The third section, which is the one whose scope and meaning is involved in this action, provides that:

"In all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow-servant, but superior of such other employe, also that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow-servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

At the trial below it was contended on behalf of the plaintiff that the conductor and switchmen or yard brakemen, even when engaged together, at the same time and place, in operating the same train of cars, were not to be deemed fellow servants within the rule exempting an employer from liability to one servant for an injury caused by the negligence of a fellow servant. The circuit court, held by Judge Hammond, without determining this question as one of general law, decided that the case was governed by the third section of the above act of April 2, 1890, and, consequently, that Bartley, the conductor, having power to direct and control the work in which Van Dusen was engaged, was the superior, not the fellow servant, of Van Dusen, and was, therefore, the representative of the receiver.

The contention of the receiver is that that act by its terms applies only to corporations owning or operating railroads in whole or in part in Ohio by their own officers, and that it cannot properly be construed as applying to receivers operating railroads under the orders of a court of chancery. There are adjudged cases arising under statutes similar to the Ohio statute which seem to sustain this contention of the receiver. *Henderson v. Walker*, 55 Ga. 481; *Campbell v. Cook*, 86 Tex. 630, 634, 26 S. W. 486.

If the reasoning of the Georgia and Texas courts be applied to the Ohio statute, it cannot be held to embrace employes acting under the receiver of a railroad corporation. But, in our judgment, the statute is applicable to actions against receivers of railroad corporations. To hold otherwise would be to subordinate the reason of the law altogether to its letter. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words. If the Ohio statute is construed as applicable only to actions for personal injuries brought directly against railroad corporations, the result would be that in an action brought in one of the courts of Ohio the employes of a railroad corporation would be accorded rights that would be denied in another action of like kind, perhaps in the same court, to employes of the receiver of a railroad corporation under exactly similar circumstances. Could such a result have been contemplated by the legislature of Ohio? We think not. The avowed object of the statute was the protection and relief of railroad employes. To that end it declared that in the actions mentioned in it every person employed by the railroad com-

pany, and invested with power or authority to direct or control other employes, should be deemed the superior, not the fellow servant, of those under his direction and control. The legal effect, as well as the object, of this declaration was, in the cases specified, to make the negligence of the superior the negligence of the company. No violence is done to the ordinary meaning of the words of the statute if it be held that the legislature had in mind actions against receivers of railroad corporations as well as actions directly against such corporations. The appointment of a receiver of a railroad does not change the title to the property nor work a dissolution of the corporation. Although the creature of the court, and acting under its orders, the receiver, for most purposes, stands in the place of the corporation, exercising its general powers, asserting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those who have claims against the corporation or its property. The corporation remains in existence notwithstanding a provisional receivership established by an order of court; and for the purpose of effectuating the will of the state, as manifested by the act of 1890, an action against the receiver arising out of his management of the property may be regarded as one against the corporation "in the hands of" or "in the possession of" the receiver. *McNulta v. Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11.

In *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (1886) 26 Fed. 12, it was held that the statute of Missouri giving double damages against "every railroad corporation" which did not erect and maintain fences, openings, gates, farm crossings, and cattle guards on the line of its road (the validity of which act was sustained in *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110), was held applicable to a railroad in the hands of a receiver. To the same effect was *Hornsby v. Eddy*, 5 C. C. A. 560, 572, 56 Fed. 461, where the question was as to the applicability to federal receivers of a railroad of a statute of Kansas providing that "every railroad company" organized or doing business in that state "shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage." In that case, the circuit court of appeals for the Eighth circuit well said:

"It is clear that, with respect to persons employed by a railway company as railway operatives, the statute last above quoted changes the rule of the common law that the master is not liable to a servant for an injury sustained in consequence of the negligence of a fellow servant. Does the fact that a receiver is appointed to temporarily operate a railroad forthwith alter the status of all of its employes, and re-establish as to them the old rule of the common law, so long as the receiver remains in charge? Viewing the question in the light of those considerations of public policy which probably gave birth to the statute, we cannot conceive of any reason why the appointment of a receiver should have such effect. It is a fact of which we may well take judicial notice that great railway systems, which employ thousands of men, are frequently operated for a term of years through the agency of a receiver. Such receivers do not, as a general rule, change the working force of the road, or the rules and regulations by which trains are run, or by which the other business of the road is transacted. The men

whom they employ are engaged in the same quasi public service as other railway employes, and daily encounter the same risks and hazards. Furthermore, the receiver of a railroad operates it for the immediate benefit of the company by which it is owned, in that he discharges all of the public duties of the corporation, and appropriates the income of its road to the preservation of its property and franchises, and to the payment of its debts."

So much as to the scope and true meaning of the Ohio statute, without reference to the courts in which it may be enforced. If the statute means what we hold it to mean, must not full effect be given to it in actions for personal injuries brought against a receiver in a court of the United States? This question must be answered in the affirmative. Such legislation is not liable to the objection that it encroaches upon federal authority, or upon the jurisdiction or power of the United States court. The statute does nothing more than to prescribe a rule of action to be observed by all within the state. The authority to enact it is derived from the general power of the state to regulate the exercise of the relative rights and duties, and to provide for the safety, of all persons within its territorial jurisdiction. It is the duty of the federal court sitting in this state to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Rev. St. § 721; *Baltimore & O. R. Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. Indeed, if congress had not so declared, this court, upon principles of comity, and in support of the public policy of the state, might well recognize and enforce, in actions brought against receivers of railroads, any rule established by the state for like actions brought against railroad companies.

The Ohio statute is not applicable alone to railroad corporations of Ohio engaged in the domestic commerce of this state. It is equally applicable to railroad corporations doing business in Ohio, and engaged in commerce among the states, although the statute, in its operation, may affect in some degree a subject over which congress can exert full power. The states may do many things affecting commerce with foreign nations and among the several states until congress covers the subject by national legislation. This principle is illustrated in many cases; as in *Cooley v. Board*, 12 How. 299, 320, where the pilot laws of Pennsylvania were sustained, and were held to have been enacted in virtue of the power residing in the state to legislate, congress not having abrogated them nor established regulations inconsistent with them; as in *Sherlock v. Alling*, 93 U. S. 99, 104, where the court held that a statute of Indiana, giving a right of action to the personal representatives of a deceased when his death was caused by the wrongful act or omission of another, was applicable to the case of death resulting from collisions between vessels engaged in interstate commerce, and in which case it was said, generally, "that the leg-

isolation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit"; as in *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 6 Sup. Ct. 1114, where a quarantine statute of Louisiana, directly affecting commerce among the states and with foreign nations, was held not to be void as a regulation of commerce, but was valid under the power of the state to protect the public health, and was to be respected until the system of quarantine established by it was abrogated or displaced by congress; as in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, where a statute of Alabama was upheld that required all locomotive engineers in that state, whether they served on trains engaged in domestic commerce or only on trains engaged in interstate commerce, to be examined and licensed by a state board before acting as engineers within that state; and as in *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 100, 9 Sup. Ct. 28, in which the court held to be constitutional a state enactment requiring all locomotive engineers to be examined by a state board for color blindness, and in which case it was said that "wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life and property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable," and which local enactments were to be deemed valid until congress took action on the subject. In *Telegraph Co. v. James*, 162 U. S. 650, 662, 16 Sup. Ct. 934, the supreme court of the United States held a statute of Georgia requiring every telegraph company with a line of wires wholly or partly within that state to receive dispatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, under a named penalty, to be a valid exercise of the police power of the state in relation to interstate messages. The court said:

"While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and, in the absence of any legislation by congress, the statute is a valid exercise of the power of the state over the subject."

In *Hennington v. State of Georgia*, 163 U. S. 299, 317, 16 Sup. Ct. 1086, in which a statute of Georgia forbidding the running of freight trains in that state on the Sabbath day was assailed as unconstitutional when applied to interstate commerce, the supreme court of the United States, upon a review of the adjudged cases, held it to be clear that:

"The legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to congress to regulate such commerce; and, if not obnoxious to some other constitutional provision, or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of congress passed in execution of the powers granted to it by the constitution."

Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by congress under its power to regulate commerce among the states. But, as congress has not dealt with that subject, it was competent for Ohio to declare that an employé of any railroad corporation doing business here, including those engaged in commerce among the states, shall be deemed, in respect to his acts within this state, the superior, not the fellow servant, of other employés placed under his control. If the effect of the Ohio statute be, as undoubtedly it is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employés which would not otherwise rest upon them according to the principles of general law, that fact does not release the federal court from its obligation to enforce the enactments of the state. Of the validity of such state legislation we entertain no doubt. In *Railway Co. v. Mackey*, 127 U. S. 205, 208, 210, 8 Sup. Ct. 1161, the supreme court had occasion to consider several objections to a law of Kansas making railroad companies liable for injuries suffered by employés through the negligence of their fellow servants. Replying to the objection that such legislation denied the equal protection of the laws to railroad companies, in that it did not apply alike to all corporations, the court said:

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination."

There is another view of this matter, equally conclusive. By Act Cong. March 3, 1887, c. 373 (24 Stat. 554), corrected by Act Aug. 13, 1888, c. 866 (25 Stat. 433), it is provided:

"Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall

be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It would seem to be clear that, under this act of congress, if a railroad in the possession of a federal receiver is to be managed and operated according to the requirements of the laws of the state in which the property is situated, "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof," such management and operation must be subject to any rule prescribed by the state imposing upon railroad corporations liability for the negligence of employes having superior authority over other employes.

This we understand to be the effect of the decision in *Eddy v. Lafayette*, 163 U. S. 456, 464, 16 Sup. Ct. 1082, in which the question arose whether the local statutes regulating the service of process against a railway corporation were applicable to actions against the receivers of such corporations. The trial court and the circuit court of appeals were of opinion that the third section of the judiciary act of March 3, 1887, c. 373, § 2 (24 Stat. 552, 554), authorizing suits to be brought against receivers of railroads without special leave of the court by which they were appointed, was intended to place receivers "upon the same plane with railroad companies," both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service of process. This court said:

"We concur in that view, and in the conclusion reached, that the service in the present case, on an agent of the receivers, was sufficient to bring them into court in a suit arising within the Indian Territory."

But it is contended that the Ohio statute is repugnant to the provision of the constitution of Ohio declaring that "all laws of a general nature shall have uniform operation throughout the state." Article 2, § 26. The argument made in support of this view by the learned counsel for the receiver may be thus summarized: That the act imposes a liability for damages for the negligence of fellow servants only as against a railroad company operating a railroad within Ohio; that it confers a right of action only upon employes of such railroad companies; that no other employer is subject to the liability, and no other employe is given the right; that the act selects from the general class of employers railroad companies operating railroads, and imposes upon them a special burden; that the act is special class legislation, not uniform throughout the state, and applies to no person or company engaged in any other occupation employing servants, although the occupation be equally hazardous. Consequently, the act is special in its operation and effect, is confined to particular corporations engaged in a specific business, does not cover the whole subject of the relations of master and servant, and is not, therefore, of a general nature, and of uniform operation throughout the state, within the meaning of the constitution of Ohio.

In support of these views counsel have referred to *Shaver v. Pennsylvania Co.*, 71 Fed. 931, which was an action to recover dam-

ages for personal injuries alleged to have resulted from the negligence of a railroad corporation and its agents. The defense was that the plaintiff, by becoming a member of an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," and accepting the benefits of said association, had agreed that the railroad company should be discharged from any and all liability to him on account of such injuries. The plaintiff demurred to the answer upon the ground that the agreement referred to was invalid under the above statute of Ohio of 1890, which, as we have seen, provides in its first section that:

"No railroad company, insurance company, or association, or other person shall demand, accept, require, or enter into any contract, agreement, stipulation with any other person about to enter, or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever, and all such stipulations or agreements shall be void," etc.

Judge Ricks held that the contract relied on by the railroad company was valid, and that the statute of Ohio declaring it to be void was unconstitutional.

"The Ohio statute," he said, "in denying to the employes of a railroad corporation the right to make their own contracts concerning their own labor, is depriving them of 'liberty,' and of the right to exercise the privileges of manhood, 'without due process of law.' Being directed solely to employes of railroads, it is class legislation of the most vicious character. Laws must be not only uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike. There cannot be one law for railroad employes, another law for employes in factories, and another law for employes on a farm or the highways. Class legislation is dangerous. Statutes intended to favor one class often become oppressive, tyrannical, and proscriptive to other classes never intended to be affected thereby; so that the framers of our constitution, learning from experience, wisely provided that the laws should be general in their nature and uniform throughout the state."

The court, elsewhere in its opinion, when considering the scope of the constitutional provision that all laws of a general nature shall have uniform operation throughout the state, said:

"The act under consideration, while it is general in its nature, applies only to railroad companies and their employes, and is not, therefore, general in its application, and does not operate uniformly on all classes of citizens. Under this statute, railroad companies are prohibited from making contracts which other corporations in the state are allowed to make. * * * The act under consideration is certainly one which impairs the rights of a large number of the citizens of Ohio to exercise a privilege which is dear to all persons, namely, that of making contracts concerning their own labor and the fruits thereof, and, so far as it relates to such contracts already made, impairs their validity. The act seems to assume that a large class of the citizens of the state, namely, those employed by railroad corporations, are incapable of making contracts for their own labor."

It may be proper here to observe that in a case recently determined by the supreme court of Ohio a contract such as the one involved in Shaver's Case was held not to be interdicted by the above act of April 2, 1890 (87 Ohio Laws, 149), and was not contrary to public policy. *Railway Co. v. Cox*, 45 N. E. 641.

It is quite clear from an examination of Judge Ricks' opinion that he intended to decide nothing more—indeed, the case, under his view of the statute, required nothing more to be decided—than

that the part of the act of 1890 relating to contracts or agreements, whereby a right to damages against a railroad company, arising from personal injury or death, was surrendered or waived when the employé became a member of the relief association referred to, was unconstitutional, as depriving the employés of railroad corporations of their liberty without due process of law. He had no occasion, in the case before him, to consider the validity of the third section of that act. The first section might be held void, leaving the third section in full force. Even if the act of 1890, in the particulars involved in Shaver's Case, and for the reasons stated by Judge Ricks, were held to be unconstitutional,—upon which question it is unnecessary to express an opinion,—the statute, in respect of the matters mentioned in the third section, can be sustained as one of a general nature, and having uniform operation throughout the state.

This general question has been considered by the supreme court of Ohio. In *McGill v. State*, 34 Ohio St. 238, the court, referring to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state, said:

"A general law that land should not be sold upon execution for less than two-thirds of its appraised value was excluded from operation in several counties by local enactment. There were different laws in different counties respecting the descent and distribution of intestate property. Some statutes defining legal offenses were excluded in their operation from a large part of the state; and different penalties for a violation of the same act were, in some instances, provided for different localities. These are examples of the legislation to prevent which in the future, and the mischief resulting from it, this provision of the constitution was adopted. But no wider scope was claimed for it than to guard the future against the evils and inequalities resulting from legislation of the character complained of."

See, also, *Lehman v. McBride*, 15 Ohio St. 573, 653; *Ex parte Falk*, 42 Ohio St. 638, 641; *Costello v. Village of Wyoming*, 49 Ohio St. 202, 30 N. E. 613.

In *State v. Nelson*, 52 Ohio St. 88, 97, 39 N. E. 22, where the question was whether an act entitled "An act requiring persons, associations and corporations owning or operating street cars to provide for the well-being of the employés"—the act, in its provisions, being made applicable only to electric street cars other than trail cars—was in conflict with the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state, the court said:

"The act in question is clearly of a general nature, so that the only inquiry left is whether it is of uniform operation throughout the state. And here again it is equally clear that the law is in operation throughout every part of the state, uniformly as to all classes therein named. Is this sufficient? Soon after the adoption of the constitution it was said by this court that the scope and purpose of this section was to prevent laws of a general nature from being in force in some counties and not in others, and these early cases have been followed ever since."

Again:

"Of late years an effort has frequently been made to claim for this section of the constitution a wider scope than to guard against the evils resulting from legislation of the character mentioned by Thurman, J., in *Cass v. Dillon*, 2 Ohio St.

607, Scott, J., in *Lehman v. McBride*, Boynton, J., in *McGill v. State*, and Okey, J., in *Ex parte Falk*; but such efforts have uniformly failed. The only statutes which have been declared in conflict with this section of the constitution are statutes making different classes of different parts of the territory of the state, such as cities, villages, etc. This section of the constitution requires that laws of a general nature shall have not only an operation, but a uniform operation, throughout the state; that is, the whole state, and not only in one or more counties. The operation must be uniform upon the subject-matter of the statute. It cannot operate upon the named subject-matter in one part of the state differently from what it operates upon it in other parts of the state; that is, the law must operate uniformly on the named subject-matter in every part of the state, and when it does that it complies with this section of the constitution. That this is the scope and purpose of this section appears from its language, the debates of the constitutional convention, and the uniform construction placed thereon by this court in the cases above cited, and others hereinafter referred to. * * * In *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672, an effort was made to have the statute there under consideration declared unconstitutional because its classification included saloons and excluded distilleries and breweries, but the effort failed. A similar effort was made in *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. 321, because wholesale dealers and manufacturers were not included within the same class, and the effort again failed. A similar effort was made in *State v. Turnpike Co.*, 37 Ohio St. 481, as to the classification of turnpikes, and the effort again failed. * * * The scope and force of this section of our constitution being as herein indicated, it is clear that the statute in question is not in conflict therewith. The statute is in operation in every part of the state, and operates uniformly upon the classes of persons therein designated in every part of the state. The act is clearly authorized as a police regulation to protect the health and promote the comfort of those engaged in operating electric cars."

The question under consideration is somewhat like that presented in *Harwood v. Wentworth*, 162 U. S. 547, 563, 16 Sup. Ct. 890. There the question was whether an act of the legislature of Arizona fixing the compensation of county officers, and for that purpose classifying the counties of the state according to the assessed valuation of property in each county, was a local or special act. If so, it was void, as repugnant to an act of congress declaring that the legislatures of the territories shall not pass local or special laws in certain cases. The practical effect of the act was to establish higher salaries in some counties for the particular officers named than for the same class of officers in other counties. "But," the supreme court said, "that does not make it a local or special law. The act is general in its operation; it applies to all counties in the territory; it prescribes a rule for the stated compensation of certain public officers; no officer of the classes named is exempted from its operation; and there is such a relation between the salaries fixed for each class of counties, and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special in any just sense, but is general in its application to the whole territory, and designed to establish a system for compensating county officers that is not intrinsically unjust, nor capable of being applied for purposes merely local or special."

We do not deem it necessary to pursue this subject further. We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all

railroad corporations operating railroads within the state, it is, within the meaning of the state constitution, general in its nature; and, as it applies to all of a given class of railroad employes, it operates uniformly throughout the state.

It is next contended by the plaintiff in error that if Van Dusen was injured by the negligence of Bartley, the conductor, he is not entitled to recover, for the reason that the latter was not negligent in the performance of any duty imposed by law on the master personally, but only in respect of the performance of work pertaining to him and other employes in the same work. The principal authorities cited in support of this view are *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, and *Stockmeyer v. Reed*, 55 Fed. 259.

If this contention were sustained, the statute of Ohio would be deprived of all practical value, and the manifest object of the legislature in passing it would be defeated. The *Keegan* and *Stockmeyer* Cases enforced the general rule that a foreman or superintendent of a body of employes doing a particular service was a fellow servant of those under him, and, consequently, the common employer was not liable to one of them for the negligence of the other. The very object of the statute before us was to prevent the application of that rule in Ohio as between a railroad company and its employes. Hence it declared that every person in the employ of a railroad company, "having power or authority to direct or control any other employe of such company, is not the fellow servant, but the superior, of such other employe." If, by force of the statute, Bartley was not a fellow servant, but the superior, of Van Dusen, he did not become, within the meaning of the statute, a fellow servant simply because he did some work of the kind done by Van Dusen. The object of the statute was to make one to whom is committed by a railway company the authority to direct and control employes in the same service the representative, in respect of that service, of the common employer, so that his acts, within the scope of his employment, are the acts of the company, and his negligence its negligence.

That the evidence was such as to require the submission of the question of negligence to the jury is, in our judgment, too manifest to require discussion. Indeed, so far from there being no proof to support the allegation of negligence, the preponderance of evidence on that issue was with the plaintiff.

It is said that the damages found were excessive, and that the judgment below should, for that reason, be reversed. That was a question for the consideration of the trial court on a motion for a new trial. Upon a writ of error this court can deal only with questions of law. If there was a case of disputed facts upon which the plaintiff was entitled to go to the jury,—as undoubtedly there was,—it was for the jury to assess the damages; and, if the trial court did not disturb the verdict upon the ground that the damages were excessive, that was the end of the question of damages. As that court laid down no rule for the assessment of damages that was erroneous in law, this court is without power to revise

the judgment in respect of the amount of damages. It is restricted in its consideration of the case to questions of law. *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

It is alleged that error was committed in permitting plaintiff, against the objection of the defendant, to prove what Bartley, the conductor, said just after the plaintiff was injured. The conductor and those under him were very near each other during the performance of the work committed to them. Van Dusen testified that his hand was caught and held fast while the car that mashed it backed up five or ten feet. Getting his hand out as soon as the car backed, he came from between the cars, and walked towards the engine, holding his hand up. The engineer got off the engine, and, with Bartley, came towards Van Dusen. Being asked how long after the accident before Bartley met him, Van Dusen said: "It was not a minute,—that is, a minute after I got my hand out and walked towards the engine;" and that it may have been "six or seven car lengths" before he met Bartley. Being asked what Bartley said to him at that time, the question was objected to, but the court permitted him to answer, upon the ground that it came "within the rule of the *res gestæ*," and that "what was said by this plaintiff and what was said by the engineer or by the conductor in the very doing of this thing is a part of the thing itself." The plaintiff answered: "Well, I asked Mr. Bartley what in the world he was trying to do, coming back on me the second time without saying anything about making a second cut. He said: 'Ed, I am sorry. I was going to put this car on the elevator track. When I backed up, I did not see you. I did not know just where you was until I heard you holler.'"

We are of opinion that this evidence was properly admitted. Its exclusion was not required by the rule that "an act done by an agent cannot be varied, qualified, or explained, either by his declarations which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held or an isolated act done at a later period." *Packet Co. v. Clough*, 20 Wall. 528, 540. The case is rather covered by the rule formulated by Greenleaf (1 Greenl. Ev. § 113), and sanctioned by the supreme court in *Railroad Co. v. O'Brien*, 119 U. S. 99, 105, 7 Sup. Ct. 118, namely:

"The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it."

Judge Hammond, in an opinion overruling the motion for a new trial, properly indicated the situation, when he said that the conductor "almost immediately, and while the cars were moving, or had just stopped, and while the plaintiff was bleeding from the injury at that moment received, described his own part in bringing about the motion that effected the injury." The rule insisted upon for the exclusion of such declarations would, he said, "ex-

clude everything from the *res gestæ* which did not occur on the very instant of the grinding of the flesh and bones by the colliding car." In O'Brien's Case the question was as to the admissibility of certain declarations of a railroad engineer as to the rate of speed at which his train was moving at the time of the accident. The court said:

"Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declarations, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*; simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect of which his authority as engineer had been fully exerted."

We recognize the difficulty of laying down a rule upon this subject that would apply in every case. But we do not doubt that, both upon principle and authority, the declarations of Bartley, tending to show that the injury to Van Dusen was to be attributed to his (Bartley's) negligence, were admissible in evidence as part of the *res gestæ*.¹ These declarations cannot properly be characterized as hearsay, for they really accompanied the transaction out of which arose the injury. The principal matter was the doing of certain work under the supervision of one having authority to control those engaged in it. The statements of the conductor were made while the work was in progress, while the plaintiff was assisting him, and in presence of the fact necessary to be explained. They illustrated what had, up to the moment of such statements, been done by him in the prosecution of the work. What the conductor and Van Dusen set out together to do was not completed, and what the former said was almost simultaneous with the doing of the thing causing the injury. The infliction of the injury and his explanation of his conduct were so close together that they may be said to have occurred at the same time. His declarations, therefore, were not, in any proper sense, a mere narrative of past occurrences, but were part of the occasion out of which the plaintiff's cause of action arose. They served to disclose the nature and quality of the acts in question, and were made under circumstances pre-

¹ Railroad Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209; Insurance Co. v. Cheever, 36 Ohio St. 201, 207; Keyser v. Railway Co., 66 Mich. 390, 33 N. W. 867; Rockwell v. Taylor, 41 Conn. 55, 59; Waldele v. Railroad Co., 95 N. Y. 274; Railroad Co. v. Coyle, 55 Pa. St. 402; Lund v. Inhabitants of Tyngsborough, 9 Cush. 36; Carrying Co. v. Gnuse, 137 Ill. 264, 27 N. E. 190; Hermes v. Railway Co., 80 Wis. 590, 50 N. W. 584; Hooker v. Railway Co., 76 Wis. 542, 44 N. W. 1085; Hill v. Com., 2 Grat. 594, 605; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720; State v. Molisse, 38 La. Ann. 381; McLeod v. Ginther's Adm'r, 80 Ky. 399; Railroad Co. v. Foley (Ky.) 21 S. W. 866; Shafer v. Lacock, 168 Pa. St. 497, 32 Atl. 44; Baltimore & O. R. Co. v. State (Md.) 32 Atl. 201; Railway Co. v. Buck, 116 Ind. 566, 19 N. E. 453; Brownell v. Railroad Co., 47 Mo. 239.

cluding the possibility of premeditation, design, or deliberation on the part of the conductor. They were made on the spot where the injury occurred. To exclude them would be to make their admissibility in evidence depend wholly upon the matter of time, although the circumstances show such direct and immediate connection between the thing done and the declarations of the person having such thing in charge as to justify the court in characterizing the transaction as one continuous, uncompleted transaction, and such declarations to be part of it.

Having considered all the matters presented by the record which, in our judgment require consideration, and perceiving no error of law in the record, the judgment is affirmed.

EMIL KIEWERT CO. et al. v. JUNEAU et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 420.

MORTGAGES—MORTGAGEE IN POSSESSION—ACCOUNTING FOR RENTS—ESTOPPEL.

One J. made a deed of property owned by him to the president of the K. Co., as security for his indebtedness to the K. Co., existing and to be incurred; it being agreed between the parties that the rents of the premises, after paying expenses, should be applied on J.'s indebtedness. The K. Co.'s office and the residence of its president were at a great distance from the town where the property was situated, and they employed an agent on the spot to attend to the renting. J. occupied a part of the premises, took the principal charge of them, and assisted the agent in obtaining tenants. The accounts of rents collected, rendered from time to time by the agent of the K. Co., were submitted to and indorsed by J.; and no complaint was ever made by him of a want of diligence in renting, or that more rent might be obtained. *Held* that, on an accounting by the president of the K. Co. as mortgagee in possession, J. was estopped to claim that the mortgagee should be charged with more than the amount of rents actually collected.

Cross Appeals from the Circuit Court of the United States for the Western District of Michigan.

Bill to foreclose a mortgage, in form a deed, executed for the purpose of securing an indebtedness then due, and further indebtedness then contemplated. The mortgagor in August, 1888, was indebted in the sum of \$1,590 to the complainant the Emil Kiewert Company, a corporation of the state of Wisconsin. To secure this he made an absolute deed of conveyance to Emil Kiewert, president of said corporation. It is conceded that this conveyance was intended to secure the debt then existing, and such further indebtedness as should from time to time be created, to the Emil Kiewert Company. It was understood that the said company, or Emil Kiewert as trustee, should take possession of the premises, make necessary repairs, and apply proceeds of rents first to costs of repairs, taxes, and expenses, and remainder, from time to time, upon the indebtedness intended to be secured. This relation lasted more than four years, when some misunderstanding as to the state of the accounts resulted in the filing of this bill and a cross bill by Juneau, who claimed, upon a true accounting, to have overpaid his indebtedness. The matters involved were referred to a special commissioner, who was directed to state an account, charging the complainant with all rents actually collected, and all which by proper diligence might have been collected. The report found that the mortgagor was chargeable with rents aggregating \$9,322.42, including interest. He also found that Juneau was chargeable with an indebtedness, including interest, of \$9,293.57, leaving a balance due Juneau of \$28.91. Each party filed exceptions to this report. The principal ground of ex-

ception taken by the complainant was that the mortgagee had been erroneously charged with rents not collected aggregating about \$3,362.34. This exception was in part sustained, the circuit judge, on the facts, holding that the failure to rent out the premises was the mutual fault of the complainant and defendant, and that the loss should therefore be divided between them. It was therefore directed that the accounts should be altered so as to charge complainants with but one-half of the net loss resulting from failure to rent out the mortgaged premises. This operated to credit complainants with \$1,818.83, that being one-half the loss of rent, with interest. Deducting from this the balance of \$28.91 found in favor of Juneau left the latter indebted in the sum of \$1,789.92, as due June 1, 1894. All other exceptions were overruled. Both parties have appealed, and assigned as error the overruling of their several exceptions to said report.

Fred Scheiber, for Emil Kiewert Co. et al.

Birney Hoyt, for Juneau et al.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

After making the foregoing statement of facts, the opinion of the court was delivered by LURTON, Circuit Judge.

The mortgaged property consisted of a block of three two-story business houses, situated in the small village of Ironwood, Gogebic county, Mich. The lower rooms were fitted up for business purposes, and the upper story was adapted for separate use as apartments or offices. Elisha Juneau, the owner and mortgagor, had kept a saloon in one of them, and continued to do so for much of the time embraced in the accounting. For the room so occupied, he, for a time, paid rent to the agent of the complainant company. The complainant corporation had its place of business in the city of Milwaukee, Wis., and Emil Kiewert, its chief officer, and the trustee under the mortgage in question, also resided there. Under the circumstances, we shall treat this as if a mortgage made direct to the mortgagee, the holder of the legal title being the president of the mortgage company. The object of the mortgage was to enable the mortgagee to collect current rents from tenants then in the property, or such as should succeed them, and apply the net receipts on the debt of Juneau then existing, or which might be thereafter created during its existence. Neither the complainant nor Emil Kiewert, the trustee, ever personally occupied any part of the premises. The great distance between the residence of complainants and the location of the mortgaged property made it necessary to intrust the renting and care of the property to a local agent. To this end, one Otto E. Karste, a resident banker, was made the agent of the trustee, and intrusted with the care and rental of the mortgaged premises. The actual rents collected and accounted for up to the close of the account stated by the special commissioner aggregated \$3,879.10, excluding interest. Parts of the premises were from time to time vacant and unoccupied. Expert evidence was taken as to what would be a reasonable rental for the unoccupied premises. This the commissioner fixed at something in excess of \$3,000, and reported that the mortgagee had not exercised due and reasonable diligence in respect to keeping said premises rented out, and was therefore

liable for the rents which by such diligence he ought to have realized. The exception of complainants to this charge was so far sustained by the court below as to divide equally the loss consequent upon the nonrenting of a part of the premises between the mortgagee and mortgagor, the court being of opinion that the fault was mutual.

There are a great many peculiarities about this case which made the relation between the complainants and the mortgagor, Juneau, quite exceptional. Juneau himself occupied one of the houses, and paid rent regularly for a time. For the remainder of the period the house he occupied is excluded from consideration, inasmuch as he himself was in possession. Karste, the agent of complainants, was a business man of character, and testified that he was unable to obtain acceptable tenants for much of the time, and that he mainly relied upon Juneau to secure tenants. Juneau was on the ground all the time, and did assume and exercise much authority over the entire premises; occasionally using or permitting the use of vacant premises as suited his occasion or fancies. He was in the habit of taking people who made inquiries about the premises to Karste, but seems in no active way to have sought out tenants. Ironwood experienced a period of great business depression between 1891 and 1894, which much affected rentals. Whether the failure to obtain tenants was due to the inactivity of Karste and Juneau, or to this general business depression, is, on the evidence, a question of much doubt. One fact is of great importance, and that is that, during this entire relationship, stated accounts were periodically made out by Karste, showing rents collected and moneys disbursed, which, after submission and indorsement by Juneau, were forwarded to the complainants. During this whole period, Juneau made no complaint to Karste as to the incorrectness of these statements, or as to any neglect in obtaining tenants. Neither did he make the slightest complaint to the mortgagors of the inefficiency or neglect of their agent. He knew precisely what Karste was doing or neglecting to do. He was himself voluntarily assisting in the renting of the premises, and was vitally interested in obtaining tenants and securing rents. He was in frequent communication, by correspondence and personally, with complainants during all this time, and yet made no complaint as to the management of this matter. Good faith required him to speak out, if he was conscious of any want of due diligence upon the part of Karste. His conduct was calculated to mislead, and could have no other effect than to induce the absent mortgagees to believe that due diligence was being exercised touching the management of the mortgaged premises. Undoubtedly, a mortgagee who takes possession before foreclosure of the premises is responsible for the reasonable rental value of the premises, if he actually occupy them. So, if he take possession for the purpose of renting them out, he is responsible for due diligence and reasonable thrift in obtaining acceptable tenants, in the collection of rents, and in the preservation of the property. His duty in possession is that of the ordinary prudent owner, and his liability, where he does not per-

sonally occupy, is for actual negligence in failing to make the property as productive as it might be in the hands of a reasonably careful and prudent owner. In *Scruggs v. Railroad Co.*, 108 U. S. 368-375, 2 Sup. Ct. 780, it was said that, where the mortgagee's "possession is by tenant, she is accountable for such rents and profits as she could by reasonable diligence have received." But in this case the mortgagee, whose possession was by tenant, had employed a suitable and responsible agent. Undoubtedly, such a mortgagee cannot wholly discharge himself from all accountability to a mortgagor by proof that the management of the property had been intrusted to capable and responsible agents. For the neglect of such agents the mortgagee must ordinarily be responsible. But this case presents peculiar circumstances. The mortgagor was upon the premises constantly, and was relied upon largely by the agent to secure tenants, and did, in a way, interest himself in securing renters. The facts of this case make one where the mortgagor participated in the management of the mortgaged premises. If there was inefficient advertisement for tenants, or inactivity in securing acceptable renters, it was, as found by the circuit court, the result of the mutual fault of Juneau and Karste. If, as Juneau now claims, Karste was not duly diligent,—if he neglected to close with acceptable tenants or sufficiently advertise premises,—Juneau was at all times cognizant of such negligence. Yet he made no complaint, and gave no notice to the absent mortgagee of the agent's neglect, or of his intention to hold complainant to the technical responsibility of a mortgagee in possession. His participation in the mismanagement of this property, coupled with his silence, under the circumstances, makes it grossly unjust that he should now be allowed to hold the complainants for any part of a loss which might have been avoided but for his own inactivity, and neglect to notify the complainants of facts known to him and not known to them. In *Hughes v. Williams*, 12 Ves. 493, the facts were much those of this case. There it was sought to charge a mortgagee with negligence in underletting the premises. The lord chancellor said as to this:

"Another circumstance that weighs with me,—that the mortgagor, if he knows the estate is underlet, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicate to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but, during this whole period of sixteen years while the mortgagor was out of possession, he never stated that the estate was not managed as it might be. Can the mortgagor lie by, not giving notice that a great rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence?"

The mortgagee's liability for rent, where his possession is only by tenants, must rest upon evidence of actual negligence, under all the facts of the case. This principle we think is fully supported by the authorities. 4 Kent, Comm. (12th Ed.) p. 166; 3 Pom. Eq. Jur. (2d Ed.) § 1216; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Gresham v. Ware*, 79 Ala. 192; *Hughes v. Williams*, 12 Ves. 493;

Van Buren v. Olmstead, 5 Paige, 9; Gerrish v. Black, 104 Mass. 400-404. Though Juneau was under no legal duty to aid or assist the mortgagee's agent in the renting of the mortgaged premises, it is not unjust or inequitable to hold that his voluntary co-operation with that agent involved at least the duty of seasonably complaining to the ignorant and absent mortgagee of the mismanagement of which he now for the first time complains. The special commissioner took no notice of this misconduct, and the learned circuit judge was of opinion that its only effect should be to apportion the consequences. We think it wholly estops the defendant to now assert any claim for mutual negligence aggravated by his remarkable silence when it was his duty to speak. For this reason we think the account should be recast so as to charge complainants only with the rents actually reported as collected.

The other assignments of error must be overruled. They all involve disputed questions of fact, upon which both the special commissioner and court have agreed. Under such circumstances, a very plain showing of mistake must appear, to authorize this court to go behind such a report and decree of confirmation. *Camden v. Stuart*, 144 U. S. 104-118, 12 Sup. Ct. 585; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891. The cause will be remanded, and the decree modified in the particular directed. The costs of appeal will be paid by Juneau.

UNITED STATES v. ADDYSTON PIPE & STEEL CO. et al.

(Circuit Court, E. D. Tennessee, S. D. February 5, 1897.)

1. ANTI-TRUST ACT—INTERSTATE COMMERCE.

The act of congress of July 2, 1890, commonly known as the "Anti-Trust Act," does not, and could not constitutionally, affect any monopoly or contract in restraint of trade, unless it interferes directly and substantially with interstate commerce, or commerce with foreign nations.

2. SAME.

Where several corporations engaged in the manufacture of cast-iron pipe formed an association whereby they agreed not to compete with each other in regard to work done or pipe furnished in certain states and territories, and, to make effectual the objects of the association, agreed to charge a bonus upon all work done and pipe furnished within those states and territories, which bonus was to be added to the real market price of the pipe sold by those companies, this combination was not a violation of the anti-trust act, as it affected interstate commerce only incidentally.

3. SAME.

In the examination of such a contract, fraud and illegality are not to be presumed, but must be proved, as in all other cases.

4. SAME.

In a suit such as this, in the name of the United States, jurisdiction depends alone upon the act; and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available.

James H. Bible, for complainant.

Brown & Spurlock and W. E. Spears, for defendants.

CLARK, District Judge. This suit is brought on behalf of and in the name of the United States against six named corporations. The state of creation and the chief place of business of the several defendants are as follows: Addyston Pipe & Steel Company, Cincinnati, Ohio. Dennis Long & Co., Louisville, Ky. Howard-Harrison Iron Company, Bessemer, Ala. Anniston Pipe & Foundry Company, Anniston, Ala. South Pittsburg Pipe Works, South Pittsburg, Tenn. Chattanooga Pipe & Foundry Works, Chattanooga, Tenn. The petition charges that the defendants are practically the only manufacturers of cast-iron pipe within the following states and territories: Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin. It is further charged upon information that the defendants, in order to monopolize the trade in cast-iron pipe in the above-named states and territories, entered into a contract or association known as the Associated Pipe Works; that the purpose of the association was to destroy all competition within said territory, and to force the public to pay unreasonable prices for the cast iron pipe manufactured and sold by said companies; that for such purposes each company selected a representative; and that these representatives constituted an executive committee. It is charged that the defendants, by the terms of said association, agreed not to compete with each other in regard to work done or pipe furnished in the states and territories above named, and, to make effectual the objects of the association, a bonus was agreed to be charged upon all work done and pipe furnished within said territory, and the petitioner charges that this bonus was put upon the real market price of the pipe sold by these companies, and, to that extent, increased the price to the purchasing public; that the amount of this bonus ranged from \$3 to \$9 per ton; that the purpose of the association was thus to force up the price of cast-iron pipe to an exorbitant and unreasonable extent. It does appear from the bill, as well as the answer and the proof, that upon what may be called "stock goods," regularly sold, there is a fixed bonus, and that upon goods supplied by special contract the bonus is determined as follows: When bids are advertised for by any municipal corporation, water company, or gas company, the executive committee determines the price at which the bid is to be put in by some company in the association, and the question to which company this bid shall go is settled by the highest bonus which any one of the companies, as among themselves, will agree to pay or bid for the order. When the amount is thus settled the company to whom the right to bid upon the work is assigned sends in its estimate or bid to the city or company desiring pipe, and the amount thus bid is "protected" by bids from such of the other members of the association as are invited to bid, and by the bidding in all instances being slightly above the one put in by the company to whom the contract is to go. There are within the 36 states and territories what are called "reserved cities," by which it is

agreed that particular members of the association shall have the work at particular cities, and on this they pay the regular bonus, just as on stock goods when sold otherwise than by special contract obtained by bidding. It appears, too, that by far the larger part of the work done with goods furnished by these companies is under special contract with municipal corporations and gas and water companies, as above stated. Practically, all the profitable business is thus done. The general public, so far as affected by the business at all, is affected mainly through municipal corporations. All of the states of the United States outside of the states and territories above named are called "free territory," and the states named are distinguished as "pay territory." Settlements are made at stated times of the bonus account debited against each company, where these largely offset each other, so that small sums are in fact paid by any company in balancing accounts.

The aggregate annual manufacturing capacity of the 6 companies belonging to the association is 220,000 tons, with a daily capacity or output of about 650 tons; there are 9 other companies or corporations engaged in the manufacture and sale of cast-iron pipe within the pay territory, with an aggregate daily capacity of about 835 tons, though most of these are small concerns; and there are 10 companies or corporations engaged in the same business located within the free territory, as above explained, with a daily capacity or output of, say, 1,550 tons. It appears, also, that members of the Associated Pipe Works, while they do not compete with each other, are subjected to competition by the other companies and corporations, both within and without the pay territory, though just to what extent and with what effect this competition is carried on does not clearly appear. It does appear, however, sufficiently, that the companies within the association have so far not been able to raise or maintain prices above what is reasonable, compared with the prices at which similar goods and similar work may be obtained from the companies outside of the association. It now appears that all corporations, with one or two unimportant exceptions, which have let contracts to the members of this association, are satisfied with the prices, and make affidavit to the fact that they are reasonable, and that the prices furnished are, in the main, considerably below the estimates made by the expert engineers of such companies prior to advertising for the bids. The proof shows, too, that the defendant companies have, at least in certain instances, made quotations on goods to be delivered in the free territory below corresponding prices within the pay territory. It is said by the defendants that this is explained by reason of the difference in the cost of goods manufactured under contracts obtained by bidding, and stock goods which are sold on general orders, and consisting of goods which have been rejected as not coming up to the specifications, and goods manufactured during the winter season in order to keep men and machinery from becoming idle, during which period there is practically no demand by companies which purchase goods on special orders, and contract by bids.

I think it does sufficiently appear that the average prices obtained by this association since its formation are above what was obtained before, though, as above stated, the proof is not sufficient to show that the ruling prices are now above what is reasonable, as determined in the markets and by competition. The defendants, in their answer, deny the purpose attributed to the association by the plaintiff's petition. On the contrary, they say and set up that prior to the association they were engaged in reckless and ruinous competition among themselves, as a result of which their business was not prosperous, and under which condition of things it was certain that some or all of them would fail and leave the entire field to such as might be able to survive. It is set up that what is called the "bonus" does not affect the price to the purchaser at all, but that the association determines in the first place what the market price should be, having regard also to the competition to which it is likely to be subjected by other companies not in the association, and that the price is not at any time unreasonable, and that the bonus is merely a mode of determining as between themselves, to an extent, who shall secure the work, but chiefly to make it certain that each company does its fair share of the business, by making the bonus burdensome to such companies as might undertake to do more than their reasonable share of the business within the territory named. It is further said that under the association the business has been fairly divided between the companies, and that they have been enabled to keep all of the plants in operation, their operatives at work, and the machinery from becoming idle. I think it could be safely stated that in some instances prices have been above what was probably fair or reasonable, but the proof fails to show that the average prices have been so. The leading witness for the government was for some time a stenographer in the service of the defendant Chattanooga Foundry & Pipe Works, and in that position did the work of the association, became familiar with all of the details by which the business was conducted, and, after giving up his position, made known to the government's law officer all the facts of the case, and has persistently and industriously corresponded with persons who had dealings with members of the association, and has done all in his power to instigate suits by purchasers from these companies against the associated companies, and has offered to become a witness in their behalf in such suits; always making the condition that he was to be liberally compensated, exacting generally a very large per cent. of what might be recovered. A complete exposure of all the business details of these companies has been thus made. So far, he has not been able to cause any suit to be instituted. But, upon the facts laid before him, the district attorney, under the direction of the attorney general, instituted the present suit. It was certainly eminently proper, in view of the disclosures made to the district attorney, that suit should be brought, and an investigation had.

This suit is based upon the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," com-

monly called the "Anti-Trust Act" (26 Stat. 209, c. 647; Supp. Rev. St. p. 762). Such of the provisions of the act as affect the matter now under consideration are as follows:

"Section 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

When the petition was filed, a restraining order was allowed, and the case is now heard upon the application for a preliminary injunction. The discussion on this motion has taken a wide range, and has proceeded upon the basis that the entire case has been practically developed as much as could be done upon full preparation and a final hearing. The record, so far as made up, consists of the petition, answer, affidavits, and exhibits thereto. A demurrer is incorporated in the answer of the defendants, and the defense rests upon two grounds: (1) That the association is not one subject to the provisions of the act of congress, to enforce which alone this suit is brought; and (2) that the association, in its purposes and mode of doing business, does not constitute a monopoly, and causes no restraint of trade, such as would be unlawful at the common law. It will depend upon the solution of the first question made as to whether or not it will become necessary to examine the second. The question whether this is an association such as subjects it to the provisions of the act of congress is one of some difficulty. This act, like what is known as the "Interstate Commerce Act," is new and experimental legislation by congress. The discussion which attended the passage of the act by congress, as shown by the records, makes it plain that the ablest and most thoughtful jurists of that body experienced much of the same difficulty which has since been felt by the courts in the attempt to enforce the act. It was recognized that congress was restricted in anything that it might do upon the particular subjects named in the act to a very narrow field; that the constitutional validity of the legislation was doubtful as a whole. Up to the date of the enactment of the interstate commerce law, and of the act now under consideration, the interstate commerce clause of the constitution, under which legislation of this character is justified, has been considered by the courts almost entirely with relation to state legislation, and its constitutional validity. Nevertheless it will be profitable to refer briefly to the doctrine announced in some of these cases before making any more particular reference to cases in which this act has been considered. It has, of course, been recognized from the beginning that it was no more within the province of congress to legislate upon domestic commerce, or commerce wholly within a state, than it was within the power of the legislature of a state to legislate upon the subject of interstate commerce or trade. In *Nathan v. Louisiana*, 8 How. 73, a tax was

imposed on every money or exchange broker, and this legislation was objected to upon the ground that the sole business of the defendant in that case was the buying and selling of foreign bills of exchange, which were instruments of commerce, and the act was repugnant to the constitutional power of congress to regulate commerce with foreign nations and among the several states. It was admitted by the court that foreign bills of exchange were instruments of commerce, but the court also said, in effect, that the products of agriculture or manufacture were in like manner instruments of commerce. Mr. Justice McLean, giving the opinion of the court, said:

"He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

The court further pointed out that domestic bills or promissory notes were as necessary to the commerce of a state as foreign bills were to the commerce of the Union. In the *State Freight Tax Cases*, 15 Wall. 272, the court observed:

"The transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired."

In *Railroad Co. v. Richmond*, 19 Wall. 584, a contract had been entered into between the Dubuque & Sioux City Railway Company and the Dubuque Elevator Company, both created corporations by the laws of Iowa, by the terms of which contract, among other things, the elevator company was to erect an elevator on land leased from the railroad company, to be situated at Dubuque, for the purpose of receiving, storing, delivering, and handling all grain that should be received by the cars of the railroad company, not otherwise consigned, and to receive and discharge at Dubuque, for the company, all "through grain" by which was meant grain transported, by the terms of shipment, through that place to points beyond, at a certain stated price per bushel. The railroad company stipulated on its part that it would not erect a similar building for receiving, storing, or delivering grain at Dubuque, and would not lease to any others the right to erect any such building; that the elevator company should have the exclusive right to handle all through grain at Dubuque at the stipulated price per bushel. The railroad company having leased its road and property to the Illinois Central Railroad Company, the latter company disregarded the contract; and suit was brought in the United States court to enforce the same on behalf of the elevator company, and the defense was that the contract was repugnant to the constitution, as violating the interstate commerce clause. This defense was overruled, and decree entered in favor of the elevator company, and the case was taken to the supreme court of the United States. The ruling of the lower court was affirmed, and the supreme court, in doing so, enunciated again the controlling rule upon this subject, by saying:

"The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation. It was never intended that the power should be

exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

In *Sherlock v. Alling*, 93 U. S. 100, a statute of the state of Indiana was drawn in question. This statute contained provisions designed for the better security of the lives of the passengers on board vessels propelled in whole or in part by steam, and the contention was that, as applied to marine torts, the act was invalid, as interfering with the exclusive regulation of commerce vested in congress. Mr. Justice Field, discussing this point and referring to previous decisions, used the following language:

"In supposed support of this position, numerous decisions of this court are cited by counsel, to the effect that the states cannot, by legislation, place burdens upon commerce with foreign nations, or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, as between particular places, was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports, for every passenger landed. In the *Wheeling Bridge Case*, 13 How. 518, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 How. 227, the statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement, in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state, in addition to those prescribed by congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of congress, as in *Brown v. Maryland*, 12 Wheat. 425, *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom."

And in the further progress of the opinion the court observed:

"In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

It will be readily seen that the cases recognize the distinction between the subjects of commerce and commerce itself, as well as between the instruments and aids to such commerce, and the actual business of commerce. In regard to state legislation, it has been declared from the beginning that, to render such legislation subject to constitutional objection under the commerce clause, the effect of the legislation upon interstate commerce must be direct, and not incidental or indirect. This general statement of the law so often repeated has been illustrated by the varying facts of many cases, but it would extend this opinion beyond reasonable limits to now refer to

these. It has often been observed that the line of demarkation between state and federal jurisdiction and regulation is a delicate one, and at times grows dim and shadowy. In considering a question of this delicate nature, proper and practical distinctions become extremely important. A particular business must be distinguished from the mere subjects of the business, and from mere incidents to or instruments by which the business is carried on. It is hardly conceivable that any large industrial or manufacturing establishment could be carried on without shipping products from one state to another, and such would certainly be the course of business contemplated. Nevertheless the business of such an establishment would be related to interstate commerce only incidentally and indirectly. Commerce would not be the main business, nor within the main purpose of the ordinary manufacturing establishment. Interstate commerce would be altogether an incident. There is no direct relation between the two. It is probably true that every wholesale establishment within the limits of the larger cities is engaged in such mode of business as that it is known that the business can be conducted only by the method of interstate commerce in part. Such commerce is, however, not directly affected, and least of all impeded or restricted. If every private enterprise which is carried on in part or chiefly by interstate shipments, or by a mode of business which makes this necessary, is to be regarded as thereby so related to interstate commerce as to come within the regulating power of congress, it is obvious that this power could at once be extended to almost every form of business in the country which is conducted on anything like an extensive scale. So liberal an interpretation as this would obviously, in a large sense, obliterate the lines between federal and state jurisdiction, and, as an act of congress is paramount in authority, would strike down the autonomy of the states. The doctrine applicable to this subject was thoughtfully and fully restated by Mr. Justice Lamar in *Kidd v. Pearson*, 128 U. S. 120, 9 Sup. Ct. 10, in language as follows:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation,—the fashioning of raw materials into a change of form, for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of at least such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multiform, and vital interests,—interests which, in their nature, are and must be local in all the details of their successful management. The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable, and utterly inconsistent. Any

movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be exercised by the state, and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine."

The distinction before referred to between commerce and the subjects of commerce, and between the direct and indirect effect of the business, or mode of doing business, upon interstate commerce, is here clearly recognized and declared, as was also done in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, in which the opinion in *Kidd v. Pearson* is expressly referred to, and the ruling reaffirmed. It was easy to anticipate that, when called upon to enforce the provisions of the anti-trust act, the interpretation would be in harmony with the construction of the commerce clause which had been uniformly given in considering state enactments alleged to infringe, or supposed to be an infringement upon, this provision of the constitution. In *re Greene*, 52 Fed. 104-119, is the first case in which the act in question was extensively treated. The question arose upon a petition for a writ of habeas corpus. The defendants and others, under the form of what was called the Distilling & Cattle-Feeding Company, a corporation organized under the laws of Illinois, had obtained possession and authority over such a number of distilleries that the company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, and the defendants had fixed the price at which the purchasers should and did sell the products of the distilleries. Sales were made through agencies established in Massachusetts and other places, and one of the questions considered was whether this was a combination subject to the provisions of the anti-trust act, under which the defendant had been indicted, and Judge Jackson (afterwards Mr. Justice Jackson) ruled that it was not. Discussing the point of whether the whisky trust was subject to the act, the eminent judge observed:

"It is certain that congress could not, and did not by this enactment, attempt to prescribe limits to the acquisition, either by the private citizens or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and

manufacture of commodities which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities, just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns." 52 Fed. 115.

And, speaking somewhat more specifically, it was further said:

"It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the distilling and cattle-feeding company to own seventy distilleries and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said distilling and cattle-feeding company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products, within the meaning of the statute, and may therefore be left out of further consideration."

Much of the discussion in the opinion is devoted to showing that the trust arrangement there considered was neither a monopoly nor a contract in restraint of trade, according to the common-law sense, which it was held, in that and subsequent cases, must be allowed to settle the question of what is a monopoly or contract in restraint of trade, in the absence of any definition in the act of congress. In the previous case of *In re Terrell*, 51 Fed. 215, Judge Lacombe had declared that:

"It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade,—of a contract which restrains, or is intended to restrain, trade."

The statute came before the supreme court of the United States for the first time in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249. The American Sugar-Refining Company, a corporation existing under the laws of the state of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock, four other refineries in Philadelphia, and thus obtained such disposition over these refineries throughout the United States as gave it a practical monopoly of the business, and it was held that the result of the transaction was the creation of a monopoly in the manufacture and sale of a necessary of life; but it was nevertheless distinctly held that the monopoly was not one which could be suppressed under the provisions of the act of congress now in question, and that the business of sugar refining in Pennsylvania bore no direct relation to commerce between the states, nor with foreign nations. And the doctrine upon this subject, and the distinctions before adverted to, which pervade all of the previous cases, are again declared in the opinion with great clearness. Mr. Chief Justice Fuller, speaking for the court, said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond or union, the other is essential to the preservation of the autonomy of the states, as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences, by resorts to expedients of even doubtful constitutionality. It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected."

After referring with approval to *Gibbons v. Ogden*, 9 Wheat. 1, 210, *Brown v. Maryland*, and other previous cases, the opinion was concluded by saying:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly direct, as such; or to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property, or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states, or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect to contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

It is a doctrine expressly stated and clearly implied in these cases that the act of congress does not, and could not constitutionally, deal directly with a monopoly or a contract in restraint of trade, as such, according to the common-law definition of these terms; and, as has been seen, the act of congress gives no definition of its own. To do so would be clearly to trench upon the exclusive jurisdiction of the states. Federal authority exists only when a monopoly or a contract in restraint of trade assumes such form or has such effect as to go beyond any common-law conception of these terms, and interferes di-

rectly and substantially with interstate commerce or commerce with foreign nations; and this it must do directly, and not incidentally. Now, I am unable to perceive, in the light of these cases, that the act of congress can be regarded as applicable to the association under consideration. It cannot be suggested, and has not been, that this association had in contemplation as one of its purposes the subject of interstate commerce, any more than any ordinary manufacturing establishment would have, where the products of such manufactory must find a market in other states as well as in domestic markets. It seems to me evident that private gain was the object of the association, just as was observed in regard to the sugar trust in *U. S. v. E. C. Knight Co.* Nor does the mode in which the association conducts its business have any direct relation to interstate commerce, so far as I can see. The sugar trust was confessedly a monopoly, in the common-law sense, and in a commodity of prime necessity. And the extent to which interstate commerce would be used in carrying on its business would be in magnitude out of all proportion to a similar use made by the association in question.

The learned district attorney has leveled most of his criticism at the bonus feature of the association, but it has not been pointed out, and, I think, cannot be, how the manner of using the bonus operates in restraint of interstate commerce. The object of the bonus and of the association really is not to prevent all members of the association from furnishing and shipping their manufactured products, but to determine among themselves which one of them shall do so, and it is really contemplated that some one will do so. There is certainly no restraint in this, as the supply in such case is regulated by the demand, so far as shipment is concerned. It has not been argued that the fact that certain cities are reserved to a particular company would bring the association within the provisions of the act. It is true that generally one of the reserved cities is that in which the company has its chief place of business. For example, the Chattanooga Foundry & Pipe Works is allowed, under the arrangement, to supply the cities of Chattanooga and New Orleans. If it be argued that this prevents companies in other states from shipping goods to Chattanooga, it would be merely to follow a theory having no practical bearing on the case, because, in the absence of an association, the entire freight charges being in favor of the local company, and the disposition to patronize a local concern being in its favor, it would easily furnish the supplies.

It remains to remark, as should have been done before, that upon the bill and answer, where the contract of the association is admitted in the answer, as is virtually done here, but the allegations tending to show its sinister purpose, tendencies, and effects, contained in the bill, are denied by the answer, and averments are made in the answer tending to show a just and equitable purpose and effect, the averments in such answer upon this application stand admitted, and the contract must be presumed to have been made for the purposes honestly as stated in the answer, unless the provisions of the agreement and the mode of doing business clearly show the contrary. In examination of such a contract, fraud and illegality are not to be presumed, but

must be proved as in all other cases. *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58. It may be further observed, to prevent misconstruction, that in a suit such as this, in the name of the United States, jurisdiction depends alone upon the act giving jurisdiction to enforce its provisions, and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available. Having reached the conclusion that the defendant association is not subject to the provisions of the act of congress, according to the ruling in *Re Greene* and in *U. S. v. E. C. Knight Co.*, I do not feel called upon to dispose of the other issues made in this case, and the bill is therefore dismissed.

SIDELL v. MISSOURI PAC. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. CORPORATIONS—ELECTION OF DIRECTORS—MAJORITY STOCKHOLDERS.

When the majority of the stockholders of a corporation, combining together, or an individual or corporation holding a controlling interest in the stock, select a body of directors to carry out a predetermined scheme of corporate action, they practically constitute themselves the corporation for that object, and assume the fiduciary relations which the directors themselves occupy; and, if the corporation is insolvent, this trust relation towards creditors forbids the majority stockholders or stockholder from appropriating for their own advantage the property in which all have a community of interest.

2. SAME—RAILROAD COMPANIES—LEASE OF ROAD—LIABILITY OF LESSOR.

The L. Ry. Co. entered into a contract with the M. Ry. Co. and one L., by which L. was to build the road of the L. Co., and to be paid in bonds, to be issued by the L. Co., and secured by first mortgage of all its property, including rents and profits, and also to be guarantied by the M. Co., which was to acquire a majority of the stock of the L. Co. After the road was built, and the bonds issued, the L. Co. leased the road for 40 years to the M. Co.; the lease providing that the annual rent might be paid to the holders of the coupons of the bonds guarantied by the M. Co. At the meeting at which this lease was authorized, the M. Co. voted a majority of the stock of the L. Co. in favor of its execution. Subsequently, complainant, who held a claim against the L. Co. derived from L. under the contract for the construction of the road, upon which he had taken judgment against the L. Co., filed a creditors' bill against the M. Co. to compel it to account for the property of the L. Co. taken by it under the lease. It appeared that the rental value of the property was not equal to the interest on the mortgage, and that the road did not earn expenses. *Held*, that the M. Co. could acquire no benefit, as against creditors of the L. Co., by taking the lease while that company was insolvent, and would be bound to account to complainant for any profits; but, as there were no profits, the bill was properly dismissed.

3. SAME—RENTALS—PAYMENT TO BONDHOLDERS.

Held, further, that if the M. Co. had been bound to pay rent to the L. Co., a decree for its payment to the complainant would have been appropriate; but, as the rent was directed to be paid to the bondholders, as it lawfully might be, no such decree could be made.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Charles D. Ingersoll and Albert Stickney, for appellant.

Winslow S. Pierce, Rush Taggart, and David D. Duncan, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree dismissing the bill of complaint. The action was a creditors' suit founded on a judgment recovered in April, 1894, for the sum of \$31,925, by the complainant against the Leroy & Caney Valley Railroad Company, and an unsatisfied execution thereon, to reach assets in the hands of the Missouri Pacific Railroad Company, alleged to constitute a trust fund for the benefit of the creditors of the Leroy & Caney Valley Railroad Company. The theory of the bill is that the Missouri Pacific Company, being the principal stockholder and in full control of the Leroy Company, took from the latter, without any new consideration, and with the intention of hindering, delaying, and defrauding its creditors, and especially the complainant, a long lease of its entire property, leaving the company entirely insolvent; that the property was a trust fund for the payment of the debts of the Leroy Company, and the value thereof was largely in excess of the amount of the complainant's judgment; that the Missouri Pacific Company is, therefore, liable in equity to account for the value of the fund; and that, as the complainant is the only creditor of the Leroy Company whose debt remains unpaid, the Missouri Pacific Company should be compelled to pay his judgment in full.

It appears by the proofs that the Leroy Company, a corporation organized under the laws of the state of Kansas, entered into a contract dated October, 7, 1885, with the Missouri Pacific Company, also a corporation of that state, and also with one Loss, by which Loss agreed to build a railroad for the Leroy Company between certain designated places in the state of Kansas, and was to be paid therefor by the delivery to him of the first mortgage bonds to be issued by the Leroy Company and secured by a trust deed conveying all its property; and by which the Missouri Pacific Company was to guaranty the payment of the principal and interest of the bonds, and was to acquire the larger part of the stock of the Leroy Company. The complainant's claim grew out of this contract by mesne assignments from Loss. The railroad was built, the mortgage bonds were created, the Missouri Pacific Company guarantied them, and the bonds were applied as contemplated by the contract. The mortgage securing the bonds guarantied by the Missouri Pacific Company covered not only all the physical property and the franchises of the Leroy Company, but also "all the rents, issues, profits, tolls, or other income" thereof. March 3, 1887, the Leroy Company executed to the Missouri Pacific Company a lease of its railroad, together with all its other property, for the term of 40 years, at a rental of \$500 per mile of road annually. The lease provided that the Missouri Pacific Company should pay all taxes on the property, and make all the replacements and repairs. The lease contained the following clause:

"It is agreed that, whereas, the party of the second part has guarantied the payment of interest on certain of the first mortgage bonds of the party of the first part, * * * the party of the second part has the right, instead of paying the

rental herein stipulated to be paid directly to the party of the first part, to apply the same to the payment of the coupons on the bonds of the party of the first part as the same become due, and thereby exonerate itself from all liability to pay rent; this right in favor of the party of the second part being one of the considerations on which said guaranty was made."

The rent under the lease was payable semiannually, and at the same time when the semiannual interest upon the bonds would fall due. At the time this lease was executed the Missouri Pacific Company owned and held a majority of the capital stock of the Leroy Company. It voted upon this stock at a corporate meeting of the Leroy Company called to authorize the lease, and by its vote elected the directors who were instructed to cause it to be executed. It took possession of the railroad and all the other leased property under the lease, and has since remained in possession and continued to operate the same.

The proofs justify the inference that the Leroy Company was organized for the purpose of building the railroad as a branch line or feeder to become a part of the system of the Missouri Pacific Company, and that the latter was from the inception of the enterprise a virtual principal. The proofs also show that at the time of the lease the property was not of a rental value equal to the accruing interest upon the outstanding first mortgage bonds. The railroad was doubtless projected and built in the interests of the Missouri Pacific Company with the view of occupying and developing new territory, and in the expectation that at some future time its value as a tributary of the main system would equal or exceed its cost. No evidence was introduced on behalf of the complainant respecting the value of the leased property beyond that supplied by the lease itself. According to the testimony for the defendant, the railroad has been operated by it at a large annual loss, amounting altogether to more than \$400,000.

The legal principles applicable to this state of facts are familiar. In a qualified sense, the property of an insolvent corporation is a trust fund for the payment of its creditors. Creditors do not have a specific lien upon the assets any more than they do upon the property of an insolvent individual. If, instead of appropriating them to the payment of its debts, it makes a disposition of them in fraud of creditors, the creditors can reach them, and by proper proceedings acquire a lien upon them, just as they can in the case of an insolvent individual. When insolvency occurs, the directors or managing agents occupy the fiduciary relation towards creditors which they originally sustained towards stockholders. It becomes their duty to preserve the assets, and administer them for the benefit of the creditors. A court of equity will then treat the assets as a trust fund. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers, a court of equity will follow them, and compel them to be applied to the satisfaction of the debts. *Curran v. Arkansas*, 15 How. 307; *Drury v. Cross*, 7 Wall. 299; *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank of Chicago*, 134 U.

S. 276, 287, 10 Sup. Ct. 550; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Bartlett v. Drew*, 57 N. Y. 587; *Lyman v. Bonney*, 101 Mass. 562; *Goodin v. Canal Co.*, 18 Ohio St. 169.

When a majority of the stockholders of a corporation combine to effect some predetermined scheme of corporate action, and by their vote select a body of directors to carry it out, they practically constitute themselves the corporation for that particular object, and assume the fiduciary relation which the directors themselves occupy. *Ervin v. Navigation Co.*, 27 Fed. 625; *Farmers' Loan & Trust Co. v. New York & N. Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043. The same result follows when one individual, or a corporation, exercises this control by its majority voice and vote. If the corporation is insolvent, this trust relation towards creditors forbids the majority stockholder from appropriating for his own advantage the property or fund in which all have a community of interest. *Jackson v. Ludeling*, 21 Wall. 616.

The lease of the Leroy Company, having been of its entire property, denuded the corporation for the term of 40 years of any fund for the payment of its debts except that supplied by the lease itself. Having been procured by the Missouri Pacific Company through its control as a majority stockholder of the Leroy Company, if the Leroy Company was insolvent at the time, the Missouri Pacific Company could acquire no benefit by it to the disadvantage of the creditors of the Leroy Company. Unless it constituted an asset as available and valuable to the creditors as was the original trust fund for which it became a substitute, it was an unlawful disposition of the trust fund for the payment of their debts.

It is conceded that the complainant's judgment represents the only unpaid liability of the Leroy Company existing at the time of the execution of the lease. That being so, if the lease was void as to creditors of the Leroy Company, the complainant was entitled to a decree requiring the Missouri Pacific Company to account for the profits derived by the diversion of the original trust fund from its appropriate purpose, and applying the profits to the payment of the judgment. The court below was not asked to set aside the lease, nor does the bill pray for that relief, because, as was stated upon the argument, such a decree would be of no practical value; the prior mortgage would stand, and the leased property would not be of sufficient value to satisfy its lien. Under such circumstances, if it appeared that there were no profits, the court below properly dismissed the bill.

According to the proofs, there were no profits. The property included in the lease was of no appreciable value above the incumbrances upon it. It was insufficient to satisfy the lien of the mortgage. As a part of the Missouri Pacific system it could not earn expenses, to say nothing of fixed charges. Its value at the time the proofs were taken was fairly described in the statement of one of the witnesses for the defendant, a competent judge of railroad values, and in no wise connected with the defendant, who said, "I

take it that the owner of that road would be very glad not to own it." It may be conjectured that at some future time its value may exceed the amount of the incumbrances, but this depends upon many contingencies which cannot be forecast, and a decree would be founded upon mere conjecture.

If there were any obligation on the part of the Missouri Pacific Company as lessee to pay the rent to the Leroy Company, the complainant being the only creditor of the latter corporation, a decree directing payment of the rent towards satisfaction of the judgment would also be appropriate. But there is no such obligation in the lease. Instead, by its terms, the Missouri Pacific Company is at liberty to apply the rental to the payment of interest on the mortgage bonds. It was not unlawful nor inequitable for the two corporations to make provision for that application of the rental. The mortgage, by its terms, gave the holders of the bonds an equitable lien upon the rental for the payment of the interest. The railroad was built with their money. Why were they not entitled to have their interest paid as it fell due? If, incidentally, the Missouri Pacific Company derived a benefit as surety, no one not having higher rights than the bondholders has cause to complain. Certainly the complainant had no equities superior to those of the bondholders. According to the preponderance of authority, in the absence of statutory restrictions an insolvent corporation has the right to prefer one creditor to another in the distribution of its property, the same as has an insolvent individual. *Sargent v. Webster*, 13 Metc. (Mass.) 497; *In re Patent File Co.*, 6 Ch. App. 83; *Catlin v. Bank*, 6 Conn. 233; *Warner v. Mower*, 11 Vt. 385; *Coats v. Donnell*, 94 N. Y. 168; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Dabney v. Bank*, 3 S. C. 124. If the provision amounted to a preference of the bondholders, it was a legitimate one, and there is no legal theory upon which it can be, in effect, eliminated from the lease, or upon which a decree would be proper directing the Missouri Pacific Company to pay the rental to the complainant.

The case made by the proofs did not entitle the complainant to any substantial relief. The trust fund which he sought to pursue existed only in metaphor. The property of the Leroy Company was of no value to creditors, except the mortgage bondholders, at the time of the lease. The lease did not impair the value of the original fund, nor create a substituted fund of any greater value to creditors who were not bondholders. If it had not been executed, the complainant would be no better off than he is now. "*Ex nihilo nihil est.*"

The decree is affirmed, with costs.

ALGER v. ANDERSON et al.

(Circuit Court, M. D. Tennessee. February 11, 1897.)

1. TITLE OF EXECUTOR—PARTIES TO ACTION.

Where an executor is empowered by the will to sell lands, and make and acknowledge titles to lands sold, he takes the fee-simple title; and, in an action against him in that character to rescind a contract made by the testator for the sale of land, he properly represents all of the beneficiaries. But if, upon a decree obtained against the executor, the lands embraced in the contract rescinded should fail to satisfy any recovery in favor of the plaintiff, the heir in any proceeding thereafter to subject real estate descended may make any defense to the action which the executor could have made in the first instance.

2. PARTIES TO ACTIONS — FAILURE TO BRING ALL PARTIES INTERESTED BEFORE THE COURT.

When the bill suggests as a reason for not bringing all parties interested before the court that some of them are not known to the plaintiff, the case may proceed without the unknown parties, in the absence of any statement of fact in the answer showing the excuse suggested in the bill to be untrue.

3. NOTICE OF FRAUD—LACHES.

In a suit for relief from a secret fraud, the defense of laches cannot prevail where the suit was commenced within a reasonable time after the evidence of fraud was discovered; and the complainant in such a suit was not required to take notice of facts brought out in a suit to which he was not a party, and which presented no issue affecting him directly or indirectly.

4. PRINCIPAL AND AGENT—FRAUD OF AGENT IN SALE OF LAND.

The law looks at the substance of a transaction, and not its form. And where real-estate agents with whom land was listed for sale procured the owner to give them an option and title bond, in order to make certain that the sale, if made, would be allowed to go through without obstruction, they did not become purchasers, and cease to be agents, and the principal is liable for their fraud.

5. SAME—BRIBERY OF AGENT.

Where an agent has been bribed or tempted to betray his principal, that fact is sufficient to entitle the principal to repudiate the transaction; and it is not necessary, as a basis for relief for the principal, to show the actual effect of the bribe or gift upon the agent.

6. SAME—ACCEPTANCE OF PROFITS OF TRANSACTION AFTER FRAUD OF AGENT IS DISCOVERED.

Where one of two joint owners of land listed it with real-estate agents for sale, the other owner having consented thereto, and received a part of the consideration, and never having repudiated the sale made by the agents after discovering the fact that they had been guilty of fraud, he is estopped to say that he is not connected with the fraud; but, in view of his relation to the transaction, he is not liable beyond the benefit actually received.

7. SAME—RESCISSION.

The fact that the purchaser has taken a small amount of timber from the land does not constitute such a change in the condition of the premises as to preclude him from having a rescission on account of the secret fraud of the vendor's agent.

Granbery & Marks and Estill & Lynch, for plaintiff.

W. H. Brannan, W. J. Clift, A. S. Colyar, Banks & Embrey, and Vertrees & Vertrees, for defendants.

CLARK, District Judge. The bill is filed for the purpose of rescinding and setting aside as fraudulent a deed and sale of land made by John F. Anderson, of Franklin county, Tenn., ancestor of the defendants, to R. A. Alger, of Detroit, Mich. The deed was executed March 4, 1889, conveying 14,804 acres of land, in considera-

tion of \$103,628, being at the rate of seven dollars per acre, as the proof fully shows the sale was. The bill was filed August 28, 1894. In the latter part of 1888 this body of land was listed for sale by John F. Anderson, deceased, with a real-estate firm in the city of Chattanooga, Tenn.,—Sheridan, Green & Co.,—whose business was that of selling land on commission for others, and it was no part of their business to buy and sell land on their own account. After some modifications of the terms under which the real-estate agents were to handle the land, it was finally agreed that they might have such profits as could be made over and above four dollars per acre, that being the amount to be paid to Anderson for the land. The real-estate agents at once sent abroad printed circulars, descriptive of the lands, in which they were represented as possessing great value on account of the timber and mineral interests, such as coal. These circulars attracted attention, among others from Alger, and the negotiations which resulted finally in the sale and conveyance in question thus had their origin. During the progress of the negotiations, Sheridan, Green & Co. became impressed with the belief that they would be able to effect a sale with complainant, Alger; and, for some reason or other, they became apprehensive that Anderson might finally refuse to convey, or embarrass them towards the close in the effort to make the sale. This was probably due to the fact that the price put upon the lands to Alger was seven dollars per acre, and it was thought that so large a profit, if it became known, would create dissatisfaction on Anderson's part. So, under the advice of counsel, in order to guard against such contingency as this, the real-estate firm procured Anderson to give an option and title bond, and paid him down a small sum, in order to make certain that the sale, if made, would be allowed to go through without obstruction by Anderson. The real-estate firm had no means with which to have purchased the land on their own account, and did not contemplate doing so, and it is certain that Anderson did not so understand the effect of what was done. The part which Anderson took in regard to the sale was just the same after as before the execution of the title bond. The deed was, in the end, executed by him directly to Alger, and the money paid by Alger directly to him.

Included in the lands sold and conveyed by Anderson was a tract containing about 4,800 acres, jointly owned by him and his grandson, the defendant Gonce; Gonce being the owner of a three-fourths, and Anderson a one-fourth, undivided interest therein. It is insisted that Anderson was merely the equitable owner of this one-fourth interest, and not the legal owner, and that the relation of tenants in common between Gonce and Anderson did not for that reason exist in law. This view cannot, in my opinion, be successfully maintained. The fact that Anderson had listed the property with the real-estate firm before mentioned, for sale, became known to Gonce, who agreed that the land might be sold, but he desired for some reason to give the transaction the form of a sale by him to his grandfather, Anderson, instead of direct to the complainant, Alger. The body of land had been purchased by Gonce at a judi-

cial sale in the state court, and he finally gave the clerk of the court, who was empowered to make a deed, a direction to make the deed direct to complainant, Alger, instead of Gonce; but the agreement between him and his grandfather, as it is insisted, was for a quitclaim, and the direction by which the deed was made direct to Alger by the clerk was in a quitclaim, and to Anderson; and Gonce received therefor from Alger the sum of \$15,572, the deed to Anderson having been placed in the bank in escrow, to be delivered only when this sum was paid by Alger to the bank for his (Gonce's) account. For the purpose of determining whether the lands were as represented by Sheridan, Green & Co., complainant, Alger, sent one A. J. Freer, called a "land looker," to Tennessee, for the purpose of investigating the lands, and making a report to him. This man had been engaged for similar purposes, and had in that sense been the trusted agent of complainant for many years. About the same time, another gentleman from Detroit, well acquainted with complainant, Alger, by the name of Lynn, appeared upon the ground, as he says, as a result of having seen this circular of Sheridan, Green & Co.; and he in some way became interested in the sale of the land with Sheridan, Green & Co. Freer went upon the lands, and made the usual examination, being attended by a representative of the firm of Sheridan, Green & Co., made measurements of the coal veins, examined as to timber, the location and quality of the land, and all other facts which would go to settle the question of whether the purchase would be desirable and profitable to complainant, Alger. During the time of such examination, various letters were written in regard to these matters. After his examination of the land, and on his way back to Detroit, he came to the city of Chattanooga, but did not call upon the firm of Sheridan, Green & Co., and this was regarded by members of the firm as an unfavorable indication. Thereupon a member of that firm called to see Freer at the hotel, but obtained no satisfactory statement from him as to what report he would make on reaching complainant, Alger. Just as he was boarding the train for Detroit, he stated, however, to this representative of the real-estate firm, that the firm would hear from him through Mr. Lynn. Accordingly, Mr. Lynn was interviewed at the first opportunity, and made known to the firm the importance of sending a telegram to the Griffin House, in Detroit, in order that it might reach Freer in due time; and this telegram was accordingly sent. Thereafter Freer called upon complainant, Alger, and made his report in regard to the land, using for that purpose a memorandum book in which were contained some of the facts of his examination. Complainant, Alger, says that the verbal report thus made was more favorable in some respects than such report as was made by letter from time to time written from Tennessee. Thereupon complainant, Alger, sent a coal expert by the name of Shipman to Tennessee, for the purpose of making a more particular examination in regard to the coal, although Freer had made measurements and reports in regard to the size of the coal veins, the number, etc. Freer returned with Shipman, and attended him during his examination. The proof develops many

curious facts relating to Shipman's trip and examination of the coal entries, which it is not now deemed necessary to set out in detail. It is sufficient to say that Shipman made his report. Freer went to the real-estate firm, and demanded of the firm a distinct obligation to pay him one-third of the profits which that firm was to make on the sale, accompanied with the threat that, unless this was done, he would send a telegram which would break up the sale. It is reasonable to suppose that this one-third of the profits was the indispensable condition about which the telegram was sent to Freer, though this fact is a matter of inference. Without further detail, Freer's demand was agreed to, and the trade was closed, and Freer receipted for and was paid by the firm March 16, 1889, in the city of Chattanooga, and a receipt given therefor, which reads as follows:

"Chattanooga, Tenn., March 16th, 1889.

"Settlement with A. J. Freer between the said Freer and Sheridan, Green & Co. for his, the said Freer's, interest in the profits of the sale of land, formerly owned by John F. Anderson, and sold by Sheridan, Green & Co., through his, the said Freer's, recommendation, to Gen. Russell A. Alger, of Detroit, Michigan, in full of all accounts due from the said Sheridan, Green & Co. to the said A. J. Freer, as his interest in the profits of the sale. A. J. Freer."

In point of fact, by the verbal direction of Freer, \$1,620 of this sum was paid to Edward J. Lynn, the other friend and neighbor of complainant, Alger. It is probably just to say that Sheridan was personally sincerely opposed to the arrangement made with Freer, and only consented finally under pressure of the fact that otherwise the labor and expected profits on the large sale would be lost. Just how many or how few, in presence of such a condition, would have sufficiently weighed the deeper consequences, is a question which admits of only a speculative answer. The full amount of the purchase price has been paid. Rescission of the contract is sought in the bill, and in argument, upon three distinct grounds: First. Upon the ground that the coal entries had, by the real-estate firm, with the assistance of Anderson, been so manipulated as to produce a false appearance, and thereby to mislead both Freer and Shipman into the belief that the coal veins were more than twice as large and valuable as was the fact. This was done by what is called "blowing up," "facing," etc. Second. Another ground on which the case proceeds is that Anderson included in the deed of conveyance and represented the title as being good to more than 5,000 acres of land, well knowing at the time that he had no title whatever to this quantity of land, making a deficiency of more than one-third of the total. Third. Relief is asked upon the ground that the real-estate firm bribed and corrupted A. J. Freer, the agent of R. A. Alger, and influenced him thereby to make a favorable report, and to bring about a sale of the land, and that he betrayed his principal in the matter. The proof is very voluminous, and the record now unusually large. So far as the bill is based on fraud by including lands to which the vendor knew he had no title, and also so far as there are alleged misrepresentations and fraud in the false appearance which the coal entries were made to present, the relief is resisted with great ability and force, upon the ground that the complainant was put upon inquiry in respect to these matters, and that the lapse

of time is a bar to any relief. It is argued also that, in regard to the bribery of Freer, the complainant could have ascertained this fact by reasonable inquiry, and that, not having done so, relief should be denied on that account also. It is made very plain by the proof that the complainant had no knowledge or intimation that his agent had received money from those adversely interested to complainant until about April, 1894, and that prompt inquiry was then made into the truth of the matter, and, as soon as this was ascertained, the bill was filed.

In the determination of the case, I have concluded to first examine the alleged corruption of Freer as a ground of relief, for if that issue is decided in favor of the plaintiff, and against the defendants, it would render it unnecessary for the court, for the purpose of disposing of the case, to decide upon the sufficiency of the other grounds alleged as a basis for the relief asked. The defendants make what is called a "preliminary objection" to the whole bill, upon the ground that the bill shows that only a part of the heirs of John F. Anderson, deceased, are brought before the court. The bill alleges generally that they are very numerous, and many of them unknown to the complainant, although it is not alleged that any of them reside out of the jurisdiction of the court. The executrix of the last will and testament of Anderson is made a party defendant in that capacity, as well as in her capacity as an heir at law with others. In the answer filed, a number of the heirs at law joined, not named as defendants to the bill, as they had a right to do under a bill like this, filed against them as a class, by making actual parties some of the representatives of the class. The executrix is charged with certain trust duties under the bill, in addition to the duties which belong to her as executrix only; and I think it is quite clear that if the contract in this case is rescinded, and the property goes back to the estate of John F. Anderson, it would be controlled by the eighteenth clause of the will. The testator, after having devised to different ones of his relatives, children, and grandchildren various parcels of land, gives general direction, under clause 18, to sell the remainder of his land. That clause concludes with this direction:

"I desire it sold with the other lands. I also wish all the lots and lands lying about Anderson Station, in Franklin county, not disposed of, and such other lands as I may have at my death not bequeathed away, be also sold; and my executors are authorized and empowered to make such sales, and to make and acknowledge titles to any and all lands that they may sell, the same to be done under the advice of my said attorneys."

The general rule is everywhere admitted that an executor or other trustee takes just such title to the property as is required to fully execute the trust, and, under a provision such as that above quoted, it would be necessary for the executor to take the legal title in fee simple. *Neilson v. Lagow*, 12 How. 110; *Webster v. Cooper*, 14 How. 499; *Doe v. Considine*, 6 Wall. 471.

So far, therefore, as the lands embraced in this deed are concerned, it is probably true that the executrix in that character properly represents all of the beneficiaries; and if a decree is obtained against the executrix, and the lands embraced in the deed rescinded should fail to satisfy any recovery in favor of the plaintiff.

the heir, in any proceeding instituted thereafter to subject real estate descended, might make any defense to the action which the executrix could have made in the first instance. This objection, however, has given the court great difficulty. It seems, according to the practice, that where the bill suggests a reason for not bringing all parties interested before the court, and the defendant desires to make this objection by plea or answer, as may be done, the excuse suggested in the bill must be controverted by specially pleading matter which shows it to be false. 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) *290, and note. General equity rule 48 is supposed to justify the omission of some of the heirs of Anderson, as is done in the case. Whether it does or not in precisely this kind of a case has not been decided, so far as I can ascertain; but the cases of *Kerrison v. Stewart*, 93 U. S. 160; *Carey v. Brown*, 92 U. S. 171; *Railway Co. v. Newman*, 77 Fed. 787; *Smith v. Lee*, 77 Fed. 779,—may be referred to. The answer does not set out anything showing that the statement in the bill as a ground for dispensing with other defendants than such as were brought before the court is not true in fact. The answer simply suggests that the will of John F. Anderson, deceased, points out the legatees; but this does not meet the difficulty, and does not show that the allegations in the bill that plaintiff does not know the names of all of the heirs of Anderson is untrue; and the cases seem to agree that, if some of the heirs are in fact not known to the plaintiff, the case may proceed without them, otherwise justice would be plainly defeated. I am fully satisfied that the interests of all of the heirs are being represented in this case, not only in good faith, but with the most marked attention and ability. In this condition of things, although the point is not quite clear, I feel that I should hold that the charges in the bill, not shown by any statement of fact to be untrue by the answer, and really fairly sustained by the proof, are sufficiently made out to justify the court in its discretion in proceeding in the absence of part of the heirs of John F. Anderson, deceased.

And I am thus brought to the merits of the case. As before intimated, the defendants do not controvert, and could not upon this record, the bribery of the agent Freer, nor do the defendants deny that the first knowledge of this which came to Alger was as hereinbefore stated. It is suggested that in a suit between the partners of Sheridan, Green & Co. in the state court, at Chattanooga, Tenn., the fact that Freer was paid a large sum of money, and how the sum was paid, was brought out, and might have been known by the complainant by the exercise of diligence. That was a case, however, to which the complainant was no party, and it presented no issue which affected him directly or indirectly. It was not a case which he was under any obligation to take notice of, and this suggestion is fully met by the case of *Hodge v. Palms*, 37 U. S. App. 65, 15 C. C. A. 220, and 68 Fed. 61, as well as the case of *Mining Co. v. Watrous*, 22 U. S. App. 12, 9 C. C. A. 415, and 61 Fed. 163. This last case was one of misrepresentation and fraud by an agent, and is in many of its facts much like the case now under consideration. This was a secret fraud, and the defense of laches cannot prevail where the suit was commenced within a reasonable time after the evidence of fraud was discovered.

It is urged on behalf of defendants that by the execution of the title bond, and taking the option as hereinbefore recited, the firm of Sheridan, Green & Co. were the direct purchasers from Anderson, and that they are the immediate vendors of complainant, Alger, and consequently that the original vendor, Anderson, was in no way responsible for the fraud of Sheridan, Green & Co. In regard to this defense I have only to say, as was said in the case of *Continental Ins. Co. of New York v. Insurance Co. of Pennsylvania*, 2 C. C. A. 535, 51 Fed. 890, "the law looks at the substance of the transaction, and is quite unconcerned about its form." The material facts of the relation between John F. Anderson and Sheridan, Green & Co. having been already pointed out, it is not deemed necessary to go into further details. I content myself with saying that it is very clear upon this record that Sheridan, Green & Co. were throughout the agents of Anderson, and nothing more. To hold otherwise upon the proof would be to conceal by the merest form the whole substance of the truth of the transaction. Upon this point the following cases may be referred to, without taking up space to go over the reasoning contained in the opinions: *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213; *Mason v. Crosby*, 16 Fed. Cas. 1016; *Doggett v. Emerson*, 7 Fed. Cas. 804.

The contention that Sheridan, Green & Co. were, in any proper sense, at any time purchasers, is wholly without foundation in this record. Treating Sheridan, Green & Co., then, as they must be, as the agents throughout of Anderson, it is only necessary to say briefly that it is now fully established, and no longer open to question, that the principal is bound by the fraud of his agents in making a sale, in relation to that sale,—as much so as the principal would be if acting in person; and this notwithstanding the fraud was perpetrated without the knowledge or approval, and against the consent, of the principal. This doctrine and the reasons on which it is based have been often stated. *Franklin v. Ezell*, 1 Sneed, 497; *Barnard v. Iron Co.*, 85 Tenn. 139, 2 S. W. 21; *Jewett v. Carter*, 132 Mass. 335; *Continental Ins. Co. of New York v. Insurance Co. of Pennsylvania*, 2 C. C. A. 535, 51 Fed. 890; 2 Jag. Torts, 267-271; Story, Ag. §§ 134, 452; 1 Am. & Eng. Enc. Law (2d Ed.) 1158, 1159; 1 Bigelow, Fraud, 225-228; 2 Kent, Comm. marg. p. 621, and notes; *Kennedy v. McKay*, 43 N. J. Law, 288; *Mason v. Crosby*, 16 Fed. Cas. 1016; *Doggett v. Emerson*, 7 Fed. Cas. 804.

The doctrine, broadly stated, is rested upon the ground that the principal, having held the agent out as having authority, and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss. This is the statement of the rule in cases where the fraud was in fact committed by the agent, without the knowledge and consent of the principal. There are cases which show an inclination on the part of some courts to hold that the innocent principal should not be liable, even when the fraud is committed for his benefit, further than to the extent of benefit received by him, because, to the extent of benefits received to the use of the principal, he thereby necessarily, and as a matter of law, adopts the

act of the agent, although fraudulent. The extent of this liability would be an obligation to return to the injured party money received to the use and benefit of the principal in case of rescission. This opinion also finds some support in the English cases. It is to be noted, too, in passing, that there is some conflict in the authorities over the question of whether an innocent principal is liable at all in an action at law for damages for the deceit or fraud of his agent; and the case of *Kennedy v. McKay*, 43 N. J. Law, 288, may be referred to as a case denying liability at law on such facts, but recognizing fully the right in the principal to repudiate and rescind. The current of authority, however, appears to be in favor of discarding all distinction in this respect, and holding the principal liable, at law and in equity, alike for the frauds of his agent or servant in the course of employment, provided, of course, they were committed within the scope of authority of the agent, and in the interest of the principal. And the case of *Mining Co. v. Watrous*, 22 U. S. App. 12, 9 C. C. A. 415, and 61 Fed. 163, which was the case of a sale through an agent, seems to sanction the doctrine in this broader statement, recognizing the right of the defrauded vendee to sue for damages at law, or to repudiate the contract, and demand rescission. Of course, the adoption of either remedy would be inconsistent with and exclude the other. Being concerned now with a case where rescission is demanded, I have no occasion to follow out or seriously consider the distinctions here suggested. I will say, however, in passing, that the relation of the defendant Gonce to the facts of the transaction is such that I cannot consider it equitable to treat him as liable beyond the benefit actually received, and this upon the ground that, to the extent of such benefit, it is agreed by all of the cases that he thereby adopts the act of the agent, however fraudulent. I may expressly remark, too, what is clearly implied, that, so far as holding that the principal may repudiate and rescind the contract for the fraud of the agent, the cases present no disagreement whatever.

It is to be said, in passing, that counsel for the defendants did not controvert this proposition of law, and have not done so at any stage of the case. It is further argued that, conceding that a division of the profits of the trade with Freer was ordinarily calculated to tempt him to betray his principal, nevertheless the proof in this record does not show the fact that Freer made any different report as a result of receiving this money, or that his report was not a true one, as he at the time believed. I think it would be very difficult to sustain the point here taken in view of the facts hereinbefore detailed. Complainant distinctly proves that in the verbal interview after Freer's return to Detroit, and certainly after the receipt of the message at the Griffin House, his statements in regard to the land examined were more favorable than those contained in the letters written from Tennessee while on the land. I would have no difficulty in holding upon the facts in the case, giving to those facts a natural interpretation, that Freer was influenced, and the extent of such influence becomes immaterial. How far a fact of this kind may have influenced the agent is in its na-

ture an intangible mental condition very largely, and could only be rationally judged of by what follows. It would probably never be within the power of the principal complaining of the transaction to affirmatively show what was the secret operation of such an influence on the mind of a treacherous representative. It is well settled, consequently, that the fact of the agent having been bribed or tempted to betray his principal, is sufficient to entitle the principal to repudiate the transaction, and it is not necessary as a basis for relief for such principal to show the actual effect of the bribe or gift upon the agent. The ground on which the rule rests is much deeper and broader than a mere question of evidence, and takes into full account human nature. The agent is not allowed, by gift, commission, or other form of compensation or consideration, to assume an attitude in conflict with the very best interests of his principal. It is a relation which, on grounds of public policy, demands the utmost loyalty to the principal at all times.

The philosophy of the law in relation to this subject was well stated by the supreme court of Minnesota in the recent case of *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662. The facts of the case were that one McEwen was superintendent and general manager of the business of the Northern Mill Company. The mill company had under consideration a plan for remodeling the mill, and extending its logging road to Gull river, where the mill was situated. In this juncture of affairs, McEwen agreed to use his influence and authority as superintendent of the mill company to secure the removal of its mill to Brainerd, and the plaintiff, in consideration of that influence, executed an obligation promising to pay the defendant Clark \$5,000 nine months after date, on condition that within that time the mill company extended its logging railroad to Brainerd, and built a sawmill of a certain specified capacity. This note was given to Clark for the benefit of McEwen, but was given to Clark in order to conceal McEwen's connection with the matter. Suit was brought to cancel the note, and, from the judgment in favor of the plaintiff, McEwen appealed. Mitchell, J., delivering the opinion of the court, made the following observations:

"That this contract was illegal and void on grounds of public policy will not admit of a moment's doubt. Loyalty to his trust is the first duty which an agent owes to his principal. Reliance upon an agent's integrity, fidelity, and capacity is the moving consideration in the creation of all agencies; and the law condemns, as repugnant to public policy, everything which tends to destroy that reliance. The agent cannot put himself in such relations that his own personal interests become antagonistic to those of his principal. He will not be allowed to serve two masters without the intelligent consent of both. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. In the matter of determining the policy of removing the mill and extending the road, McEwen, in the discharge of his duties, whether merely that of making recommendations, or of exercising authority to act, owed to his principal the exercise of his best judgment and ability, uninfluenced by any antagonistic personal interests of his own. His attempt to secure \$5,000 to himself was calculated to bias his mind in favor of the policy upon which the payment of the money was conditioned, regardless of the interests of the mill company. It is not material that no actual injury to the

company resulted, or that the policy recommended may have been for its best interest. Courts will not inquire into these matters. It is enough to know that the agent in fact placed himself in such relations that he might be tempted by his own interests to disregard those of his principal. The transaction was nothing more or less than the acceptance by the agent of a bribe to perform his duties in the manner desired by the person who gave the bribe. Such a contract is void. This doctrine rests on such plain principles of law, as well as common business honesty, that the citation of authorities is unnecessary. The doctrine is perhaps as clearly and concisely expressed as anywhere in *Harrington v. Dock Co.*, 3 Q. B. Div. 549. The fact that the validity of such transaction is attempted to be sustained in courts of justice does not speak well for the state of the public conscience on the subject of loyalty to trusts in business affairs."

And in full harmony with the law as thus stated is the case of *City of Findlay v. Pertz*, 31 U. S. App. 340, 13 C. C. A. 559, and 66 Fed. 427, decided by the United States circuit court of appeals for the Sixth circuit. In that case an officer of the city of Findlay, a municipal corporation under the laws of Ohio, was charged with the duty of making contracts for supplies for the city, and in that capacity surreptitiously stipulated for a commission for himself from the seller to the city on certain machines purchased by the agent for the city. The court held that the city might repudiate every contract thus made upon the discovery of the improper inducement operating upon its agent, and that the city might return the machines thus purchased, and resist recovery. Contracts of this character are strongly condemned in the opinion. Judge Lurton, speaking for the court, said:

"Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principles of reason and morality, and has been sanctioned by the courts in innumerable cases. 'It has its foundation in the very constitution of our nature,' says Judge Dillon, 'for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.' 1 Dill. Mun. Corp. (4th Ed.) § 444. 'An agent cannot be allowed to put himself in a position in which his interest and his duty will be in conflict.' Leake, Cont. (3d Ed.) 409. The tendency of such an agreement is to corrupt the fidelity of the agent, and is a fraud upon his principal, and is not enforceable, 'even though it does not induce the agent to act corruptly.' 'It would be most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not damaged.' Wald's Pol. Cont. (2d Am. Ed.) 245, 246, and note a, citing *Harrington v. Dock Co.*, 3 Q. B. Div. 549, and other cases. See, also, *Taussig v. Hart*, 58 N. Y. 425; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 460; *Smith v. Sorby*, 3 Q. B. Div. 552; *Young v. Hughes*, 32 N. J. Eq. 372; *Yeoman v. Lasley*, 40 Ohio St. 190. Such agreements are a fraud upon the principal, 'which entitles him to avoid a contract made through such agency.' Leake, Cont. (3d Ed.) 409. See, also, *Panama & South Pac. Tel. Co. v. India Rubber, Gutta Percha & Tel. Works Co.*, 10 Ch. App. 515. 'Where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal, on discovering this, has the option of rescinding the contract altogether.' Wald's Pol. Cont. (2d Am. Ed.) 246. 'And profit made by an agent in the execution of his agency must be accounted for to the principal, who may claim it as a debt for money received to his use. A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence; and a gratuity to an

agent after the execution of the agency must be accounted for to his principal; as in the case of an agent or servant employed to make payments accepting a discount or present from the creditor.' The same author says: 'If an agent stipulates with a contractor for a commission upon the work to be done for his principal, he must account for the commission, and it is good ground for his dismissal.' Leake, *Cont.* (3d Ed.) 409, 410. See, also, *Ice Co. v. Ansell*, 39 Ch. Div. 339; *Stoner v. Weiser*, 24 Iowa, 434; *Bell v. Bell*, 3 W. Va. 183; *Moore v. Mandlebaum*, 8 Mich. 433. The principle which prevents an agent from contracting with himself, or from entering into any agreement which gives him an interest conflicting with his duty, applies more strongly to the officers, servants, and agents of a municipal government than to private parties. 1 Dill. *Mun. Corp.* (4th Ed.) § 444."

It may be remarked, too, that the rule hereinbefore announced, that the principal is bound by the fraud of the agent, is clearly implied and recognized throughout this instructive case. Such contracts are now treated as void on grounds of public policy, and are to be so regarded whenever the agent has been tempted by a gift or consideration reasonably calculated to influence his conduct unfavorably towards his principal in a matter which concerns the principal; and the law pronounces such a transaction illegal and void, regardless of the extent to which the agent may have been influenced, or regardless of whether his course of conduct was thereby changed or not. Whenever the fact that he is subjected to an improper influence of this kind is fully made to appear, it becomes a question of law, and the right of the principal thereby to repudiate the transaction is no longer open to dispute. "The rule," says Chancellor Kent, "is founded on the danger of imposition, and the presumption of the existence of fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its application to particular cases; but, as a general rule, it appears to be well settled in the English and in our American jurisprudence." 4 Kent, *Comm.* (12th Ed.) marg. p. 438. See, also, cases in note.

In the early case of *Michoud v. Girod*, 4 How. 554, Mr. Justice Wayne stated the doctrine thus:

"The general rule stands upon one great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, where he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

The same principle was well known to the civil law, and is probably a part of every enlightened system of jurisprudence. The magnitude of the inducement given Freer in the case now in question was such as that it would be difficult to believe Freer did or could have resisted its influence. And the principal, Anderson, being bound by the contract of his own agent, it matters not that disastrous results may fall upon those who are innocent so far as this particular fraud is concerned. I cannot, in view of any result which may follow, refuse to declare what seems to me plainly the law, and about which I have no misgiving whatever. So, without further discussion of this or any other point in the case, I feel constrained to hold that the bribery of Freer, as a matter of law, entitles the complainant to the relief sought. The sale is accordingly declared fraudulent, void, and rescinded, and decree will go against the executrix of John F. Anderson, deceased, for the full consideration paid, with interest from the date of payment, with the usual lien and account following a rescission. Just at this point I may say, in passing, without discussion, that I do not think there has been any such change of condition in the premises, by reason of the small amount of timber taken, as to constitute any obstacle to the relief to which the complainant is otherwise so clearly entitled. To so hold would be to allow time to sanction a secret fraud in nearly every case of importance.

In regard to Gonce's relation to the transaction I need say but little. He was fully aware of the fact that this tract of land had been placed in the hands of the real-estate agents for sale by his grandfather, and having consented thereto, and received a part of the consideration, and not having in any way repudiated the transaction after discovery of the bribery of Freer, he has adopted the transaction of the agents. It is not pretended, and could not be upon this record, that there was in fact any sale by him to Anderson, or that Anderson at any time had the least idea of buying the property from Gonce. In substance and for any practical purpose, it was a sale by Gonce to complainant, Alger; and having taken and retained the proceeds of the sale, and thereby the benefits of the entire transaction consummated through the real-estate agents, he is estopped to say that he is not connected with the fraud. He has fully adopted the transaction in taking the profits. I content myself upon this branch of the case by reference to *Veazie v. Williams*, 8 How. 134; *Doggett v. Emerson*, 7 Fed. Cas. 804; *Mason v. Crosby*, 16 Fed. Cas. 1024; *Daniel v. Mitchell*, 6 Fed. Cas. 1151; and the authorities stated above as sustaining the proposition that the principal is bound by the fraud of his agent. The law as declared in *Mason v. Crosby*, 16 Fed. Cas. 1016, has been accepted in subsequent cases, so far as I am aware, without question, and the statement of the law and the reasons on which it is founded, as contained in the opinions in these cases, have not been improved upon.

The recovery against Anderson will be declared a lien on the land belonging to Anderson, and embraced in the conveyance, and the recovery against Gonce will be declared a lien on the tract conveyed

by him separately; that is, upon a three-fourths undivided interest therein. The costs will follow the result of the suit as in ordinary cases.

ROLLINS et al. v. BOARD OF COM'RS OF GUNNISON COUNTY, COLO.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1897.)

No. 856.

BILLS OF EXCEPTIONS—POWER TO AMEND—LEAVE OF APPELLATE COURT.

An appellate court will not make an order authorizing the court below to amend the bill of exceptions so as to show whether or not it contains all the evidence produced at the trial; for, if the amendment be to make the record speak the truth, when by mistake it speaks an untruth, then the court below has authority to allow it, without permission, notwithstanding the lapse of the term; and, if it be not of that character, the power to make it is gone, and cannot be restored by any action of the appellate court.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by E. H. Rollins & Son against the board of commissioners of Gunnison county, Colo., to recover on coupons cut from county bonds. At the trial the jury, by direction of the court, returned a verdict for defendant, and judgment was entered accordingly. Plaintiffs thereupon sued out this writ of error, and they have now moved the court to make an order authorizing the court below to amend the bill of exceptions, so as to show whether or not it contains all the evidence produced at the trial.

Willard Teller, for the motion.

W. H. Bryant, opposed.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

PER CURIAM. A motion is made in this case in behalf of the plaintiffs in error to enter an order authorizing the circuit court of the United States for the district of Colorado to amend the bill of exceptions, as it appears in the record, so as to show whether the same does or does not contain all the evidence produced on the trial of the case. This court has heretofore decided in *Bank v. Perry*, 32 U. S. App. 15, 14 C. C. A. 273, 66 Fed. 887, that a trial court has the power to correct its record so as to make it speak the truth when by mistake it speaks an untruth, even after the lapse of the term at which the judgment was rendered, and after the record in the case has been removed to an appellate court by a writ of error. See, also, *Walker v. State*, 102 Ind. 502, 1 N. E. 856; *Seymour v. Harrow Co.*, 81 Ala. 250, 1 South. 45; *Whiting v. Society*, 8 C. C. A. 558, 60 Fed. 197. It results from this rule that the alleged mistake that is said to have been made in formulating the bill of exceptions can be corrected by the trial court without the leave or sanction of this court, provided it is a mistake falling within the rule aforesaid, such as may be corrected by amendment. No order of this court is necessary to enable the circuit court to amend the record in the respect desired if

we assume that the correction is one which the circuit court was authorized to make after the lapse of the term at which the judgment was rendered; and no order made by this court would confer any authority upon the circuit court in addition to that which it now has. It was held by the supreme court of Indiana in *Seig v. Long*, 72 Ind. 18, that the power to amend a bill of exceptions by adding thereto a statement that it contained all the evidence produced at the trial cannot be exercised by the trial court after the lapse of the term at which the judgment was rendered, and the bill of exceptions was signed, sealed, and filed. If this be so, if the amendment sought is of such nature that the power to make it has been lost by the trial court by the lapse of the term at which the final judgment was rendered, then it is obvious that this court cannot restore the lost power by any order which it may now make. It is the function of this court to review the record of the trial court, and to determine whether it discloses a reversible error. It is not within its province to enlarge the authority of the trial court with respect to settling bills of exceptions, or to enlarge its power to amend them when once signed and filed. We think, therefore, that in either aspect of the case the order which we are asked to enter is one which we ought not to make, because it would not alter in any respect the power or duty of the trial court in the matter of making the amendment. The motion must accordingly be denied.

BOWLES v. FIELD et al.

(Circuit Court, D. Indiana. February 17, 1897.)

CONFLICT OF LAWS—CONTRACTS OF MARRIED WOMEN.

A contract of a married woman, valid by the law of the place where it is made, is valid and binding upon her, although by the law of her domicile she is prohibited from making such a contract.

Morrow & Goodhart and D. W. McKee, for complainant.

Alexander & Alexander and Smith & Korbly, for defendants.

BAKER, District Judge. This is a demurrer to a part of the amendment to the bill of complaint which is exhibited here to procure the foreclosure of a mortgage upon real estate situated in the state of Indiana. The larger part of the consideration of the note, which was executed in this state, and which is secured by the mortgage in suit, rests upon certain notes alleged to have been executed by Mrs. Field, in the state of Ohio, as the surety of her husband. The note in suit is for money borrowed by Mrs. Field to pay off the notes executed by her in Ohio as surety of her husband, and also for a certain other sum of money included therein. The validity of the note as to this latter sum of money is not material to the present inquiry.

It is insisted that the notes executed by her as surety in Ohio, and payable there, were void by reason of her coverture, and that the note executed by her for money borrowed to pay them off is pro tanto invalid. It is evident that if the notes executed by her in Ohio as surety for her husband were valid and binding obligations,

which, by an action at law, she might have been compelled to pay, in that event she might voluntarily do what she would have been compelled to do,—that is, pay them off; or, if needful, she might lawfully borrow money to make such payment, and execute a valid note to evidence such loan. It is conceded that at the time these notes were executed, to take up which she borrowed money, the law of Ohio gave to a married woman the same power to bind herself by contract as if she were unmarried. It is also admitted that, if she had been a resident of Ohio when these notes were executed, she would have been legally bound to pay them, and that, if she borrowed money in this state to pay off her own valid debts, she would have the power to execute a valid note for the money she borrowed. But it is earnestly contended that, being a resident of Indiana, and having a permanent domicile therein, a note executed by her while transiently in Ohio to a citizen of Ohio is invalid, because, by the law of her domicile, she was prohibited from entering into a contract of suretyship. It is not charged that she went to Ohio, and executed the notes as surety of her husband, for the purpose of evading the law of her domicile.

Whatever may be the views of foreign jurists, it is settled as the general rule, in countries where the common law is prevalent, that the execution, interpretation, and validity of contracts are to be governed by the law of the place where the contract is made. This rule is subject to some exceptions, among which are that the courts of no country or state are under any obligation to enforce contracts which are contrary to good morals, or are violative of its public policy, or are forbidden by its positive law. At common law a married woman was disabled to bind herself to a promissory note either as principal or surety. Her promissory notes were simply void. But long before the feme defendant executed the notes in Ohio as the surety of her husband, all the legal disabilities of married women to make contracts were abrogated, except as otherwise provided, by the legislature of this state. It was provided that a married woman should not enter into any contract of suretyship. It is clear that this limitation on her general power to contract has no extraterritorial force. The law of this state could not prevent a married woman from making a contract elsewhere; and her ability to contract with a citizen of Ohio while she was in that state would be governed by the *lex loci contractus*.

Judge Story, after a careful review of the authorities, says:

"That in respect to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus* aut actus,—the law of the place where the contract is made or the act is done." Story, *Confl. Laws* (7th Ed.) § 103.

In *Scudder v. Bank*, 91 U. S. 406, the supreme court sums up the general principles in these words:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of

suit, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

In *Pearl v. Hansborough*, 9 Humph. 426, the supreme court of Tennessee said that a contract for the purchase of slaves made by a married woman in that state was void, although she was a citizen of the state of Mississippi, by whose laws such a purchase by her would have been valid.

In *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, it was held, where a married woman resident in Indiana entered into a contract in that state which was made payable there, that a mortgage duly executed by her upon real estate owned by her in Ohio to secure such contract could not be enforced.

In *Bell v. Packard*, 69 Me. 105, the plaintiff, a resident of Skowhegan, Me., holding an overdue note against Alvin Packard, the husband of the defendant, Harriet A. Packard, then a domiciled resident of Cambridge, Mass., wrote the note in suit at Skowhegan, and inclosed the same in a letter directed to Alvin Packard, at Cambridge, and there received by him, agreeing in the letter to surrender the old note upon the delivery of the new one, signed by him with a good surety. The new note was duly signed by Alvin Packard and the defendant, at Cambridge, and there mailed to, and was received by the plaintiff at, Skowhegan. The plaintiff thereupon mailed, at Skowhegan, the old note to Alvin Packard, at Cambridge, who duly received the same. The defendant signed the note as surety of Alvin Packard, her husband, without any consideration received by her, or any benefit to her separate estate. At the time the note was signed, a married woman could not bind herself in such a way in Massachusetts, but she could in Maine. The defendant, Mrs. Packard, being sued in Maine, was held liable.

In *Milliken v. Pratt*, 125 Mass. 374, it was held that a note executed in Maine by a married woman domiciled in and a citizen of Massachusetts, which note a married woman was allowed by the laws of Maine to make, but was not, by the laws of Massachusetts, capable of making, would sustain an action against her in the courts of Massachusetts, although the note was executed by letter sent by her in Massachusetts to the payee in Maine.

See, also, *Klinck v. Price*, 4 W. Va. 4; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38; *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412; *Baum v. Birchall*, 150 Pa. St. 164, 24 Atl. 620; *Evans v. Cleary*, 125 Pa. St. 204, 17 Atl. 440; *Story, Conf. Laws* (7th Ed.) §§ 101-103.

There is no statute in this state which prohibits a married woman from executing a note or mortgage to raise money to pay off a debt for which she is personally liable. The notes executed by her in Ohio, although as between herself and her husband she was only surety, were by the *lex loci contractus* her personal obligation, and made the debt evidenced thereby, as between herself and the payee of the notes, her personal debt. When she gave her own individual note as sole maker to take up the old notes on which she was holden as surety, it became her own primary obligation. The old notes were surrendered to her in consideration of her executing, as sole maker, the note in suit. There is no statute here which prohibits a married

woman from being sued and held liable upon such a note; and a mortgage on her own land, if it secures such note, is valid. The demurrer will therefore be overruled, with leave to answer.

ST. LOUIS, I. M. & S. RY. CO. v. EDWARDS.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1897.)

No. 759.

1. OPINION EVIDENCE—DAMAGE TO CATTLE BY CARRIER'S DELAY.

Upon the question of the amount of damages to a number of cattle, caused by the negligent delay of a carrier in delivering them, a witness, who is familiar with the handling and transportation of cattle and with their market value, and has attended the cattle in question during their transportation, may give his opinion as to the amount of damage sustained by them in consequence of the detention, and as to the difference in their value between the condition in which they arrived at their destination and that in which they would have arrived if there had been no delay.

2. CARRIERS—DAMAGE TO CATTLE—DELAY OF CONNECTING CARRIER.

Where a carrier had undertaken to transport goods of a shipper from one point to another, the fact that a delay in their delivery was caused by the fault of another carrier, who has no contractual relation with the shipper, but who had contracted with the first carrier to carry the goods a part of the distance, is no defense to an action against the first carrier for damages for the delay.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This action was brought in the circuit court of the United States for the Eastern district of Arkansas by J. L. Edwards, the defendant in error, against the St. Louis, Iron Mountain & Southern Railway Company, the plaintiff in error, to recover damages for negligently delaying the transportation of 847 head of cattle over the defendant's road. The plaintiff in the action recovered judgment in the lower court, and the defendant sued out this writ of error. The cattle were detained in the defendant's cars 12 or 15 hours in excess of the limit allowed by the act of congress, during the most of which time the cars were standing still. To prove the damage sustained by the cattle by reason of their long and negligent detention in the cars, the plaintiff called a witness, who was shown to have been extensively engaged for many years in buying, selling, and feeding cattle, and in shipping them by rail and attending them in transit, and who attended the shipment of the cattle in controversy, and was familiar with their market value, and the effect upon them of their long detention in the cars, and propounded to him the following questions: "Q. From your observation of these cattle at that time, and your knowledge of cattle, can you state what damage they had sustained? A. My judgment is, they sustained a damage of three dollars a head. Q. Doctor, state, if you can, what the difference in the value of these cattle was per head between the condition in which they arrived as you saw them, and the condition in which they would have arrived had they gone in on proper time, and with proper transportation. A. Three dollars a head." The defendant made timely objections to each of these questions upon the ground that "it was incompetent and improper, and for the further reason that it called for an opinion as to the value, which was wholly within the province of the jury"; and it also objected to the answers to each of the questions because "it was incompetent and improper, and for the further reason that it was an opinion as to value, which was wholly within the province of the jury." The court overruled these objections, to which ruling of the court the defendant duly excepted, and has assigned the same for error.

Geo. E. Dodge, B. S. Johnson, and J. E. Williams, for plaintiff in error.

T. E. Webber, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The objection to the testimony was, not that the witness was not qualified to give an opinion as to the damage to the cattle, but it was that the question "called for an opinion as to values, which was wholly within the province of the jury." The general rule undoubtedly is that witnesses are to testify to facts, and not to give their opinions; but this rule has its exceptions as familiar and well settled as the rule itself. The exceptions rest upon the common ground of necessity. Among these exceptions is this one: That a witness, having special knowledge and experience as to the value of property animate or inanimate, and as to how the value of such property is affected by certain conditions or treatment, may give his opinion as to how much the property was damaged or benefited by such conditions or treatment. In many cases witnesses are allowed to testify to their opinions, not because they are experts in the technical sense of that term, but because they have special knowledge of the particular facts in the case, which the jurors have not. It is manifest that one who has never handled or shipped cattle by rail, and has never looked after and attended them while in the cars en route to their destination, can have no accurate conception of the effect upon cattle of confining them in cars standing still on the track for 10 or more hours at the end of a long journey. It does not accord with reason or experience to say that a jury composed of merchants, bankers, tailors, shoemakers, or others, who know absolutely nothing about raising or shipping cattle, or the effect upon them of detaining them for an unreasonable length of time in cars standing still on the track, are as capable of estimating the effect of such detention as an experienced cattle man, who has been engaged in handling and shipping cattle by the thousands for almost the space of a human life, and who was present with the cattle, attending to them, during their transportation. It is no answer to this to say that perchance there might be on the jury a farmer or cattle man who had had some experience in handling and shipping cattle, for it is a rule that a jurymen cannot testify, in the jury room, to his fellows about facts within his personal knowledge, and, if he does, the verdict will be set aside. Nor is it any answer to say that the witness can tell the jury how long the cattle were in the cars, or how they looked and acted, and that from that imperfect information the jury may arrive at a correct conclusion as to the damage. The poverty of the English language makes it absolutely impossible for a witness to present to the minds of the jurors the appearance of cattle, and what that appearance denotes, as it is presented to his practiced and experienced eyes. The experience of the witness and the appearance of the cattle cannot be photographed on the minds of the jurors. The knowledge of the con-

dition of these cattle, and how that condition affected their value, must of necessity have existed in the mind of the witness who had had such a large and extended experience in shipping cattle with far greater clearness and certainty than it could have been communicated to the minds of the jurors by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. It is obvious that, if witnesses were to be permitted to state to a jury those facts only of which they have absolute knowledge, not only the range of inquiry, but the province of remedial justice, would be very materially contracted. *Gulf, C. & S. F. Ry. Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. 347; *Harpending v. Shoemaker*, 37 Barb. 270. It is clear upon principle and authority that the objections to the questions and answers were rightly overruled.

In *Clifford v. Richardson*, 18 Vt. 626, the court said:

"The facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself, and it often happens that the triers are not qualified, from experience in the ordinary affairs of life, duly to appreciate all the material facts when proved. Under these circumstances the opinions of witnesses must, of necessity, be received."

In *Shattuck v. Railroad Co.*, 6 Allen, 115, the supreme judicial court of Massachusetts said:

"It is settled in this commonwealth that where the value of property, real or personal, is in controversy, persons acquainted with it may state their opinion as to its value; also where the amount of damage done to property is in controversy such persons may state their opinion as to the amount of the damage. This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of that term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which the jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety. *Walker v. Boston*, 8 Cush. 279; *Dwight v. Commissioners*, 11 Cush. 201; *Vandine v. Burpee*, 13 Metc. (Mass.) 288; *Wyman v. Railroad Co.*, Id. 326; *Clark v. Baird*, 9 N. Y. 183."

And in a later case in the same court (*Swan v. Middlesex Co.*, 101 Mass. 173, 178), the court, speaking by Judge Gray, now Mr. Justice Gray of the supreme court of the United States, said:

"The only objections taken at the trial, so far as they applied to each of the witnesses, were to the admission of the question 'what, in his opinion, would be the effect upon the value of the estate in question, of widening the street and cutting off the land and trees,' and to the answer to this question given on direct examination. The grounds assigned for these objections were twofold: because the witnesses were not qualified to answer the question, and because it did not relate to a matter upon which the opinion of any witness would be admissible. Neither of these grounds is tenable. * * * These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience; but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have; and that they are the most satisfactory, and often the only obtainable, evidence of the fact to be proved. *Dwight v. Commissioners*, 11 Cush. 203; *Shattuck v. Railroad Co.*, 6 Allen, 116, 117; *Whitman v. Railroad Co.*, 7 Allen, 316, and cases there cited. The same rule has prevailed in courts of authority in other states. *Kellogg v. Krauser*, 14 Serg. & R. 137; *Warren v. Wheeler*, 21 Me. 484; *Clark v. Baird*, 9 N. Y. 183."

In *Polk v. Coffin*, 9 Cal. 56, the action was to recover damages to cattle by falling through the defendant's wharf, and the assignment of error was exactly the same that it is in this case. It was, as stated by counsel for the plaintiff in error, that:

"The court allowed the plaintiff Polk to prove by his witness John Hensley his opinion of the damage, in money, done to the cattle, as the mode of ascertaining the amount of damage sustained by such plaintiff. To this mode of proving damages the defendants' counsel objected. The objection was overruled, and defendants excepted. There is nothing in the case showing that this witness was competent to determine the amount of damages; this was the province of the jury upon evidence of facts."

This is precisely the contention of the plaintiff in error in this case. After referring to all the points made by the plaintiff in error, the court said:

"We do not think any of the points well taken. The witness Hensley testified that his business was that of a stock raiser, and, therefore, he was capable of forming an accurate judgment as to the actual injury sustained by the stock, and the consequent depreciation of their value."

In *Railroad Co. v. Thompson*, 10 Md. 76, 85, the court said:

"On questions of science, skill, or trade, or other of the like kind, persons of skill may testify not only to facts, but are permitted to give their opinions in evidence. 1 Greenl. Ev. § 440. And so accordingly it has been held that 'persons accustomed to observe the habits of fish have been permitted to give in evidence their opinions as to the ability of the fish to overcome certain obstructions in the rivers which they were accustomed to ascend.' Id. If this be so, we see no reason why one who is familiar, from long observation, with the habits of cattle, shall not be permitted to give his opinion as to the probable influence of certain causes on their condition. In this record it appears from the testimony of Baker, that 'an experienced grazer can tell by the look of cattle whether they have been frightened and scared or disturbed in the pasture.'"

In a criminal prosecution for maliciously injuring a mule by inflicting a cut upon it, it was material under the statute to prove "the amount of the injury done" to the mule, and witnesses were permitted to give their opinions as to the amount the mule was damaged, and the court said:

"We think the court below committed no error in permitting the state to prove that the damage or injury done to the mule was fifty dollars. Considering this evidence in connection with the evidence which precedes it, we understand it to amount to nothing more than the expression of the opinion of the witnesses that the value of the mule was diminished fifty dollars by the injury done to it. It is but a comparison of the value before and after the injury, and such a comparison it was certainly competent for the witness to make." *Johnson v. State*, 37 Ala. 457.

In the case of *Railroad Co. v. Woosley*, 85 Ill. 370, 373, the court said:

"Objection is also urged that witnesses were allowed to give their opinions of the amount of damages sustained. The witnesses first stated that they had personal knowledge of the alleged injuries on which the claim for damages is based, and detailed their character. It was then competent to receive their opinions as to the amount of the damages sustained. *Cooper v. Randall*, 59 Ill. 317; *Railroad Co. v. Henry*, 79 Ill. 290."

In *Railroad Co. v. Haslam*, 73 Ill. 494, 497, the court said:

"Witnesses were allowed to give their opinions as to the damages sustained by the several claimants by reason of the construction of the railroad, notwithstand-

ing the objection of appellant. This practice is warranted by the rule stated in *Coke Co. v. Graham*, 35 Ill. 346. It is one mode of arriving at the true measure of damages, and, when the witness possesses peculiar knowledge of the facts, it is often valuable evidence. The rule has its foundation in obvious necessity. It is sometimes very difficult to convey to the mind of the jury an accurate idea of the location of the premises, and exactly how they may be affected by the contemplated improvements. This difficulty has given rise to an exception to the general rule that the witness must be confined to a detailed statement of facts. In such cases his opinion as to the damage sustained is admissible, and is to be considered in connection with the other evidence in the case."

In *Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, exceptions had been taken at the trial to receiving the opinions of witnesses as to the value of the property in controversy. Mr. Justice Brewer, speaking for the court, said:

"It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject, but their contention is that the witness permitted to testify had no such sufficient knowledge. * * * After a witness has testified that he knows the property, and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence."

"But when," says Dr. Wharton, "as is often the case, these facts can be best expressed by the damage they caused, then this damage and its extent may be testified to by the witness." 1 Whart. Ev. (3d Ed.) § 450. Judge Sutherland, in his valuable treatise on Damages, after reviewing the authorities, says:

"There is a growing tendency to the doctrine, if it be not already established, that opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature of the subject, the facts disconnected from such opinions cannot be presented to a jury so as to enable them to pass upon the question with the requisite knowledge." Suth. Dam. § 442.

The defendant set up as a defense that the detention of the cattle in the cars was occasioned by the delay in transferring the cars containing them across the Mississippi river from West Memphis to Memphis, and that the inclines and transfer boats used for that purpose were not "its property, nor in its control or possession," but belonged to another corporation, namely, the Kansas City, Ft. Scott & Memphis Railroad Company, "whose duty it was to transfer the same." There were no contractual relations between the plaintiff and the last-named company. The defendant had contracted to carry the plaintiff's cattle to Memphis. It was no concern of the plaintiff what cars, bridges, inclines, or boats the defendant used, or expected to use, for this purpose. If, as alleged in the answer, it was the duty of the Kansas City, Ft. Scott & Memphis Railroad Company to transfer the defendant's cars from West Memphis to Memphis, it was a duty it owed to the defendant and for a breach of which it is liable to the defendant; but clearly, for the purpose of determining the rights and liabilities of the plaintiff and defendant in this action, the Kansas City, Ft. Scott & Memphis Railroad Company, upon the evidence, must be regarded as the defendant's agent for the pur-

pose of transferring its cars. *Railroad Co. v. Friel*, 23 C. C. A. 77, 77 Fed. 126. Moreover, the contract between the defendant and the Kansas City, Ft. Scott & Memphis Railroad Company relating to the transfer of cars from West Memphis to Memphis contains the stipulation that "loss and damage to cars and their contents, whether passenger or freight, shall be borne by the company for which the car or cars are being transferred."

Other errors are assigned, but, as none of them is of any general importance, a separate consideration of them is unnecessary. They have all been carefully considered, and found to be without merit. The judgment of the circuit court is affirmed.

ANDERSON v. INDEPENDENT SCHOOL DIST. OF ANGUS.

(Circuit Court, S. D. Iowa, C. D. February 10, 1897.)

1. PLEADING—OBJECTION WAIVED.

After a case had been submitted to the court on the evidence, it is too late for the defendant to object for the first time that plaintiff has not pleaded an estoppel upon which he relied, when the parties had, upon the trial, treated the issue as made. And, as leave given plaintiff to file an additional pleading extended only to estoppel claimed by him on the trial, defendant was not entitled to introduce further evidence.

2. BONDS OF SCHOOL DISTRICT—ESTOPPEL.

An incorporated school district having issued bonds reciting that they were issued pursuant to authority conferred by a vote of the people at an election held for that purpose as required by law, the corporation is estopped, as against a bona fide holder before maturity, from claiming that an election was not held as recited in the bonds, and that the board of directors failed to pass such resolutions, or take such other steps, as may have been required to make the bonds valid.

Cummins, Hewitt & Wright, for plaintiff.

R. F. Jordan, for defendant.

WOOLSON, District Judge. This case was tried to the court without the intervention of a jury. During the introduction of evidence, many rulings were reserved, and evidence admitted, subject to such rulings. I have indicated in the transcript of the stenographer's notes the rulings now made. Counsel can, if so advised, prepare bills of exception accordingly. The press of official duties will not permit me to state at length the reasons impelling me to the findings and conclusions reached herein. Counsel upon either side have assisted the court with elaborate briefs. I must content myself with briefly announcing the conclusions reached upon the points, so far as deemed practicable, requested by counsel.

Counsel for defendant, in his opening brief, objected to the attempted application by plaintiff of the doctrine of estoppel herein, on the ground that plaintiff had not filed any pleading wherein such estoppel was pleaded; whereupon counsel for plaintiff asks leave to file such pleading, to which counsel for defendant objects. The pleadings were not examined by the court until after the case had been submitted on the evidence, and leave given for counsel to file their

briefs. At different times during the trial counsel for plaintiff insisted upon the doctrine of estoppel as applied to various portions of the evidence offered by defendant. No objection was then urged by defendant to the application of such doctrine because of any failure on part of plaintiff to plead estoppel, and not until the trial was had and concluded has such objection been raised. It is now too late to raise this objection. Had the pleadings fully and formally contained allegations setting up estoppel, the course of the trial would not have been different from that actually pursued. The case was submitted, except as to briefs, on the evidence offered and objections then urged. These objections cannot now be enlarged. The court will decide the case as counsel presented and submitted it on the evidence. This submission could not have more fully included the persistent pressing of an estoppel had the pleadings affirmatively alleged its existence. While of the opinion that no such pleading herein is now required, and that the court is authorized to consider the question of estoppel as to all matters wherein the same was urged on the trial (without objection being then made that such estoppel had not been formally pleaded), and without now deciding whether such pleading should have been filed, leave is now given, if counsel for plaintiff be so advised, to file such pleading, so far as such estoppel was by plaintiff claimed during the introduction of evidence. Counsel for defendant asks to introduce further evidence if such leave be granted, but presents no showing as to evidence, not offered by defendant on the trial, which he now desires to offer. Since the leave above given extends only to estoppel claimed by plaintiff on the trial, and will only make the pleadings conform to the trial as actually had, this request of defendant is refused.

From the evidence submitted, I find the following facts:

Findings of Fact.

(1) Plaintiff, Walter C. Anderson, was, when this action was commenced, and is now, a citizen of the state of Illinois, and a nonresident of the state of Iowa; and the defendant was, when this action was commenced, and is now, a corporation created under the laws of the state of Iowa, and a school district situated in the counties of Boone and Greene, in said state of Iowa.

(2) Upon December 1, 1883, said defendant duly issued its certain negotiable bonds, to wit, five bonds, each for the sum of \$500, with interest coupons attached, said bonds falling due December 1, 1893; and the four bonds in suit, to wit, bonds Nos. 2, 3, 4, and 5, are a portion of said series so issued. Said bonds are as follows,—each bond being the same as that hereinafter copied, except as to the number of said bond,—to wit:

United States of America, State of Iowa. No. 2. 500 Dollars.

Counties of Boone and Greene, Angus School District Bond, Issued for School District Improvement.

Know all men by these presents: That the independent school district of Angus, in the counties of Boone and Greene, and state of Iowa, is justly indebted unto the bearer in the sum of five hundred dollars, for money borrowed, the receipt of which is hereby acknowledged, and which amount the said district prom-

ises to pay in lawful money of the United States, at the banking office of Preston, Kean & Co., in the city of Chicago, Illinois, on December 1st, 1893, or at any time before that date, at the pleasure of said district, with interest at seven per cent. per annum, payable semiannually, on presentation and surrender, at the said bank, of the proper coupons hereto annexed, as they severally mature, on the first day of June and December in each year; and for the payment of which principal and interest the full faith, credit, and honor of said independent school district is hereby irrevocably pledged. This bond is one of a series of five bonds of five hundred dollars each, making in the aggregate the sum of two thousand five hundred dollars, issued for school purposes, under the provisions of section 1822 of the Code of Iowa of 1880, the same being authorized by a vote of the people at an election legally held on the second day of October, 1883, as required by law, and this bond is executed and issued in all respects in accordance with the requirements of the constitution and laws of the state of Iowa. The aggregate indebtedness of the aforesaid independent school district for all purposes whatsoever, including this bond, does not exceed the limit fixed by law. In witness whereof, the board of directors of the aforesaid district has caused the signatures of the president and secretary of the said board to be affixed hereto, and the same to be registered and countersigned by the treasurer of the district aforesaid, this 1st day of December, A. D. 1883.

J. C. Thomas, President.

B. F. West, Secretary.

Registered and countersigned by W. A. Swiler, Treasurer.

(3) The bonds in suit each have six interest coupons attached, being coupons Nos. 15 to 20, inclusive, said coupons reading as follows,—each coupon being same as that hereinafter copied, except as to the number of coupon and number of bond to which attached, and date of maturity, said dates of maturity extending (by semiannual periods) from June 1, 1891, to December 1, 1893, inclusive,—to wit:

\$17.50. Interest Coupon, Bond No. 2. (15.)

Angus, December 1st, 1883.

The independent school district of Angus, Boone county, state of Iowa, will pay to bearer, June 1st, 1891, at the banking office of Preston, Kean & Co., Chicago, Illinois, the sum of seventeen dollars and fifty cents, for interest due on the bond of said district numbered and dated as above.

J. C. Thomas, President.

B. F. West, Secretary.

(4) Said bonds and coupons were negotiated by said defendant, and plaintiff is the owner and bona fide holder, before maturity, for due consideration, of the four bonds in suit, and of the said six interest coupons attached to each of said bonds.

(5) The evidence does not show that, at the time said bonds in suit were issued by said defendant, said defendant was indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within said defendant corporation, as ascertained by the last state and county tax lists previous to the issuance of said bonds, which said value I find to be \$110,905.

(6) I am not able to find affirmatively from the evidence what was the exact amount of indebtedness of said defendant which, at time of issue of said series of bonds, was outstanding as the valid indebtedness of said defendant, the accounts of said defendant having been very inaccurately kept, and the evidence tending to show

that at least a portion of the records of said defendant relating thereto is lost.

(7) Under rulings reserved to objections at the time made by plaintiff, evidence was introduced as to whether or not an election had been held, as recited in said bonds, and as to whether the board of directors of defendant passed any resolution or took any other action relating to or authorizing the issue of said bonds. From said evidence I am not able to find that no such election was so held, or that the board of defendant failed to take the proper steps to make a valid issue of said bonds. Accepting said recital in said bonds as *prima facie* evidence of the facts therein recited, I find from all the evidence that an election was held as in said bonds recited, and said bonds were duly issued by said district.

(8) Under rulings reserved to objections at the time made by defendant, evidence was introduced relating to a former issue of bonds by defendant, which evidence sustains the following finding, which is here inserted at request of defendant, viz.: On September 27, 1889, the Aetna Life Insurance Company instituted in the district court of the state of Iowa in and for the county of Boone an action against defendant herein upon certain coupons detached from bonds by defendant issued on December 6, 1882, and June 5, 1883. In said action defendant filed its answer and counterclaim, wherein defendant alleged that the coupons on which said action was founded were a part of, and had been detached from, certain bonds issued by said defendant, to wit, bonds in the sum of \$1,500, issued by defendant on December 6, 1882, and in the sum of \$3,500, issued by defendant on June 5, 1883. Defendant also alleged therein that said bonds so issued were void, in that the same, when so issued, were beyond the limit of indebtedness which said defendant was permitted to incur under the constitution of the state of Iowa, except as to the sum of \$722.10 thereof. And defendant therein prayed affirmative judgment that said coupons be declared illegal and void, and be surrendered for cancellation, and that said plaintiff therein be restrained from disposing of the said bonds of which said coupons had formed a part; that a trial was had on the merits, and said district court of Boone county adjudged and decreed that said bonds so issued as aforesaid on December 6, 1882, and June 5, 1883, were in excess of said constitutional limit of indebtedness which defendant was permitted to incur (except as to the sum of \$861.64), and were illegal and void as to the entire amount thereof in excess of said sum of \$861.64, and that the same be by said plaintiff surrendered upon payment by defendant of said sum of \$861.64, and be canceled; that said defendant paid said sum, so adjudged valid, and said plaintiff thereupon surrendered to defendant said bonds and coupons, and same were canceled.

(9) The principal of bonds in suit herein is now due, amounting to \$2,000, and, with interest thereon at 7 per cent. from December 1, 1893, to wit, \$446.83, aggregating \$2,446.83 on February 10, 1897, is due and unpaid. The coupons herein in suit are due and unpaid, and each coupon is entitled to draw 6 per cent. per annum from its date on amount of said coupon; and said coupons,

and interest thereon; aggregate \$531.90 on February 10, 1897. The total amount due plaintiff February 10, 1897, is \$2,978.73.

Conclusions of Law.

1. Defendant, under recitals contained in the bonds in suit, is estopped from claiming (1) that an election, as recited in said bonds, was not held; and (2) that defendant's board of directors failed or omitted to pass such resolutions, or take such other steps, as may have been required to make the issuing of said bonds a valid issue.

2. Plaintiff is entitled to recover herein of and from defendant the sum of \$2,978.73, with interest from February 10, 1897, as follows: upon \$2,000 7 per cent., and \$978.73 6 per cent., with costs of this suit.

Let judgment be entered accordingly; to all of which defendant excepts.

TRAVELERS' INS. CO. OF HARTFORD v. RANDOLPH.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 439.

1. TRIAL—PEREMPTORY INSTRUCTION—WAIVER.

The failure of a defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction, will not of itself preclude such a motion at the close of the whole evidence.

2. SAME—WHEN GIVEN.

A peremptory instruction should not be given to a jury unless, upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking such instruction; and a case cannot properly be withdrawn from the jury because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking such instruction. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, reaffirmed.

3. ACCIDENT INSURANCE—EXCEPTIONS FROM RISK—VOLUNTARY EXPOSURE.

The expression "voluntary exposure to unnecessary danger," used in stating the exceptions to the liability of an insurance company upon an accident policy, refers only to dangers of a real, substantial character, which the insured recognized, but to which he, nevertheless, purposely and consciously exposed himself, intending at the time to assume all the risks of the situation.

4. SAME—QUESTION FOR JURY.

Under a policy of accident insurance, which expressly declares that the insurance does not cover entering or trying to enter or leave a moving conveyance using steam as a motive power, and which also excepts injuries due to voluntary exposure to unnecessary danger, voluntary riding upon the platform of a rapidly moving railroad car, though there may be no necessity therefor, is not, in itself and as matter of law, a voluntary exposure to unnecessary danger, but presents a question of fact to be determined by the jury under all the evidence.

5. SAME—NEGLIGENCE OF INSURED.

Cases determining that certain acts constitute contributory negligence, such as to defeat a recovery for personal injuries claimed to have been caused by the negligence of another, have no application to actions upon accident insurance policies which do not in terms exempt the insurer from liability for injuries caused by the negligence of the insured, since the liability upon such policies depends upon contract, and the negligence of the plaintiff is no defense unless expressly made so.

6. SAME.

Where an accident insurance policy exempts the insurer from liability for injuries received while violating rules of a corporation, it is proper, in an action on the policy, to leave to the jury, upon all the evidence, the question whether the insured knew of a rule of a corporation which it is claimed he was violating when injured, and to charge them that, in order for the insured to be bound by the rule, it must be one which the corporation enforced or used reasonable effort to enforce.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

J. K. Flippin and Luke E. Wright, for plaintiff in error.

Geo. Randolph, Samuel Holloway, and Wm. M. Randolph, for defendant in error.

Before HARLAN, Circuit Justice, LURTON, Circuit Judge, and SAGE, District Judge.

HARLAN, Circuit Justice. This is an action upon insurance contracts evidenced by an annual policy and two accident tickets issued to Albert G. Mitchell by the Travelers' Insurance Company of Hartford, Conn. There were a verdict and judgment for the plaintiff.

By its policy of June 5, 1894, that company insured Mitchell, a bookkeeper by occupation, in the sum of \$50 per week, against loss of time, not exceeding 26 consecutive weeks, resulting from bodily injuries effected through external, violent, and accidental means, which should, independently of all other causes, immediately and wholly disable him from transacting any kind of business pertaining to his occupation. If death ensued from such injuries alone within 90 days, then the company agreed to pay the sum of \$10,000 to the legal representatives of the assured. But the policy declared that the insurance did not cover "disappearance; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability, resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease or bodily infirmity; hernia; fits; vertigo; sleep-walking; medical or surgical treatment, except amputations necessitated solely by injuries, and made within ninety days after accident; intoxication or narcotics; voluntary or involuntary taking of poison, or contact with poisonous substances, or inhaling of any gas or vapor; sunstroke or freezing; dueling or fighting; war or riot; intentional injuries (inflicted by the insured or by any other person); voluntary overexertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expeditions into wild and uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power, except cable cars; riding in or on any conveyance not provided for transportation of passengers; walking or being on a railway bridge or roadbed (railway employes excepted)."

The same provisions, substantially, are set forth in the accident tickets issued by the company.

The defendant pleaded that it did not owe the plaintiff in manner and form as alleged, and that proper proofs of death were not furnished.

It also pleaded: That the assured committed suicide on the 9th day of November, 1894, by "voluntarily, and with intent to take his life, jumping off" a train of cars, en route from St. Louis to Memphis, Tenn., and which at the time was moving 35 miles an hour, he being a passenger on such train.

That the assured "intentionally and of a purpose sprang or jumped" from said train, with the intent of inflicting injury upon himself, and, as a result thereof, he was dashed against the ground with great violence, receiving injuries from which he shortly afterwards died.

That when the train approached Memphis, at the rate of 35 miles an hour, the assured voluntarily and unnecessarily left his seat in the sleeping car, where he was safe and free from danger, and went out of such car and upon its platform, thence to the rear platform of the next car ahead, thence to the lower step of the last-named platform, the same being a very dangerous place, from which, by any sudden jar or movement of the car, he was liable to fall or be thrown from the train; that, in standing on said lower step of the platform, it was necessary for him to hold to the hand railing provided on each side for the use of persons getting off and on the car; that while in that position, the cars moving at a high rate of speed, he was in great danger of losing his hold by reason of the moving of the car or from other causes, and of being thrown from the step, and injured or killed, "all of which danger was obvious and well known to the said Mitchell"; that the assured went into said place of great and unnecessary danger without any reasonable cause therefor, and, while there, "fell or sprang" from the car step, receiving great injuries, from which he shortly died; and that, by reason of this voluntary exposure of the assured to unnecessary danger, the contract of insurance between him and the defendant did not attach or become operative, nor cover the injuries and resulting death of the assured.

That the insured, while the car was moving at the rate of 35 miles an hour, attempted to leave, and did leave, the same, by "stepping or leaping" therefrom, and thereby he was thrown to the ground with great violence, and received injuries from which he shortly thereafter died.

That while standing upon the lower step of the rear platform of the car immediately in front of the sleeping car, as above stated, the insured was intoxicated, and, being so intoxicated, either "fell or sprang" from such step when the car was moving at the above rate of speed, and was dashed violently against the ground, receiving fatal injuries, from which he shortly died. And

That the assured came to his death by reason of his standing upon the platform, as above stated, in violation of a rule of the railroad company which was then, and had been for many years,

in force, forbidding passengers to stand or ride on the platforms of its cars while they were in motion.

The plaintiff filed replications, which put in issue all the material facts set out in the several pleas.

Mitchell was a resident of the city of Memphis, where for many years prior to his death he had been employed as a bookkeeper. He was unmarried, about 46 years of age, and lived with a widowed sister and her children in that city. It seemed to have been his habit when traveling any distance on railroads to buy accident tickets, and, when his relatives went from home, he bought tickets of that kind for them.

He left Memphis in June, 1894, to go to St. Louis, holding at the time two annual accident policies for \$10,000 each, namely, the one here in suit, issued by the Travelers' Insurance Company, and the other issued by the Fidelity & Casualty Company. Before leaving home, he increased his accident insurance by buying \$18,000 of tickets that were good for a few days only, and left them in a package addressed to W. M. Randolph, his attorney, with a writing appointing the latter as his executor, without bond or report, and directing the disposition of the above sum. This package was found, after his death, in the safe of the Hill Shoe Company, of which he was assignee.

It does not appear what particular object Mitchell had in going to St. Louis, nor what he did while in that city. He remained there about five months. While there, he bought the accident insurance tickets in suit. One of the persons who sold him the tickets testified that he did not know that Mitchell would have bought so much insurance if he (the insurance agent) had not forced it upon him. Before leaving St. Louis he placed his insurance policies in an envelope addressed to W. M. Randolph, his attorney at Memphis, and sent the package by express. He also telegraphed to W. M. Randolph & Sons from St. Louis: "Leave to-night on Chesapeake & Ohio. Will be at your office to-morrow at 9."

He left St. Louis for his home on the evening of the 8th of November, 1894, and was due at Memphis at 7:55 the next morning. The train on which he traveled was composed of a sleeping car, two ordinary passenger cars, and a baggage car. He occupied a seat in the sleeping car. He arose quite early on the morning of the 9th, and was seen several times standing on the platform of the cars, while the train was moving 15 to 25 miles an hour. At one time he stood with both feet on the platform, and with his back against the side of the door of the car. At another time, according to some of the evidence, he held onto the railing, with one foot on the platform, and the other on the top step of the platform.

The colored porter of the sleeping car was examined as a witness for the defendants. He testified that he first saw Mitchell, the morning of the 9th, standing on the platform of one of the coaches, when the train was about 25 miles from Memphis; that he heard the deceased ask the conductor several times how far

it was to Memphis; and that, when he came out to wipe off the hand rails of the car, Mitchell and a little boy were on the platform together, Mitchell standing on the lower step, and the boy just going into the door of the ladies' coach. The witness said that Mitchell, when last seen by him, was on the lower step, holding with one hand to the rail attached to the body of the car, and with the other to the platform railing, "one foot up like a man going to jump off, and the other foot on the lower step,"—"standing like a railroad man who was going to jump off." He also testified that in about "a minute or a half minute, a short time," he observed that Mitchell "let all hold go, and fell back; released his hold, and went back"; that he rushed to the front of the car, to find the conductor, and report what had occurred; that the train was immediately stopped, and was backed, until it came to the place where Mitchell was lying across a side track; that the body was at once put into a baggage car, and Mitchell died in a few minutes thereafter, just before the train reached Memphis.

The little boy who was seen by the porter on the platform with Mitchell was 13 years old at the time. In his deposition he stated that he went into the car to warm his hands, and "came back to the door, and he [Mitchell] was not there"; that he went back to the stove, and in a few minutes the porter came running in, and said something about a man falling off.

It is proper here to observe that the sleeping-car porter was the only witness who testified that Mitchell, while on the platform, and just before he disappeared from the train, was in the attitude of a person about to jump from the moving car. The jury might well have concluded, from his examination as a witness, that he was mistaken upon that point, and that there was nothing in Mitchell's conduct indicating a purpose to put his life in peril by jumping or throwing himself from the train. But there was no room to doubt that Mitchell was riding on the platform while the train was moving at the rate of from 15 to 30 miles an hour.

At the close of the evidence, the defendant moved the court for a peremptory instruction in its behalf, assigning as the ground of the motion that Mitchell "voluntarily exposed himself to unnecessary danger, and that his injury and consequent death resulted therefrom." This motion was overruled, and an exception was taken by the defendant.

The first proposition by the plaintiff is that the evidence in his behalf made a case which, in the absence of all other testimony, entitled him to a verdict, and as the defendant elected to introduce testimony in its own behalf, the court was without authority, at the close of the evidence on both sides, to direct a verdict for the defendant.

The authorities cited do not sustain this proposition. It is well settled that if, at the close of the plaintiff's evidence, the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defense. *Railway Co. v. Cummings*, 106 U. S.

700, 1 Sup. Ct. 493; *Insurance Co. v. Crandal*, 120 U. S. 527, 530, 7 Sup. Ct. 685; *Railroad Co. v. Hawthorne*, 144 U. S. 202, 206, 12 Sup. Ct. 591; *Campbell v. City of Haverhill*, 155 U. S. 610, 612, 15 Sup. Ct. 217; *Railway Co. v. Callaghan*, 161 U. S. 91, 95, 16 Sup. Ct. 493. But the failure of a defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction, will not, of itself, preclude such a motion at the close of the whole evidence. It often occurs that the evidence on behalf of a defendant, in connection with that on behalf of the plaintiff, will justify a peremptory instruction to find for the defendant, when such an instruction would not have been authorized by the *prima facie* case made by the plaintiff's proofs.

The circumstances under which a court may withdraw a case from the jury have been elaborately discussed by counsel. The rule upon that subject has been defined in recent adjudications. The thought intended to be expressed in them is that the jury should be permitted to return a verdict according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction. A mere scintilla of evidence in favor of one party does not entitle him, of right, to go to the jury. *Improvement Co. v. Munson*, 14 Wall. 442, 448. On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial. In disposing of that motion, the court, in the exercise of a sound legal discretion, may interpose and prevent the injustice that may be done by such a verdict. While the court may instruct the jury as to the law arising upon a given or hypothetical state of facts, it is for the jury, if the facts are disputed, or if there is substantial evidence both ways, even if there be a preponderance of evidence one way, to say what facts are established. And this is what was meant by the observation in some cases that the court should not withdraw from the jury a case depending upon the effect or weight of testimony, unless the evidence should be of such conclusive character as to compel the court to set aside a verdict returned in opposition to it. *Insurance Co. v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18. The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, unless the evidence is so distinctly all one way that a different view of it would shock

the judicial mind. Hence it has been held in an action for damages against a railroad company—one of the issues being the contributory negligence of the plaintiff—that the court erred in not submitting the question of contributory negligence to the jury, where the conclusion did not follow, as matter of law, that no recovery could be had upon any view that could be properly taken of the facts. *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118. To the same effect are *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679; *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748; *Gardner v. Railroad Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140; *Railroad Co. v. Everett*, 152 U. S. 107, 113, 14 Sup. Ct. 474.

The general question was considered in the recent case of *Sparf v. U. S.*, 156 U. S. 51, 99, 15 Sup. Ct. 273. Referring to the rule defining the respective functions of court and jury in a case where there is some substantial evidence to support the particular right asserted, and in a case in which there is an entire absence of evidence to establish such right, the court said:

"In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without intrenching upon the constitutional functions of the jury. The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But, if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of the case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury. *Pleasants v. Fant*, 22 Wall. 116, 121; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403; *Randall v. Railroad Co.*, 109 U. S. 478, 482, 3 Sup. Ct. 332; *Schofield v. Railway Co.*, 114 U. S. 615, 619, 5 Sup. Ct. 1125; *Marshall v. Hubbard*, 117 U. S. 415, 419, 6 Sup. Ct. 806; *Meehan v. Valentine*, 145 U. S. 611, 625, 12 Sup. Ct. 972."

See, also, *Gunther v. Insurance Co.*, 134 U. S. 110, 116, 10 Sup. Ct. 448.

Our re-examination of this question has been in deference to the arguments of learned counsel. It should be observed, however, that the subject was very carefully considered by this court in *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463. Upon a full review of the American and English authorities, this court, speaking by Judge Lurton, announced these propositions: That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a "proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new

trial, set aside the verdict," and that the court "may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict"; that, upon reason and authority, "there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence"; and that "in the latter case it must be so insufficient in fact as to be insufficient in law."

Guided by the rules laid down in the adjudged cases, we proceed to inquire whether the circuit court should have sustained the defendant's motion for a peremptory instruction to find in its favor. The court was undoubtedly entitled to assume that Mitchell left his seat in the car, and rode many miles on the platform while the train was running at considerable speed. The evidence to that effect was entirely uncontradicted. The only doubt that could arise in reference to the facts was whether, as stated by the colored porter, the assured stood on the lower step of the platform, and jumped or threw himself from the train. If the case depended upon the accuracy of this statement, the court, in view of all the evidence, could not properly have directed a verdict for the defendant without usurping the functions of the jury, and without infringing the constitutional right of the plaintiff to a trial of his case by a jury. The porter's statement that Mitchell jumped from the steps of the platform bore directly on the issue as to suicide. That question was fairly submitted to the jury, and their verdict was, in legal effect, a finding that he did not commit suicide; and we may here observe that the averment in one of the pleas that Mitchell was intoxicated was entirely unsupported by the evidence.

But the defendant's motion for a peremptory instruction distinctly presented the question whether riding upon the platform of a car running 15 to 25 or 30 miles an hour, even if the passenger, while so riding, holds to a railing, and thereby diminishes the danger of being thrown from the car, was, within the meaning of the policy and as matter of law, a voluntary exposure of himself to unnecessary danger. The principal contention of the defendant is that the jury should have been so instructed.

What do the words "voluntary exposure to unnecessary danger" in the contracts in suit import?

In *National Bank v. Insurance Co.*, 95 U. S. 673, 679, it was said that, if a policy of fire insurance was so framed as to leave it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to a binding contract, the court should lean against a construction that imposes upon the assured the obligations of a warranty. "Its attorneys, officers, or agents," the court observed, "prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." The same rule was rec-

ognized in *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019, which was a case of fire insurance, and was upheld in *Insurance Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. 1360, as applicable in a case of life insurance. This court enforced the same rule in *Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 309, 7 C. C. A. 581, and 58 Fed. 945, where this court, speaking by Judge Taft, said that all language in life policies limiting the liability of the company should be construed favorably for the insured; that all doubts or ambiguities should be resolved against the insurer.

The words "voluntary exposure to unnecessary danger," literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is therefore the interpretation which the court should adopt. One of the accepted meanings of the word "voluntary" is "done by design or intention; purposed; intended." *Webst. Dict.* Judge Clark, who presided at the trial, instructed the jury that:

"Mere negligence or inattention is not an exposure to danger within the meaning of the policy,—mere thoughtlessness,—but it requires a degree of appreciation of danger at the time to make it voluntarily assumed, and a voluntary exposure.
* * * If you find that standing on the platform, under all circumstances of this case, taking into account his position on the train, the speed of the train, the track, and everything else that makes up the situation where the accident occurred, if you find that that was dangerous, and that, being conscious of that danger, he took a position that exposed him to it, and death resulted, your verdict should be for the defendants, otherwise for the plaintiff, as to that issue."

The company was not entitled to a more favorable interpretation of the contract than this instruction indicated.

This interpretation is in harmony with other clauses of the written contract. For instance, the company insured against "bodily injuries," effected through external, violent, and accidental means, which, independently of all other causes, immediately and wholly disabled the assured from transacting business pertaining to his occupation as a bookkeeper, but expressly excepted "intentional injuries, inflicted by the insured or any other person." A bodily injury, therefore, not intentionally inflicted upon the assured, but which may have been due wholly to negligence or thoughtlessness, was covered by the contract; and it is equally clear that, if death ensued from bodily injuries resulting from such negligence or thoughtlessness, the case would be covered by the contract. But is it to be supposed that the contract included a case of death from bodily injuries inflicted by the accused upon himself carelessly, but not intentionally, and yet that death, resulting from a careless or

negligent exposure of the assured to unnecessary danger, with no intention upon his part to commit suicide or to injure himself, was excepted from the operation of the policy? This question must be answered in the negative; and such an answer means that, looking at the whole contract, the words "voluntary exposure to unnecessary danger" are to be held as importing an exposure by the assured to unnecessary danger, with the intention or design at the time to risk the consequences of such exposure.

In *Miller v. Insurance Co.*, 92 Tenn. 167, 187, 21 S. W. 39, which was a suit upon an accident policy, exempting the company from liability where the injury resulted from "voluntary exposure to unnecessary danger," the court held that these words were not "the entire equivalent of 'ordinary negligence,'" and that "a degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity."

In *Keene v. Association*, 164 Mass. 170, 41 N. E. 203, which was an action upon a policy of life insurance, exempting the company from liability when death or injury happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, the court said:

"A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. * * * There are other dangers which one need not encounter, if he knows of their existence long enough beforehand, as, for example, a runaway horse or a coming car; and a mere inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious intentional exposure,—something of which one is conscious, but willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence. Great negligence will not necessarily defeat a fire policy. *Johnson v. Insurance Co.*, 4 Allen, 388. And in the present policy against accidents, upon the evidence, although the jury might well find a voluntary exposure to danger, we cannot say that it would be bound, as matter of law, to do so."

In *Follis v. Association*, 62 N. W. 807, 809, the supreme court of Iowa held that "voluntary exposure to unnecessary danger," in a life insurance contract, means something more than contributory negligence, or the want of ordinary care on the part of the assured.

There are, it must be admitted, authorities that look the other way. But we are of opinion that the better reason is with the cases holding that the words "voluntary exposure to unnecessary danger," in accident policies such as the one here in suit, import a consciousness of the danger, and an intention to risk the consequences of exposing one's self to it. Whether, in the present case, the exposure was unnecessary, and whether the assured was aware of and appreciated the danger, and intentionally or purposely risked it, were questions of fact that were properly left for the determination of the jury under appropriate instructions by the court as to the law of the case. In making such determination, the jury were entitled to look at all the evidence, and, as a recognition of the danger and the intention of the assured to take the risk attending the situation may not unreasonably have been inferred

from the circumstances and from his acts, the jury were entitled to infer a voluntary exposure to unnecessary danger from any facts showing that he could not have failed to recognize the existence of the danger, and must have purposely or intentionally risked it.

Before leaving this part of the case, it is proper to refer to the action of the circuit court touching certain special requests by the defendant for instructions.

The defendant asked the court to instruct the jury that if they found "that Albert G. Mitchell was an intelligent man, accustomed to railroad traveling, and while in the exercise of his own free will, and without any necessity therefor, was standing upon the platform of the car with his hands in his pockets, or upon the steps of the platform of said car, while in a train propelled by steam, and running at a speed of about twenty-five miles an hour, then this will be a 'voluntary exposure to unnecessary danger,' in the sense of the policies; and, if death resulted from the same, you will find for the defendants." This instruction was properly refused, because it assumed that the conduct of Mitchell, as described in the proposed instruction, was, as matter of law, a voluntary exposure of himself to unnecessary danger.

The defendant also asked the court to instruct the jury that if they found that "Mitchell was an intelligent man, and at the time exercising his own free will, and, without any necessity therefor and with a knowledge of the danger to which he was exposed, was standing upon the platform of the car with his hands in his pockets, or upon the steps of the platform of said car while the train was being propelled by steam at a speed of about twenty-five miles an hour, then this would be a 'voluntary exposure to unnecessary danger'; and, if death resulted from the same, you will find for the defendants." This instruction was given as requested, with the addition of the words "if the jury, under all the circumstances, find that the position was, in fact, dangerous." The modification made by the court of the proposed instruction was entirely proper. It was not for the court to say, as matter of law, that the position of Mitchell when riding on the platform was in fact dangerous. The track of that part of the road over which the train passed while Mitchell stood on the platform was straight and level, and therefore the danger of being thrown from the car by sudden jerks of the train was not so great as it would have been if the road had been curved or uneven. The question as to the extent or character of the danger to which Mitchell exposed himself was a question of fact. At the trial below, the defendant itself placed numerous witnesses upon the stand, and interrogated them as to the danger of riding upon the platform of a rapidly moving railroad train. It sought to establish by evidence that it was a position of great danger. It was eminently proper that such an issue of fact should have been left to the jury.

The defendant requested the following instruction to be given:

"If you find Albert G. Mitchell was an intelligent man, and exercising his own free will, and without any necessity therefor, and with a knowledge of the dan-

ger to which he was exposed, but which danger he may not then have realized or been then thinking about, and was standing upon the platform of the car with his hands in his pockets, or was standing upon the steps of the car, running by steam at a speed of about twenty-five miles an hour, then this would be a 'voluntary exposure to unnecessary danger,' in the sense of the policies; and, if death resulted from the same, you will find for the defendants."

The instruction was properly refused, for the reason, if for no other, that it was so worded as to confuse or mislead the jury. If the assured could have had actual "knowledge" of the danger to which he was exposed, and yet did not think of it or realize it to any extent, then the object of the instruction was to affirm that the intention with which he so exposed himself was immaterial; whereas, as we have said, there could be no voluntary exposure to unnecessary danger, within the meaning of the contract, unless the assured was conscious of the danger, and intended—that is, purposely determined—to risk it. But, independently of this view, the instruction might well have been refused upon the ground that the subject had been fully covered by the general charge of the court.

There is another view of this question which is entitled to great weight. The policy expressly declares that the insurance does not cover "entering or trying to enter or leave a moving conveyance using steam as a motive power, except cable cars." It thus appears that the minds of the parties were directed to the possible conduct of the assured when about to use or when using railroad cars propelled by steam. When, therefore, the insurance company took care to declare that it would not be liable for injuries or death resulting from entering or trying to enter or leave a moving conveyance using steam, it is reasonable to hold that it did not intend to forbid absolutely riding on the platform of a railroad car, but intended to insure against all accidents arising from railroad travel other than those arising from entering or leaving a car when it was in motion, leaving every question as to "voluntary exposure to unnecessary danger" to be determined by the facts of each case. Of course, the officers of the insurance company knew, what every one else knew, that passengers on railroad cars often passed over the platforms of cars from one car to another while the train was moving rapidly, and sometimes stood or rode upon the platforms of rapidly moving cars. If the company intended to exclude liability for injuries or death resulting from voluntary acts of the assured while on a railroad car that exposed him to danger, why did it expressly except only the "entering or trying to enter or leave a moving conveyance using steam," and omit all reference to the more common occurrence of riding upon the platform of such a conveyance? The answer to this question suggests reasons, founded in justice and fair dealing, why the general words "voluntary exposure to unnecessary danger" should not be so enlarged by construction as to embrace, as matter of law, a case of riding upon the platform of a moving railroad car through mere carelessness or heedlessness, and without any purpose or apprehension of being injured or killed.

In *Southard v. Assurance Co.*, 34 Conn. 574, it was said:

"Now, it may be said that this specific exception from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth leaves, by fair implication, death or injury from all other causes and under all other circumstances included in the contract of indemnity; thus logically inverting or complementing the maxim, '*Expressio unius est exclusio alterius.*'"

And in *Marx v. Insurance Co.*, 39 Fed. 321, 322, which was an action upon a policy similar to the one here in suit, the court said:

"As to the condition exempting defendant from liability in case of death from violating a rule of a corporation, it is said that deceased was forbidden to ride on the platform by a rule of the railroad company, which was inscribed on a metal plate on the door of the car. Whether this can be taken to be a rule of a corporation, or what shall be a rule of a railroad corporation within the meaning of the condition, is not very clear. By another condition, some limitations are imposed upon policy holders traveling by rail, as follows: 'Entering or trying to enter or leave a moving conveyance using steam as a motive power; walking or being on a railway bridge or roadbed.' Having thus defined the acts which must be avoided by policy holders in traveling on cars, I doubt very much whether another can be added under the general designation of a 'rule of a corporation.'"

While we do not rest our decision upon the ground last stated, the considerations in support of that ground tend to sustain the general proposition that the voluntary riding upon the platform of a rapidly moving railroad car, although there may be no necessity therefor, is not in itself and as matter of law a voluntary exposure to unnecessary danger, within the meaning of the contract in suit, but presents a question of fact to be determined by the jury under all the evidence before them.

It is proper to add that at the close of the general charge the court was asked by the defendant to instruct "the jury on the subject of voluntary exposure, and especially as to his knowledge of danger, that men are intended or presumed to know that which is open and plain to be seen, and to intend the natural and probable consequences of their own acts." The court replied:

"Well, that is good law. I said to the jury, in another form, that in determining whether he knew the danger, and was, to an extent, conscious of it, that they would look to whether it is one that a man of reasonable care and caution would have seen and appreciated, and from that they may infer that he knew it; on the contrary, as bearing on the same point, that they might look to the fact, if proven as a fact, that men of intelligence and reasonable care and prudence constantly rode in a position of that sort. That is a mere circumstance. It don't prove that the man who rode in the position didn't appreciate that it was dangerous."

Counsel for defendant having observed that there was evidence in the case that the deceased "had his hands in his pockets at the time, and that he also warned a little boy," the court replied:

"Yes, sir; I have said, 'Look to everything in the case,' and I meant the most minute particle of the proof. I didn't go over it all, but I presumed that, when I said they would look over it all, it was their duty to charge their memory, so far as they can, and give it consideration."

Our attention has been called to numerous adjudged cases in which the court has instructed the jury, as matter of law, that certain acts upon the part of a passenger on a railroad car constituted such contributory negligence as precluded a right of recovery

against the railroad company. The principles announced in those cases are not, in our opinion, applicable to a contract of life insurance that does not in terms exempt the insurer from liability where the death of the insured is caused by his negligence or want of due care. If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides. The contract in suit covers the injury or death of the assured from all external, violent, and accidental means, except in the cases specifically declared in the contract not to be covered by its provisions. Bodily injury or death resulting from the carelessness of the assured is not excepted from the contract. This question was satisfactorily disposed of by Judge Clark when overruling the motion for a new trial. After observing that the law, as a matter of public policy, imposes on the carrier of passengers the highest degree of skill and caution reasonably possible for the protection of its passengers, and that, whenever the passenger's negligence contributes to bring about the accident, that is an end of the case, he said:

"On the contrary, in cases between insurer and insured, the relation is one established by contract, and this contract or policy undertakes to insure the policy holder, generally, against death or injury resulting from violent, external, and accidental means, and includes an accident resulting from the ordinary negligence of the insured, as well as that of others. The policy then provides that it shall not extend to nor cover accidents which result under special and exceptional conditions, and among such exceptions is that of an accident resulting from a 'voluntary exposure to unnecessary danger.' The policy protects the assured, then, against all violent and external accidents not embraced within one of these exceptions. The policy does not require, and the assured does not contract for, the exercise of reasonable care and caution, and no such consideration as that enters into the question except remotely and secondarily. The primary and general purpose of the contract is clearly one of insurance against accidents generally; and the question of whether the circumstances of a particular accident bring it within one of these exceptions is not a question whether the assured has exercised reasonable care or caution, nor whether he has been guilty of contributory negligence; but it is a question of whether or not the insurance company has shown (the burden being on it to do so) that the insured voluntarily and unnecessarily exposed himself to danger, and that the accident resulted in consequence thereof. And it is to be borne in mind all along that these exceptions by which the benefits of the contract may be forfeited or lost to the assured are strictly construed against the company, and liberally in favor of the assured. In fact, this principle pervades the entire law of insurance contracts of every kind whatever."

In these views we entirely concur. They are supported by the decision in *Insurance Co. v. Martin*, 32 Md. 310, 312, which was an action upon an accident policy. The court said:

"Nor is it a good defense that the accident was caused by the mere carelessness or negligence of the assured. In cases where the foundation of the action is an injury occasioned by the negligence of the defendant, and the liability of the latter grows out of such negligence, it is always a good defense to show contributing negligence on the part of the plaintiff; but here the liability is created by a contract, one of the chief objects of which was to protect the assured against his own mere carelessness or negligence. It has long been the universally settled construction of fire policies that they cover a loss where the fire may be caused by the carelessness, negligence, and want of due caution on the part of either the assured himself, or of his servants, agents, or tenants, because one of the prin-

principal objects the assured has in view in effecting an insurance is protection against casualties arising from these causes. The same construction, for the same, if not a stronger, reason, must be given to a policy like the present, not only because of the character of the insurance effected, but because its positive language and the terms of the exception show that all accidents resulting from mere carelessness or negligence are insured against. The observance of due care and diligence on the part of the assured is no element of the contract on his part, and can in no way affect the right of action thereon."

See, also, *Wilson v. Association*, 53 Minn. 470, 479, 55 N. W. 626; *Freeman v. Insurance Co.*, 144 Mass. 572, 576, 12 N. E. 372; 2 May, Ins. § 530.

It remains to consider the question relating to the clause of the policy exempting the company from liability if the assured was injured or came to his death in consequence of his "violating rules of a corporation." Upon this point the court charged the jury:

"If the company had a rule that the passengers were not permitted to stand on the platform of the car, and that was known to him, it was his duty to obey it; and whether it was known to him or not you may determine by looking to the fact of the extent of his acquaintance with traveling,—how much of that he had done; how frequently,—the fact that the rule was placarded on the doors of the car, if such was the fact, and whether or not it was a rule which a reasonable and prudent man would probably know. To constitute it a rule such as he is bound by, it must have been a rule which the company itself enforced, or used a reasonable effort to enforce, and it required that to keep it in force as a rule; and if the company habitually violated, or permitted it, without any effort to prevent it, to be habitually violated by passengers, then it would not be a rule which he was bound to obey. If it was known to him, and was a rule which was enforced, or a reasonable effort was made to keep it enforced, it was his duty to obey it; and, if he failed to do so, it would defeat his recovery."

The defendant excepted to this portion of the charge, upon the ground that all the evidence in the case tended to show that the railroad company had a rule forbidding passengers from riding on the platform of its cars while trains were in motion, and that the company and its agents attempted in good faith to enforce the same, and did not voluntarily permit said rule to be violated or nullified.

We think the specific objections made to the charge were met by what the court said to the jury. The objections conceded that the assured was not bound to obey any rule of the railroad company which the latter did not itself recognize as binding, and in good faith attempt to enforce. That question was fairly submitted to the jury. The court assumed, and rightly, that the assured was not to be charged with violating any rule of the company of which he had no knowledge. To this part of the charge no exception was or properly could have been taken. Whether the assured had such knowledge of any rule of the railroad company forbidding passengers to ride on the platforms of cars was left to the jury to determine upon the evidence. That was a proper disposition of the question. It was well said in *Marx v. Insurance Co.*, 39 Fed. 321, 322:

"If, however, it shall be conceded that the railroad company had at some time prior to the death of Marx adopted a rule forbidding passengers to ride on the platform of a car, and that such rule was within the general condition of the policy referring to rules of a corporation, it was not then in force. The testimony of

the trainmen was to the effect that it was not at all observed. All passengers on the road who were so inclined, and often by the invitation of the trainmen, rode on the platforms of the cars as freely and as commonly as elsewhere. Under such circumstances it cannot be said that there was any rule of the railroad company as to riding on the platform. The cases cited to show that the consent of a conductor of a train or others in authority shall not be effectual to set aside such a rule, in so far as it may affect the liability of the railroad company for any injuries received while in that position, are not controlling. An insurance company offering indemnity for injury or death in case of accident, as to its policy holders, is not at all in the position of a carrier for hire as to its passengers. The latter is engaged in a special service of peculiar danger, as to which some rules of conduct on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the insured. Will any one say that on sea and land, at home and abroad, a policy holder must constantly consider whether he is within all the rules of all the corporations, public and private, which he may in any way encounter? Whatever the answer may be to any such question, it is plain enough that a rule of a corporation, within the meaning of this policy, must be one which is known to the policy holder, and of force at the time of the alleged violation. The evidence at the trial did not establish this fact, and the policy cannot be avoided on the ground that the deceased was not observing its terms at the time of the accident."

See, also, *Railway Co. v. Lowell*, 151 U. S. 209, 218, 14 Sup. Ct. 281.

We perceive no error of law in the record, and the judgment of the circuit court is therefore affirmed.

BENNETT v. SALISBURY.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. LIBEL—FALSE NEWSPAPER PUBLICATION—MALICE—RECKLESS INDIFFERENCE.

A newspaper proprietor, absent in Europe, prescribed for his employes a rule that communications of a personal nature sent by unknown correspondents must be verified on investigation by an accredited correspondent, and, when so verified, might be published. *Held*, that where a scandalous story, so received, verified, and published, was utterly untrue, the court, in an action against such proprietor, properly left it to the jury to determine whether the rule evinced such wanton disregard of others' rights, and such reckless indifference to consequences, as to be equivalent to malice, which would authorize the infliction of punitive damages.

2. SAME—ADMISSIBILITY OF EVIDENCE.

In such case, testimony of the city editor as to his belief in the thoroughness of the investigation was properly stricken out, as his good faith or malice was not in issue, and the question of punitive damages turned entirely on the malice of the defendant.

3. SAME—INSTRUCTIONS.

Where the publication contained utterly false charges of unchaste and scandalous conduct, the court told the jury it was quite likely they would consider it as an atrocious libel, of the character which, in remoter regions, where respect for law does not prevail to the same extent, is frequently punished by an appeal to the horsewhip or shotgun. *Held*, that this was not error, as, in connection with the whole charge, it was not of an inflammatory character, and amounted to no more than a statement that plaintiff was rather to be commended than prejudiced by appealing to the courts for redress.

4. SAME—EVIDENCE OF SPECIAL DAMAGE.

Where punitive damages only are sought, and no evidence of special damages is given, evidence by defendant tending to show absence of special damages may be excluded as immaterial.

5. SAME—EVIDENCE—JUDGMENTS AGAINST OTHER NEWSPAPERS.

Evidence that plaintiff has recovered a judgment against another newspaper for publishing the same libel is inadmissible.

Appeal from the Circuit Court of the United States for the Southern District of New York.

John A. Taylor, for plaintiff.

Joseph H. Choate, for defendant.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Everett E. Salisbury, the defendant in error, brought an action in the circuit court for the Southern district of New York against James Gordon Bennett, the publisher and proprietor of the New York Herald, to recover damages for a libel which was published in that newspaper on November 28, 1892, and recovered a verdict for \$5,000, whereupon the present writ of error was brought by the defendant in the trial court.

The libel, after the headlines: "Wrecked Two Families. Bertha Kinney's Confession Made Her Mother Insane and Drove Her Father to Resign His Pastorate,"—proceeds as follows:

"Plainfield, Conn., November 27, 1892. The facts have come out to-day in a scandal of the most painful character in the flourishing factory village of Moosup, near this town. The two families involved are the most prominent and influential in the village, and one of them is practically destroyed, the daughter being disgraced, the mother made insane, and the father, a preacher, so overwhelmed with shame and sorrow that he has retired from the ministry. The ruin was caused by the relations between E. E. Salisbury, the wealthiest man in the village, who has a beautiful home and an interesting family, and Miss Bertha Kinney, the daughter of the Rev. G. W. Kinney, pastor of the Baptist Church."

The libel, after giving a sensational story in regard to the discovery of Miss Kinney's condition, the almost hopeless insanity of her mother in consequence, and of the resignation as pastor of "the heart-broken father," said:

"What will be the result of the exposure in the Salisbury family remains to be seen, but Mr. Salisbury stands deeply disgraced in the eyes of all the people of the town in which he had long maintained an irreproachable character."

On the night of November 26th this article was sent by telegraph to the Herald office, and was signed by an unknown person. The employé who acted at the time as night city editor telegraphed the substance of the story to the "accredited" or known correspondent of the Herald in Plainfield, asked him to investigate it, and reply at once whether it was true or false. Moosup is a manufacturing village of 2,500 or 3,000 inhabitants, in the town of Plainfield. This dispatch came within what was called the "city department" of the Herald, which included a radius of about 100 miles, except Philadelphia, from New York. In this department the newspaper had numerous "accredited" agents or correspondents. A witness, who had been connected with the Herald, said: "It would be impossible to tell the number. At every little place they had a correspondent." Reply was received from the regular correspondent about 11 o'clock in the evening of November 27th that the account was correct, whereupon it was published. The entire story, in all

its incidents, turned out to be baseless, and on January 16, 1893, the Herald published a retraction, in which it said that it had made a thorough investigation, and, in substance, that no ground for allegations or suspicions against either of the parties ever existed, and that it had been imposed upon by its news correspondent, who had ceased to have any connection with the Herald. Upon the trial no evidence of special damage was introduced by the plaintiff, and the falsity of the libel was admitted by the defendant. At the time of the publication the defendant was in Paris, and it was apparently conceded that he had no personal ill will against the plaintiff, and had probably never heard of him.

The important question which arises upon the bill of exceptions is in regard to the charge of the trial judge upon the subject of punitive damages. It was testified that the defendant's rule was that the employes should never take anything that should be sent to them by anybody who was not regularly in their employ, and should not print such communications unless they could be verified. Another witness said that the rule was that, when matter of a suspicious nature reached the office, it was not, under any circumstances, to be published, unless each and every statement contained in it was fully verified on investigation by accredited correspondents, or in some other way. The court, after charging the jury upon the question of compensatory damages, charged that the plaintiff was not entitled to punitive damages on account of personal malice or personal ill will on the part of the defendant, and that:

"The only theory upon which it is claimed that exemplary or vindictive damages should be given in this case is upon the theory of reckless indifference to the rights of others. The rule has been laid down by the courts that, even where no actual malice is shown, exemplary damages may be given when there is proved such wanton disregard or such reckless indifference to the rights of others as is equivalent to the intentional violation of such rights. There are cases which have held that a jury was warranted in finding such reckless indifference where a newspaper published libelous statements with regard to an individual without making the slightest effort to investigate into their truth or falsity. Now, the situation here is different from the situation in those cases, because you have evidence here of the employes of the defendant as to the rules of the office. The principal, Mr. Bennett, has prescribed certain rules for the guidance of his subordinates, and for the negligence of his subordinates he is responsible, whether they obey the rules or not. For a malicious act on the part of a subordinate the principal is not responsible, unless he himself has been in fault; that is, in the sufficiency of the rule which he has prescribed. The rule in force in the Herald office at that time was that, where communications libelous in character were received from some one unknown to the paper, they were not to be published until the paper had sent to its accredited representative in the place where the notice came from, and had been informed by him that the statement was accurate."

After stating the arguments which the plaintiff had suggested against the sufficiency of the rule, the judge further charged:

"Bearing those rules in mind, you will determine whether, in publishing this article in the way in which it was published,—that is, hanging it up for twenty-four hours until the accredited agent could be communicated with, and not publishing it until he had vouched for the accuracy of the article,—you are to determine, in the first place, whether or not that rule allowed publications to be made with such wanton disregard of another's rights, and such reckless indifference of consequences, as would be the equivalent of malice. If you reach that

conclusion, you may add compensatory or vindictive damages to the amount which you will find the plaintiff entitled to for injury to his feelings, and for the blemishment of his reputation. But, unless you do reach the conclusion that the methods adopted in the Herald office under the direction of Mr. Bennett himself, as his personal regulation of the machinery under his control, were so devised that they may fairly be said to be recklessly indifferent to the rights of others, you are not entitled to add anything for exemplary damages to the amount of your verdict."

The defendant excepted to so much of the charge as permitted the jury, under any circumstances of the case, to allow exemplary damages, and to that part of the charge which permitted the allowance of such damages if they found that the rule of the defendant allowed publication to be made with such reckless disregard of others' rights as to amount to malice. The subject of the care that shall be demanded from the large daily newspapers of the country in the investigation of the charges of misconduct or of crime which they publish in regard to persons who are comparatively unknown beyond the communities in which they live, has been, of late, frequently before judges and juries. It has become the course of business of newspapers of this class to receive announcements of this character from news bureaus and from numerous special correspondents who are scattered over the country, and it has been the custom of some daily journals to rely upon the good faith and accuracy of these correspondents, and to publish, in substance, whatever they sent over their own signatures, without further investigation into its truthfulness, and, in an action for libel, when the falsehood of the publication was manifest, to attempt to ward off the charge of recklessness by saying that the information was received and was published in the usual course of business. Neither judges nor juries have been satisfied with the sufficiency of this kind of care. It is so insufficient as to be justly regarded as an absence of care, and as recklessness with respect to the rights and reputations of strangers to the publisher. The excuse was itself regarded as indicative of a careless indifference to and ignorance of the obligations of an owner to use his property so as not to injure others.

This case presents a different state of facts and a different defense upon the subject of punitive damages. The defendant was an absentee, and, in addition to the fact that he could have no personal ill will against a plaintiff of whom he had never heard, he had no personal oversight over the conduct of his agents, and could not be visited with punitive damages for recklessness which he had neither known nor permitted nor countenanced. Thus, Mr. Justice Gray, in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, in discussing the law relating to punitive damages against a principal for the unauthorized tort of his agent, says: "Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." The defendant, therefore, for the purpose of showing that he did not give his employes license to publish libelous articles without investigation, and could not, therefore, be

considered as participating in their conduct if it was malicious, gave evidence of the rules which have been stated. The trial judge was, therefore, called upon to look at the rule, and see whether, if carried out, it shut the door against recklessness, or if it was simply a course of conduct which was recklessness in itself. He was properly of the opinion that an absent owner of a newspaper, who had left the reputations of people to protection by this rule only, could not be said to be, as matter of law, freed from liability to punitive damages, and that the question was one of fact for the jury. He therefore instructed the jury in the language which has been quoted.

The rule was, in substance, that communications of a personal nature, which were sent by unknown correspondents, must be verified on investigation by an accredited correspondent, and, when thus verified, might be published; and the question which was submitted was whether, upon its face, and in view of the known hazards which attend the imprimatur of an accredited correspondent, it was not merely inadequate, but was so devised as to show that the owner of the newspaper was recklessly indifferent to the rights of others. Experience has shown it to be a fact that the rule of implicitly trusting a newspaper correspondent is a dangerous one, and that of all slanders those in regard to chastity require prudent investigation, lest the character of innocent persons should suffer a lifelong injury. The rule in question turned over a suspicious story from an unknown author to the regular correspondent. The rule is silent in regard to the character of the investigation, the character of the man who is to make it, the caution, the prudence, the thoroughness with which it must be conducted, the amount of proof which must be required, or the extent of the report which must be made. The story which was received at the office of the Herald, if it was true, wrecked, and if it was not true, must injure, the happiness of two families, and was of such a character as to require especial caution before publication. The jury probably found that the rule was inadequate to meet the imperative demands for prudence and caution which an investigation of the truth of such a narrative required. If such a rule is to protect from punitive damages the absent or nonresident or resident owners of newspapers who intrust the management of their large property and business to subordinate agents, the principle of law which makes careless indifference to an injury which may happen to others equivalent to malice can be easily avoided. It is probably true that the requirement of a more stringent rule and more searching habits and practice of investigation and of more self-denial in respect to the publication of libelous matter would compel a marked diminution of that style of news, but such a result would not be a cause for anxiety.

A sentence in the charge of the judge is excepted to in which he told the jury that it was quite likely that they would consider that it was an atrocious libel, of the character which in remoter sections of this country, where respect for the law does not prevail to the extent that it does here, is frequently punished by an ap-

peal to the horsewhip or the shotgun. That it was an atrocious libel was manifest, and was not denied. The context shows that the remaining part of the sentence was for the purpose of suggesting to the jury that an appeal to the courts of the country for reparation was not to be regarded as improper or unmanly. The remark, read in connection with the whole charge, was not of an inflammatory character. It was but the statement of a fact within common knowledge, and in substance amounted to no more than telling the jury that the plaintiff should rather be commended than prejudiced by choosing a judicial tribunal for redress.

Questions were asked of the night city editor, who was in charge of the office when the communication was referred to the regular correspondent, as to his belief in the thoroughness of the investigation. The answers were stricken out upon motion, to which the defendant excepted. The good faith or the malice of the city editor was not in issue, for the question in regard to punitive damages turned entirely upon the malice in fact, if any there was, of the absent defendant.

The plaintiff was asked by the defendant if he knew of any one in Moosup who believed the story, and if he had lost his status in society or in the church, and if he had lost business in Moosup in consequence of the libel, which questions, upon objection by the plaintiff as immaterial, were ruled out. No special damage was attempted to be proved. It was not claimed upon the trial that he had sustained such damage, and the jury were consequently informed in the charge that there was no evidence of any pecuniary loss sustained. Inasmuch as the plaintiff's testimony was silent in regard to special damage, the attempt to prove its absence became immaterial.

An objection was made to the defendant's attempt to prove that the plaintiff had recovered judgment against another newspaper for the publication of the same libel, which objection was sustained. The same question, in substance, was considered by this court in *Printing Ass'n v. Smith*, 14 U. S. App. 173, 5 C. C. A. 91, and 55 Fed. 240, and was properly regarded as immaterial. The judgment of the circuit court is affirmed, with costs.

NATIONAL ACC. SOC. v. SPIRO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 260.

1. EVIDENCE—PROOF OF LETTERS.

Upon the trial of an action against the N. Co., a witness testified that he mailed a letter, addressed to the home office of the company; that he received in reply a letter written on a printed letter head of the N. Co., which was signed with a rubber stamp fac simile of the signature of an officer of the company, who had signed a plea in the action, and which referred to the subject-matter of the witness' letter to the N. Co. *Held*, that the letter received by the witness was sufficiently proven, and was admissible.

2. APPEAL AND ERROR—DEFECTIVE ASSIGNMENTS OF ERROR—WHEN CONSIDERED.

Under the discretion reserved in rule 11 of the circuit court of appeals (21 C. C. A. cxii., 78 Fed. cxii.), as to noticing errors not assigned, if an assignment

which does not comply with the rule has any sound merit in it, and the court can be satisfied from the whole record that a probable injustice has been done, it will be disposed to notice the error so defectively assigned; but, if the error complained of is highly technical, the record indicating no probable injustice, the court will not incline to leniency in the enforcement of the rule, though, if the error had been correctly assigned, it might have felt constrained to reverse the judgment because of it.

8. PLEAS IN ABATEMENT—JUDGMENT.

Under the practice at common law prevailing in Tennessee, when a plaintiff succeeds upon an issue joined on a plea in abatement the proper judgment is peremptory that the plaintiff recover.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action upon a contract of accident insurance between the National Accident Society, a corporation organized under the laws of the state of New York, and Herman Spiro, the assured. The contract provided, among other things, for the payment of \$5,000 to Fannie Spiro, wife of the assured, in the event said assured should, during the continuance of the contract, come to his death "through external, violent, or accidental means." An action was begun upon this agreement by Fannie Spiro in the circuit court of the state of Tennessee for Knox county. The writ of summons was issued and executed April 17, 1894, by service upon one H. D. McBurney, as an "agent and adjuster" of said nonresident corporation found in Knox county. Upon the filing of the plaintiff's declaration the cause was removed to the circuit court of the United States for the Eastern district of Tennessee, upon petition of the defendant corporation, upon the ground that it was a citizen of the state of New York, and the plaintiff a citizen of the state of Tennessee. After the removal, the defendant filed a plea of abatement, denying that H. D. McBurney, on whom process had been served, was at the time of said service, or before or since, an agent of said corporation of any kind or character. This plea was verified by Jos. I. Barnum, secretary of the said corporation. To this a replication was filed, averring that when the writ of summons was served upon H. D. McBurney he was an agent of said corporation. Issue was joined, and a jury impaneled, who found the issue for the plaintiff; whereupon judgment was entered "that the plaintiff, Fannie Spiro, recover of said defendant her damages on account of the matters alleged in her declaration to be assessed at the present term of the court." A motion for a new trial was entered and overruled, and thereupon the same jury was again impaneled and sworn, to well and truly assess the damages so sustained, who found for the plaintiff in the sum of \$5,055, for which judgment was duly entered. A bill of exceptions was allowed, and a writ of error has been sued out, and error assigned.

Cooper & Davis (McBurney & McBurney, of counsel), for plaintiff in error.

Ingersoll & Peyton, for defendant in error.

Submitted on briefs without oral argument.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The only questions presented by the assignment of errors relate to the proceedings on the trial of the issue joined on the plea in abatement. That issue was one of fact, and involved the single question as to whether H. D. McBurney was an agent of the National Accident Society of any kind at the time process was served upon him. The Tennessee statute of March 29, 1887 (Acts 1887, c. 226) concerning suits against corporations of other states "found

doing business in the state," provides that all such corporations may be sued in respect of business transacted within the state, and that process may be served "upon any agent of such corporation found within the county where the suit is brought, no matter what character of agent such person may be." To secure actual notice of the pendency of such suit, the statute further provides that it shall be the duty of the clerk of the court "to immediately mail a copy of the process to the home office of the corporation by registered letter," and to file with the papers a certificate of the fact of such mailing, and make a minute thereof upon the docket; "and that no judgment shall be taken in the case until 30 days after the date of such mailing." The fourth and last section of that act, as further security for actual notice, provides as follows:

"That it shall be the duty of the plaintiff to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same, stating the facts and with whom the notice was lodged, or else the plaintiff or his attorney shall make an affidavit that he has been prevented from serving such notice by circumstances which should reasonably excuse giving it, which circumstances the affidavit of the plaintiff or his attorney shall particularly state; and no judgment shall be taken until one or the other of these affidavits shall be filed and the court be satisfied that the notice had been given, or that the excuse for not doing so be sufficient."

All the steps required by this statute for the purpose of giving actual notice of the pendency of this suit in the circuit court of the state were complied with before the declaration was filed, and the only question made below upon the trial of the issues under the plea of abatement was in respect to the actual relationship of H. D. McBurney to the defendant below. The effect of the appearance in the state court for the purpose of removing the suit to the circuit court, unaccompanied by a plea in abatement, and unaccompanied by any qualification of the objects of the appearance, did not operate as a waiver of the right to object to the jurisdiction of the state court over the person of the defendant below, and did not cut off the right to plead in abatement after the removal had been perfected. This question was certified to the supreme court at a former term of this court. *Society v. Spiro*, 18 C. C. A. 382, 37 U. S. App. 639, 71 Fed. 897. The opinion of that court upon the question thus certified is reported in 164 U. S. 281, 17 Sup. Ct. 996. Upon the trial of the issues joined under the plea in abatement, Masterson Peyton, one of the attorneys representing the plaintiff below, testified without objection that the claim of Fannie Spiro was placed in the hands of Ingersoll & Peyton, a firm of lawyers at Knoxville, Tenn., for collection, and that he at once mailed a letter, duly addressed to the home office of the National Accident Society in the city of New York, asking for blank forms upon which he might make out formal proofs of the death of the assured, Herman Spiro. He then said, "I received this letter in reply," and started to read the same to the jury. The defendant objected to the introduction of this letter, "because

the same had not been duly proven." Before any ruling was made upon this objection, the witness further said:

"I am not acquainted with the handwriting of the defendant, or any of its officers. The letter is signed by Jos. I. Barnum, the secretary of the defendant, and the same person who has signed the plea in abatement filed in this cause. The signature to the letter seems to have been placed there by a rubber stamp, and is a fac simile of the signature of said Jos. I. Barnum, as it appears on said plea."

The objection to the introduction of the letter in evidence was renewed, "because the same had not been duly proven, and that comparison of handwriting could not be resorted to, to identify and prove a written instrument, especially so inasmuch as the signature affixed to said letter was done by a rubber stamp, and not under the seal of the company, or under its signature." The objection was overruled, and the letter admitted as evidence. The letter was written upon what purported to be a printed letter head of the accident society, and described Jos. I. Barnum as the secretary and general manager of the company. The letter was as follows:

"New York, April 11, 1894.

"Messrs. Ingersoll & Peyton, Knoxville, Tenn.—Gentlemen: Replying to yours of the 9th, I herewith inclose, without prejudice to the rights of our society, blanks upon which to submit to us proofs of death in the case of Herman Spiro; and, with further reference to this matter, will say that our adjuster, Mr. McBurney, who is at present in Terre Haute, Ind., received instructions from us some little time ago to call at your office, and make a personal investigation into the matter of Mr. Spiro's death. He has full authority to act for us, and will show the same to you on his arrival.

"Very truly yours,

Jos. I. Barnum, Secy. & Genl. Mgr."

Did the court err in permitting this letter to go to the jury? The letter was one received in reply to one addressed to the plaintiff in error at its home office in New York. It came, or purported to come, from New York, and purported to be a communication from the plaintiff in error. It was written upon the business letter heads of the corporation, and to it was affixed, by stamping, a fac simile signature of its secretary and general manager. The circumstances made a prima facie case in favor of the genuineness of the letter, and justified its submission to the jury, who were the ultimate triers of the fact of its genuineness. The general rule which requires proof of handwriting where the genuineness of a document or paper writing is involved, has its exceptions. There was no question in the case of proof of handwriting by comparison. The plea in abatement and other papers already in the case did show the undisputed genuine signature of Jos. I. Barnum; and, if it had been claimed that this letter had been written or signed in the handwriting of the same Jos. I. Barnum, it would have been competent for the jury to have tried the question of handwriting by comparison of the disputed signature with the admittedly genuine signatures already in evidence for other purposes, though such comparison was probably not admissible by experts. *Moore v. U. S.*, 91 U. S. 270; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334. Of course, no such comparison could have

been made between a stamped signature and one handwritten, though the circumstance that one was a fac simile of the other might well add to the presumption of genuineness already raised by its receipt in reply to one addressed to the corporation at its place of business. In considering the exceptions to the general rule requiring proof of handwriting where the genuineness of a letter is involved, Prof. Greenleaf, in his work upon Evidence, at section 573a, says:

"A further exception to the rule requiring proof of handwriting has been admitted in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received a reply purporting to be from the defendant, it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting; and that letters of an earlier date, in the same handwriting, might also be read, without other proof."

The same exception is approved in Wharton on Evidence, at section 1328.

The next error assigned is in these words:

"The court erred in allowing the witness for the plaintiff, Masterson Peyton, to give to the jury the contents of the paper writing which said witness, said H. D. McBurney, showed him upon his arrival in Knoxville, and which, according to Mr. Peyton's testimony, was a power of attorney from the defendant to the said H. D. McBurney, without first showing that said writing was lost or destroyed, that it was in the possession of the defendant and therefore could not be produced."

The witness Peyton, after identifying the letter of April 11, 1894, and after it had been allowed to go to the jury, proceeded to say, that:

"After the receipt of this letter on April 17, 1894, a man came to my office, and introduced himself as a Mr. McBurney of New York, and presented to me written authority from the defendant company to settle and adjust the claim of Fannie Spiro; and said that he was acting for the defendant, and had come here to adjust the claim of Fannie Spiro, the plaintiff, against the defendant. He told me he had full authority from the company. He also showed me an instrument, with the seal of the company attached, which"—

Here the attorneys for the defendant objected to the witness giving the contents of said paper writing, because it had not been shown that the paper writing had been lost or destroyed, or that the plaintiff could not have had the same produced, and submitted to the jury. The court overruled said objection, and allowed the witness to give the contents of said paper writing to the jury as he remembered it. The said witness, resuming, said:

"It was a power of attorney or authority from the company to Mr. McBurney to act for it. McBurney took the paper with him. He did not leave it with us. He and I talked some time, and tried to settle the claim; but we failed to come to any agreement. He then left my office. Before he left town, on the same day, the plaintiff commenced her case against the defendant in the circuit court of Knox county, Tennessee, and on the same day process was served on Mr. McBurney, as agent of the defendant."

For the defendant in error it is urged that the assignment of error does not comply with rule 11 of this court (21 C. C. A. cxii., 78 Fed. cxii.) in several respects: First, that it does not quote the full substance of

the evidence admitted; second, it does not point out any error committed by the court; and, finally, that, though the ruling of the court may have been an abstract error, it was innocuous, because the evidence added nothing of weight to that already in, and because in fact the witness did not prove the contents of the paper writing, only characterizing it as a power of attorney authorizing McBurney to represent the corporation. The eleventh rule of this court, after providing for assignments of errors, provides, that "errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." This assignment is not in compliance with the rule which requires, "when the error alleged is to the admission or rejection of evidence, the assignment of error shall quote the full substance of the evidence admitted or rejected." Neither does it particularize the error which is really complained of. The witness had shown, not that the paper writing in dispute was lost or mislaid, but that it had been returned to the possession of the defendant's agent, and was, therefore, under the control and in the possession of the defendant. It was, therefore, shown, contrary to the statement in the assignment of error, that the so-called "power of attorney" was in the possession of the agent of the defendant, and presumably could be produced, not by the plaintiff, but by the defendant. This was not such a document as that parol evidence of its contents could be given upon mere proof that it was in the control of the opposite party. Plaintiff should have gone further, and shown that notice had been given the defendant to produce the document on the trial. If, on such notice, this was not done, secondary evidence as to its contents would be admissible, after proof of its existence. Greenl. Ev. § 560. But the assignment of error does not assign as error that notice was not given the defendant to produce this paper. This, however, is the very point now pressed on us as error. If this assignment had been in compliance with the plain rule of the court, we should feel constrained to reverse the judgment, and remand for a new trial. So, if the error had any sound merit in it, and we could be satisfied from the whole record that a probable injustice had been done, we should be disposed, under the discretion reserved in the rule, to notice a plain and meritorious error, though not assigned. That is not the case here. The letter of April 11, 1894, above set out, distinctly declared that "H. D. McBurney has full authority to act for us, and will show the same to you on his arrival." In accordance with this authoritative announcement by the secretary and general manager of the corporation, Mr McBurney did make his appearance in Knoxville, and in the office of the attorneys representing Mrs. Spiro. That letter was prima facie evidence of McBurney's agency. It was competent, therefore, to show the acts and declarations of the agent, whose agency was at least prima facie established. The witness Peyton was permitted, without objection, to testify that McBurney said that he "was acting for the defendant company to settle and adjust the claim of Fannie Spiro," and said "he had full authority from the company, and showed him an instrument,

with seal of the company attached, which," said the witness— At this point it was objected that the witness could not give the "contents of said paper writing, because it had not been shown that the paper writing had been lost or destroyed, or that the plaintiff could not have had the same produced, and submitted to the jury." The bill of exceptions states that "the court overruled said objection, and allowed the witness to give the contents of the paper as he remembered it." The only disclosure then made by the witness which could possibly be construed as a statement of the contents of the paper was the statement that "it was a power of attorney, or authority from the company to Mr. McBurney to act for it." We cannot construe this objection as relating to anything previously stated by the witness. It is an objection to evidence anticipated, and must be taken as an objection to the witness being allowed to say that the paper exhibited to him was a power of attorney authorizing McBurney to act for the defendant. This was no more than had been said without objection, and was little more than a description of the paper exhibited as authorizing the negotiation which the witness said was then had without arriving at a result. A written statement made by this same H. D. McBurney and by Jos. I. Barnum, secretary and general manager of the company, was received as the sworn deposition of each, and read to the jury as evidence for the defendant. Neither denied the execution of such a power of attorney as was mentioned by the witness Peyton, and neither, in this statement, denied the authenticity of the letter of April 11, 1894. In fact, neither made the slightest reference to either of these written admissions touching the agency of Mr. McBurney. The evidence of those two important witnesses was confined to a statement that McBurney was a lawyer, residing in New York, and the president of a corporation of the state of New York known as the Mercantile & Insurance Agency; that the business of such corporation was to "secure facts and give advice to mercantile and insurance companies"; that that company was employed by the defendant below "to furnish to it the facts and circumstances surrounding the death of said Herman Spiro," and that the said Mercantile & Insurance Agency sent McBurney to Knoxville as one of its counsel to investigate said matter, "and he was not in any way connected with the defendant as officer or agent or in any other capacity. He had no authority to bind the defendant in any way, and he could not compromise or adjust any claim. All he could do was to ascertain the facts, and report them to the Mercantile & Insurance Company, which company would in turn report to its client, which, in this case, was the defendant, and which is a corporation of the state of New York." This evidence conflicted most materially with the letter of April 11, 1894, and with the statements of Mr. McBurney to Peyton; yet neither the letter nor the declarations of McBurney are denied or explained, and no denial is made of the statement that McBurney exhibited a paper purporting to be a power of attorney from the defendant to him authorizing him to represent it. And this was the entire evidence upon the issue

joined under the plea in abatement. Under the Tennessee statute above cited, the character of McBurney's agency was immaterial, and the plea denies that he was an agent of any character. Whether his agency was such as at common law would justify service of a writ of summons upon him as a representative of the company is immaterial. If the company had refused to appear or defend said suit, and, when sued upon the judgment in the state of its creation, had attacked the validity of a statute which sought to obtain jurisdiction by service upon an agent of the character of McBurney; or if, when its property was seized under such a judgment, it had resisted upon the ground that the judgment was void,—it would have some standing to assail the judgment as without personal service, and to attack the Tennessee statute as violating the fourteenth amendment of the constitution that forbids a state to "deprive any person of life, liberty, or property, without due process of law." *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9. But this is not the situation of plaintiff in error. It appeared and staked its defense upon the fact of McBurney's agency. That issue has been decided adversely to its contention, and nothing is now open on this record save the proceedings upon the trial of that issue. The failure of both Barnum and McBurney to deny the genuineness of either the letter of April 11, 1894, or of the power of attorney exhibited by McBurney to Peyton, or to deny the declarations of McBurney as proven by Peyton, is most persuasive evidence as to the truth of all that was said by the latter, and of the genuineness of the letter admitting the agency of McBurney. To reverse this case because Peyton was permitted to say that the paper writing shown him by McBurney was "a power of attorney from the plaintiff in error authorizing him to act for the corporation," when McBurney did not deny that he had and exhibited such a paper, would be to reverse for the merest technicality. The facts about this matter were certainly known to one or both of these witnesses, and their silence justifies the conclusion that their testimony upon these points would not be favorable to the plaintiff in error. The objection now urged is so highly technical that we do not feel disposed to leniency in the enforcement of the rules of the court, as we might do, in our discretion, if the error urged was meritorious.

The third and fourth assignments of error are to the refusal of the court to give in charge certain requests. These requests are not made a part of the bill of exceptions. They appear in the record following the bill of exceptions, but are not part thereof. No journal entry either sets them out or refers to them, so that they are in no way made a part of the record, as in *Wilson v. Pauly*, 18 C. C. A. 475, 72 Fed. 129. Neither does it appear whether these requests were made before or after the charge. To the charge no exception was taken. The assignments of error based upon these requests must therefore be overruled.

The ninth assignment is that the court erred in rendering judgment upon the policy of insurance, because the suit was premature, the policy providing "that all claims under this certificate

shall be subject to proof of insurable interest, and shall be payable within ninety days after satisfactory proof." The assignment states that proof was brought within less than 90 days after the death of the assured. It is perhaps enough to say that the company repudiated all liability upon the policy, and refused to pay at all. This waived the stipulated delay, and authorized immediate suit. *Hochster v. De La Tour*, 2 El. & Bl. 678. But, aside from this, no such question was made below, and perhaps could not have been made after going to a jury upon a plea in abatement. "Where the plea in abatement is regularly put in, the plaintiff must reply to it or demur. If he reply, and an issue of fact be thereupon joined, and found for him, the judgment is peremptory quod recuperet." 1 Tidd, Prac. § 641. The reason stated is that, "the defendant choosing to put the whole weight of his cause on this issue, when he might have had a plea in chief, it is an admission that he had no other defense." 1 Bac. Abr. 31; 1 Archb. Pl. 225. This is the practice in Tennessee. *Bacon v. Parker*, 2 Tenn. 57; *Straus v. Weil*, 5 Cold. 126, 127; *Simpson v. Railway Co.*, 89 Tenn. 308, 15 S. W. 735.

The eighth assignment of error was that it was error to render final judgment against the defendant, and the judgment should have been respondeat ouster. This assignment was properly withdrawn by counsel for plaintiff in error, as it was manifestly bad.

The judgment must be affirmed.

EVANS v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. February 17, 1897.)

No. 9,281.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS DEFENSE—PLEADING.

Contributory negligence is a matter of defense, in the national courts, and an answer setting up the contributory negligence of the plaintiff, in an action for personal injuries alleged to have been caused by defendant's negligence, is not demurrable.

2. SAME—ANSWER—DEMURRER.

A paragraph in an answer, in an action for personal injuries alleged to have been caused by defendant's negligence, which sets up the negligence of one who was driving the vehicle in which the plaintiff was a passenger, such negligence not being imputable to the plaintiff, and also sets up plaintiff's own contributory negligence, which has already been fully pleaded, is demurrable, and may also be stricken out on motion as surplusage.

Holstein & Barrett and Emerson McGriff, for plaintiffs.

W. E. Hackedorn and John B. Cockrum, for defendants.

BAKER, District Judge. The plaintiff has interposed a demurrer to the second and third paragraphs of defendant's answer. The complaint, which is in four paragraphs, alleges that the plaintiff sustained serious and permanent injuries, without fault or negligence on her part, from the negligence of the defendant, while she was crossing its track on one of the principal streets of Portland, Ind. The first paragraph of answer is a general denial. The second par-

agraph is addressed to each paragraph of the complaint, and alleges that the plaintiff ought not to recover in this suit, because the negligence and want of ordinary care on the part of the plaintiff proximately contributed to cause the accident and injuries of which the plaintiff complains, and because the plaintiff did not, before entering upon the track, carefully look and listen for any train, cars, or locomotive that might be approaching, but, without the exercise of such care, or any care to avoid injury, entered upon said track, and received said injuries. Contributory negligence is a matter of defense in the national courts, and the facts stated in this paragraph show contributory negligence on the part of the plaintiff. This paragraph is therefore sufficient. *Berry v. Railroad Co.*, 70 Fed. 193.

The third paragraph of answer is addressed to each paragraph of the complaint. It sets up that the plaintiff, at the time she was approaching said crossing, and at the time she entered upon the same, was riding in a vehicle drawn by a horse or horses driven by one Frank Moore, to whose prudence and care or lack of the same she then and there negligently committed herself and her safety in the premises, without herself giving the matter of the safe crossing of said railroad any personal care or attention, although she was so situated that she might have done so; and that the said Frank Moore, driver as aforesaid, so in charge of said vehicle, did, without stopping or looking or listening for any approaching car or locomotive, or exercising any care in the premises to avoid injury, drive upon said track in a heedless and careless way, and thereby, and as the result thereof, said vehicle came in collision with said car or locomotive, and the plaintiff received the injuries of which she complains. In so far as this paragraph sets up the negligence of Frank Moore, it is immaterial, because it is settled by the decisions of the supreme court of this state and of the United States that the negligence of the driver is not imputable to the passenger riding with him. *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. 339; *Railway Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391. In so far as it charges negligence on the part of the plaintiff, it adds nothing to the allegations of her contributory negligence set out in the second paragraph of the answer. Whatever defense the defendant has growing out of the plaintiff's contributory negligence is fully stated in the second paragraph, and no new or material matter of defense is set up in the third paragraph. This latter paragraph of answer would have been stricken out on motion as surplusage, and in such case it is no error to eliminate it by sustaining a demurrer to it. The demurrer to the second paragraph of answer is overruled, to which ruling the plaintiff excepts; and the demurrer to the third paragraph of answer is sustained, to which ruling the defendant excepts.

GRAND TRUNK RY. CO. OF CANADA v. COBLEIGH.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS—DUTY TO LOOK AND LISTEN.

In an action against a railroad company for alleged negligence in running over the plaintiff while crossing its tracks at a highway crossing, the defendant is entitled to have the jury specifically instructed as to the duty of the plaintiff, under such circumstances, to look and listen for a train, before attempting to cross the track, especially when the plaintiff's own testimony suggests that he may have been negligent in this respect; and a general charge that the plaintiff was bound to act as a prudent man would do under the circumstances, leaving it for the jury to fix the standard of prudence, is not sufficient.

In Error to the Circuit Court of the United States for the District of Vermont.

This was an action by Wayne Cobleigh against the Grand Trunk Railway Company of Canada to recover damages for personal injuries. The plaintiff recovered a verdict. A motion for a new trial was denied (75 Fed. 247), and the defendant now brings error to review the judgment against it.

A. A. Strout, R. N. Chamberlin, and C. A. Hight, for plaintiff in error.

Bates & May, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

The action was brought to recover damages for injuries sustained by the plaintiff by the alleged negligence of the defendant. While driving his team over the defendant's tracks where they intersected a public highway in the town of Stratford, N. H., he was struck by one of the defendant's trains. The negligence imputed was the failure of the defendant to sound the whistle and ring the bell upon the locomotive, as required by the statutes of the state. Error is assigned of the refusal of the trial judge to instruct the jury as requested in behalf of the defendant. The assignments of error present the single question whether the rulings of the trial judge in respect to the issue of the plaintiff's contributory negligence were correct.

It appeared upon the trial that the accident took place on a November day, about noon, when there was a snow storm. The general course of the defendant's railroad was substantially north and south, and that of the highway was substantially east and west, the intersection being at practically a right angle. The plaintiff was on his way from the nearest village to his home, which was about four miles beyond the crossing, proceeding westerly, driving a pair of horses harnessed to a farm wagon. Along the highway easterly of the crossing, for a distance of about 1,200 feet, there was an unobstructed view of the railway track to the southerly as far as the station house and beyond. The station house was

about 90 rods southerly from the crossing; and from the crossing to this building, and to a considerable distance southerly beyond, the railroad track ran upon an embankment higher than the adjacent land at either side. As the train which struck the plaintiff approached the semaphore located southerly from the station house, the whistle of the locomotive was blown. The plaintiff testified that when he was about 35 rods easterly from the crossing he heard this whistle; thought it was sounded at the semaphore, and supposed it to be a signal from a train coming from the south; that he knew that there was an express train from the south due at about that time, which did not stop at the station house, but that he gave the matter no thought. He further testified:

"After I heard the whistle, I kept driving along until I got within, I should judge, eight to twelve rods from the track, and I stopped my team to see if I could see the train. I had heard it whistle distinctly. There was quite a bluster of snow coming directly in my face that blinded my view of the train, and I could not see it, and thought it had stopped. I started the team to go. I thought I could have ample time before they could get up steam to get by the tracks. The horses started into a trot. The first thing I knew after I started them, just as they was going to or did strike the track, the off mare threw up her head, and snorted, and I looked, and it looked as though the engine was coming right across into my lap, and I hollered and slapped the horses. They struck me. That is all I knew about it."

A witness for the plaintiff, who was proceeding along the highway in the same direction with the plaintiff, and about 30 rods behind him, testified that he saw the train coming, and when plaintiff was some 15 or 20 rods from the crossing saw the plaintiff's horses were prancing; that he thought plaintiff did not see the train, and would have trouble with his horses. The testimony of other witnesses who were in the vicinity of the crossing at the time tended to show that the snow storm was not such as to obscure appreciably seeing the train a long distance away as it approached. Testimony was given tending to show that the train approached the crossing at a very high rate of speed, and did not give the statutory signals. Upon the question of the plaintiff's contributory negligence the trial judge instructed the jury as follows:

"So you see that, although the railroad company brought this upon him, if he had a share in it, and contributed to it, he was in fault. In that view it becomes necessary to look at what would be a fault on his part. This is to be looked at in view of all the circumstances and in view of the law. He was situated just as he was, and heard the whistle, and the situation was as the evidence has shown it to be, and the law of the state of New Hampshire required that these two long and two short whistles should be given, and the bell be rung all the way. He had a right to rely on that being done. He had a right to expect that the law would be complied with. Now, take it altogether, in view of what he had a right to expect about that, in view of what he could see if he had looked, in view of what he could hear if he had listened, in view of the storm of snow and wind then going on as has been described,—look at the whole thing, and see if he did anything that a prudent man would not have done, or omitted anything that a prudent man would not have omitted, that brought this upon him. You know what a prudent man is. I do not qualify it one way or the other. But being right in his place, as is shown by the evidence; and in view of what he had a right to expect from the train; his knowledge that the railroad was there; the difficulty he had in seeing, bundled up as you think he was, to hinder his hearing; stopping, and doing just exactly what the evidence shows he did,—did he act prudently? If he did, that does not hinder his recovering. If he did not,—if his doing what he

ought not to have done, or failure to do what he ought to have done, brought this upon himself, contributed to what happened,—then he is not entitled to recover; that is, contributed substantially, so that when you look at it you can say that, although the railroad company was in fault, he was too, and his fault helped the fault of the railroad company to bring this upon him.”

The defendant requested the following instructions, among others:

“(3) That it was the duty of the plaintiff, after his attention had been called to an approaching train, to look and listen for such train at such distance from the crossing as to enable him to ascertain whether or not he could safely pass over the same without collision. And that, if they find that he did not so look and listen, he would be guilty of such contributory negligence as would prevent his recovery in this action, provided that such want of care contributed to produce the injury.”

“(8) That it is not sufficient to enable the plaintiff to recover, if it appears that he stopped at a distance of two hundred feet from the crossing, and being then unable, on account of a snow squall, to see the train which he had heard whistle, started his horses, and drove at a trot onto the track, without again looking for the train. If, under such circumstances, he drove onto the track, and injury ensued, he was guilty of contributory negligence, and cannot recover, even though the jury find that the defendant was also negligent in not giving proper signals for the crossing.”

These instructions were refused, and the trial judge declined to instruct the jury in respect to the issue of the contributory negligence of the plaintiff other than as he had already instructed them. The defendant duly excepted to the instructions thus given and refused.

We think the defendant was entitled to the instructions requested. The plaintiff's own testimony suggested, if it did not prove, a strong case of contributory negligence on his part. It would have justified a finding by the jury that he knew that a fast train from the south, which did not usually stop, had signaled its approach to the station; that such a train, being where the signal located it, would reach the crossing about the time he would; that he gave no thought to these circumstances, but proceeded, without paying any attention to them at all, until he reached a place about a dozen rods from the crossing; that he then stopped and looked and listened, but did not hear the train, and, owing to the snow, could not see whether one was coming or not; that he then proceeded, his horses on a trot, without any further attempt to discover whether he could cross the track without danger, until he reached the track, and was struck by the train. The jury would have been authorized to discredit the statement that he stopped at all, or that he made any effort whatever to discover whether he could safely cross, because other testimony indicated that the snow storm was not thick enough to have prevented him from seeing the train if he had looked for it at the point where he says he did; and the jury were not bound to accept his testimony, even though uncontradicted, as to any fact militating against his own prudence. A jury may properly reject any uncorroborated statement of a party to the action, even though there is no controverted testimony. *Elwood v. Telegraph Co.*, 45 N. Y. 549; *Dean v. Railway Co.*, 119 N. Y. 540, 23 N. E. 1054. If he did stop and look and listen, he was not excused from making any further

attempt to discover whether he could safely cross. According to his own testimony, at that time it was unavailing for him to look, because the snow did not permit him to see. If he had looked and listened again, stopping or not, when nearer the crossing, in all probability he could have seen the approaching train. If this is so, his omission to look again was negligence. The law imposed upon him the obligation of both looking and listening, and required him to avail himself of all his faculties for self-protection. The rule of the adjudged cases is almost universally expressed in the proposition that a person about to cross a railroad track, whether upon a public highway or elsewhere, is bound "to listen and to look." As expressed by this court in *Railroad Co. v. Blessing's Adm'r*, 35 U. S. App. 208, 14 C. C. A. 396, and 67 Fed. 280, the rule is that a person "who is about to cross a railroad track is bound to listen and look in order to avoid danger; and if he fails to do so, or if, doing so, and seeing the danger, he persists in the attempt, he is guilty of negligence that will defeat any recovery if he is injured." He does not relieve himself from the imputation of negligence by looking when he cannot see, and omitting to look again when he could see, and avoid danger. In his instructions the trial judge did not give the jury any definition of contributory negligence beyond the statement that it consisted in the omission to use the care of a prudent man. We think the defendant was entitled to the benefit of a specific instruction defining the rule of contributory negligence applicable to the case of a person about to cross a railway track. In view of the instructions given and those which were refused, the jury were at liberty to adopt their own standard of prudent conduct, and accept one less rigorous than that adopted by the courts. The first of the requests refused presented the general rule which should have been given to the jury for a guide. The second presented a rule specifically applicable to a state of facts which they would have been warranted in finding established by the evidence.

For these reasons we think the judgment should be reversed, and it is ordered accordingly.

MEYDENBAUER v. STEVENS et al.

(District Court, D. Alaska. February 13, 1897.)

No. 545.

1. MINERAL LAWS OF THE UNITED STATES IN ALASKA.

Act Cong. May 17, 1884, providing a civil government for Alaska (23 Stat. 24, Supp. Rev. St. p. 433), extends the mineral laws of the United States to said territory.

2. SAME—LODE CLAIMS—DIMENSION AND FORM.

Under the federal statute a lode claim cannot exceed 1,500 feet in length by 600 feet in width, and should be in the form of a parallelogram having its side lines equidistant from the center of the lode with end lines parallel to each other.

3. SAME—LODE DEFINED.

A lode is a zone, belt, or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics, viz.: (1) It

must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute.

4. SAME—DISCOVERY.

The finding of such a belt, zone, or body is a discovery, within the meaning of the statute, and will authorize the location of a lode claim.

5. SAME—LOCATION—REQUIREMENTS OF THE STATUTE.

In locating a lode claim all that the statute requires is that the location shall be distinctly marked on the ground so that its boundaries can be readily traced.

6. SAME—QUESTION OF FACT.

Whether any markings have been made, and whether they are such that the boundaries of the location can be readily traced, are questions of fact.

7. SAME—LOCAL RULES—JUDICIAL NOTICE.

Local rules and regulations of miners, although recognized by the statute, are not subjects of judicial notice, but must be presented with the evidence in the case.

8. SAME—RECORD OF LOCATION.

The statute does not require any record of location, but when one is made it prescribes what the same shall contain, viz. the name of the locator, the date of location, and such a description of the claim by proper references as will identify the claim.

9. SAME—PURPOSE OF RECORD.

The principal object of the record of the location is the identification of the claim; and if, considering everything it contains,—the name of the locator, the date of the location, and the description by reference to some natural object or permanent monument,—the claim can be identified, the record is sufficient.

10. SAME—NOTICE OF LOCATION.

No notice of location is required by the statute, but when the same is posted on the ground it may be considered as a marking to aid in tracing the boundaries of the location.

11. SAME—RECORD AS NOTICE.

When a notice of location contains a description of the claim, and is recorded, it operates as constructive notice that the locator claims the ground described.

12. SAME.

The description of the location as shown by the record ordinarily will bind the locator as to the locus of the claim.

13. SAME—MONUMENTS CONTROL DISTANCES AND COURSES.

But where the distances and courses set out in the description as recorded vary from the monuments or markings made on the ground, the latter prevail, and will determine the locus of the claim.

14. SAME—TITLE OF THE UNITED STATES NOT TO BE CONSIDERED—REV. ST. U. S. § 910.

By this section no possessory action shall be affected by the paramount title of the United States, but each case must be adjudged by the law of possession.

15. SAME—PRIOR LOCATION.

The effect of a valid location is to segregate from the public lands the ground located, and the prior location gives the prior and better right.

16. SAME—RIGHTS OF LOCATOR.

A valid location vests in the locator the exclusive right of possession and enjoyment of the ground located, together with all lodes therein.

17. SAME—EJECTMENT—MERE INTRUDER.

The maxim that the plaintiff must recover on the strength of his own title does not apply in the case of a naked trespasser or intruder, although the party in possession may have a defective location. In such case the latter's possession alone is sufficient to maintain ejectment.

This was an action in ejectment to recover a portion of a lode mining claim.

Burton E. Bennett, for plaintiff.
H. Stevens, for defendants.

DELANEY, District Judge (charging jury). This is an action commonly known in the law as "ejectment." The plaintiff brings the action for the purpose of recovering possession of a certain piece or parcel of land which he claims, and which is a part of a lode mining claim. He has introduced testimony that defendants have ousted him therefrom, and asks judgment restoring the ground to himself. It is the contention of the defendants that they are not on the plaintiff's land; but that the ground, when they took possession of it, was open and unoccupied public land, and that as such they had the right to take possession. Both parties claim possessory rights under the rules of law governing what are termed "mining claims." One of these claims is known as the "P. I." title to which is asserted by the plaintiff, and which, as he contends, is overlapped by two claims owned, as they contend, by the defendants, which claims are known as the "Golden Eagle" and the "Sky Pilot." A proper determination of the differences between these parties necessarily leads us to an investigation of the mining laws relating to the mineral lands of Alaska.

On the 10th day of May, 1872, congress passed an act opening all lands containing mineral deposits, belonging to the United States, to location, occupation, and purchase by citizens of the United States, and those who have declared their intentions to become such. By the act of May 17, 1884 (23 Stat. 24, Supp. Rev. St. p. 433), whereby a civil government was established for Alaska, commonly known here as the "Organic Act," the provisions of the mineral laws of the United States were extended to Alaska. Consequently the acts of congress, relating to the location and possession of mining claims, are the law of this territory on that subject. The act of 1872 (Rev. St. U. S. § 2319) is in part as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and un-surveyed, are hereby declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

"Sec. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10 day of May, 1872, whether located by one or more persons, may equal but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end-lines of each claim shall be parallel to each other."

"Sec. 2324. The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the

ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * *

This statute may be properly explained to you, as it is the province of the court to interpret and expound the law, while it is your duty to decide the questions of fact. It is evident from the language of the statute that this act contemplates that the claim shall be in the form of a parallelogram, having its side lines equidistant, and not exceeding 300 feet, from the center of the lode as it outcrops on the surface; and not exceeding 1,500 feet in length, and with the end lines parallel to each other. A claim of these dimensions and having this form will meet the requirements of the statute. In regard to the term "lode" or "vein," I may say that these words have been given a great many definitions by the courts; but perhaps among them all there is none entitled to greater weight than the one given by Mr. Justice Field, of the supreme court of the United States, who, in consequence of his long experience and eminent services on the bench, now covering a period of over 40 years, including his service in the courts of California and the supreme court of the United States, is considered by both bench and bar a very high authority. In *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548, Judge Field, in delivering the opinion of the court, discussed the question as to what constituted a lode at great length, and came to the conclusion:

"That the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes * * * all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition has been approved and followed in a large number of cases. The supreme court of the United States, in *Mining Co. v. Cheesman*, 116 U. S. 536, 6 Sup. Ct. 484, after citing this definition with approval, also defines a lode as follows:

"A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode. * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

In addition to these definitions, I will direct your attention to two characteristics mentioned in the statute, which are essential to and inherent in the formation of a lode. You will observe that the statute uses the language "quartz or other rock in place." By the phrase "in place" congress evidently intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of quartz or rock simply lying or resting upon the earth's surface without any walls, and also pieces or boulders detached from the earth's crust, commonly called "float," and usually found in the mountain gulches and along the beds of streams in a mineral country. The quartz or rock designated as "in place" must be suspended between, or lie within, or be inclosed by walls of rock constituting the general mass of the earth's crust in the

immediate vicinity of the zone or belt. "The zone may be very thin, and it may be many feet in thickness, or thin in places,—almost or quite 'pinching out,' as miners term it,—and in other places widening out into extensive bodies of ore." Uniformity of structure in the formation of the zone is not required, as it may narrow down until very thin, and then suddenly expand or swell out, and as suddenly contract, forming what miners sometimes call "kidneys"; but if it be held in place as I have described, and continuous in its formation between the country rock, it possesses one of the characteristics necessary to constitute a lode. The other necessary characteristic is that the belt or zone must bear some of the minerals or valuable deposits mentioned in this statute. A body of quartz or other rock in place might have the most clearly-defined walls, be of very great width, continue in its strike for a long distance, and go down to very great depth through the earth's crust, but, if totally barren of minerals, it would not be a lode. It is not necessary, however, that the minerals or valuable deposits shall be evenly distributed throughout the zone or belt. It may carry pay streaks near either side or in the center of the lode. In places the zone may be nearly barren of mineral, and in others disclose pockets immensely rich in the precious metals. Areas of the lode may carry ore of a very low grade, while others contain bands or shoots heavily impregnated with mineral. It is sufficient if the zone or belt, as a whole, bears any of the valuable deposits mentioned in the statute. Whenever the two conditions I have mentioned are found together,—that is, (1) quartz or rock held in place by the adjacent country rock, and (2) the presence therein of gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,—there is a lode. The finding upon the public lands of the United States of such a belt or zone as I have described is a discovery, within the meaning of this statute, and will authorize the location of a lode claim.

Your attention is now invited to the language of the statute concerning the location, which is as follows: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." This is all the statute requires. The law does not state how the markings shall be made, the kind of markings, or in what particular place or places on the claim they shall be made. Stakes or posts, or piles of stone and bowlders, are markings; blazing trees along the boundaries of the claim, or at the corners thereof, is a marking; cutting away undergrowth, or making a trail through the timber along the sides or ends of the claim, putting up a stake at the point of discovery, blazing stumps, or posting a notice on the ground, placing such notice in a tin can and attaching it to a stake, fastening such notice to a tree, or placing it in a box or frame,—such as has been offered in evidence here,—are all markings. I may say here that we are trying this case exclusively within the laws of the United States, and, while the local rules and regulations of miners are recognized by the statute, on the trial of causes in court, unless they are produced and admitted in evidence, they cannot be considered. In other words, courts do not take judicial notice of the local rules and regulations of mining districts

or camps, and therefore in this case we are only to consider the provisions of the federal statute, as no local rules are before the court.

In considering the question of location, the court cautions you not to confound the location with the record of location, as has sometimes been done in the courts. The statute does not require any record of a location; but when a record is made the law provides that it shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. As the records of the conflicting claims in this case have been introduced in evidence, it is proper for me to instruct you upon the subject of records of mining claims. The substance of the statute upon this subject is that the record must contain (1) the name of the locator; (2) the date of the location; (3) a description of the claim, and such description must refer to some natural object or permanent monument such as will identify the claim. A mountain, a hill, a ridge, or hog's back, a butte, a cañon, a gulch, a ravine, a stream, a waterfall, a cascade, a lake, an inlet, bay, or arm of the sea, is a natural object; and stakes, posts, monuments of stones or boulders, shafts, drifts, tunnels, open cuts, and well-known adjoining claims, especially if patented, are all permanent monuments. The chief purpose of the record is to identify the claim, and a reference in the record of the location of a mining claim to any natural objects or permanent monuments, like those I have enumerated, is sufficient, if such reference will identify the claim. Regarding notices of location, you are instructed that the law does not require that such a notice shall be either posted on the ground or recorded. Such a notice, however, is one kind of a marking when posted on the ground; and, when containing a description of the ground located, and placed upon the record, becomes constructive notice to the world that the locator claims the ground described in the record. The description of the location as appears from the record is also binding on the locator with this exception: If the calls as to distances and courses set out in the description vary from the markings actually made on the ground, the latter are to prevail, as it is the markings on the ground which establish the boundaries of the claim in contemplation of the statute. To illustrate: If the miner, in describing his claim in his notice as recorded, should call for 1,500 feet E. S. E., and it should subsequently appear from posts or monuments or other markings on the ground that the distance was 1,400 feet, and the course S. E., the monuments or markings would control the location of the claim as against the description in the notice and record. Therefore, while you have the right to take into consideration notices of location actually posted on the ground as being one kind of a marking, and have also, for the purpose of identifying the claims or either of them, the right to consider the record of such notices, and the descriptions therein set forth, still, if you are satisfied from the evidence that the distances and courses set out in the description, as shown by the record, do not correspond with the markings made on the ground, then the latter must prevail, and will determine the locus in quo of the loca-

tion, regardless of any description appearing from the record. The controlling act in making the location is the marking on the ground so that the boundaries of the location can be readily traced.

You will also understand, gentlemen, that the rules of law I give you apply to both sides of this case,—to the claim known as the “P. I.” as well as to the conflicting claims known as the “Golden Eagle” and the “Sky Pilot.” What has been done as to locating these claims and recording the locations thereof, and whether there is a vein or lode within their respective boundaries, are questions of fact for you to determine from the evidence, under the definitions and instructions I have given you. Having disposed of these questions, it will become necessary for you to determine another question of fact, and apply to that question another rule of law to which I will now call your attention.

Section 910, Rev. St. U. S., provides that no possessory action between parties in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. The cause now on trial is a possessory action, within the purview of this statute. The effect of the statute is to leave the United States entirely out of consideration in actions of this kind. The position of the government is one of neutrality, and neither party can take advantage of the paramount title of the United States, either to sustain his own title or defeat that of his adversary. The law of possession mentioned in this section is that the prior location and occupation carry with them the prior and better right. The effect of a valid location of a mining claim within the instructions I have given you is to segregate or cut out the ground located from the public lands; and until the locator either abandons his claim, or forfeits it by nonperformance of the annual assessment work, the same ground cannot be located or possessed by another person. The statute (section 2322) provides that the locator shall have the exclusive right of possession and enjoyment of all the surface ground included within the lines of his location, as well as of all veins, lodes, and ledges properly belonging to the claim; hence he who holds the prior valid location is entitled to the ground comprising his claim against all the world, excepting only the United States. Therefore, gentlemen, if you find from the evidence that the plaintiff, after discovering such a lode or vein as I have defined to you, did, on or about the 26th day of September, 1895, and prior to any location or possession of the defendants, and, finding the ground unoccupied and unpossessed public land, make a location, in accordance with the rules of law I have given you, of the lode claim known as the “P. I.,” then he is entitled to hold his claim, and to recover the ground in dispute. On the other hand, if you find from the evidence that the defendants, on or about the 21st day of September, 1896, made a valid location, according to the instructions I have given you, of the claims the “Golden Eagle” and the “Sky Pilot,” and that the ground so located had not been previously located and possessed by plaintiff, but

was open and unoccupied public land, then the defendants are entitled to hold their two claims, including the ground in dispute.

Counsel for the plaintiff has requested me to give you another proposition of law with reference to possessory rights of mining claimants, and I will give it to you in substance as he has submitted it. When a person in actual and bona fide possession of a piece of government land is ousted or ejected therefrom by one who, without any color of right or title, and acting as a naked intruder or trespasser, enters thereon, and ejects the first occupant, the latter has the right to recover possession, regardless of any defects in his title. If you find from the evidence that the plaintiff was in the actual possession of the ground in dispute, and that the defendants, without color of right or title but as mere intruders or trespassers, ousted the plaintiff therefrom, the latter is entitled to your verdict, although his location may have been defective. If, however, the land was unoccupied public land, the defendants had the right to enter and take possession. The theory of the rule is that the wrongdoer cannot attack the title of his adversary, and thereby sustain his own wrongdoing. This doctrine is laid down by the supreme court of the United States in a very recent case (*Haws v. Mining Co.*, 160 U. S. 316, 317, 16 Sup. Ct. 287, 288) in the following language:

"The elementary rule is that one must recover on the strength of his own, and not on the weakness of the title of his adversary; but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed."

The court also cites the case of *Christy v. Scott*, 14 How. 282, 292, wherein the court said:

"A mere intruder cannot enter on a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But, if the plaintiff has actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

You will, however, keep in mind the evidence necessary to justify the application of this rule. If you find from the evidence that the plaintiff was in the actual possession of the ground in dispute, with or without a valid location, and that the defendants, without color of right or title, acting as naked intruders or trespassers, ousted and ejected the plaintiff from the ground in controversy, then the rule of law I have just given you, as enunciated by the supreme court, will govern the case. But, if you do not find from the evidence these facts, the rights of the parties herein must be determined by the rules of law I have given you concerning the location and possession of the ground as mining claims.

The court does not desire to review the testimony, as I doubt not you will remember all its salient points, and you are the exclusive

judges of the evidence. I will remind you, however, that the only locations in controversy here are the "P. I.," as claimed by the plaintiff, and the "Golden Eagle" and "Sky Pilot," as claimed by the defendants. I have admitted some testimony concerning the location of the "Alameda" and the old "Bear Mountain" lode claims. This was done for the reason that there is some evidence tending to show that the "Alameda" was located before either the "P. I." or the "Golden Eagle" or the "Sky Pilot," and that it adjoins the "P. I." endwise; and there is also some testimony tending to show that the "Alameda" is a relocation of the ground covered by the old "Bear Mountain" claim. The evidence concerning the two claims last mentioned was admitted to aid you in determining the exact ground covered by the other claims, and you will not consider it for any other purpose.

Verdict for the plaintiff.

KAEMPFER v. TAYLOR.

(Circuit Court, D. Connecticut. February 12, 1897.)

1. COSTS—SOLICITOR'S DOCKET FEE—FINAL HEARING.

To constitute such a "final hearing" as will authorize the taxation of a solicitor's docket fee of \$20, under section 824, Rev. St., there must be a hearing of the cause on the merits. And the mere fact that an order discontinuing a cause without prejudice provides that certain depositions filed by defendant may be used by him in any suit brought by complainant on the same cause of action does not make such a discontinuance a final hearing, within the meaning of the statute. *Manufacturing Co. v. Colvin*, 14 Fed. 269, *Wooster v. Handy*, 23 Fed. 49, and *Ryan v. Gould*, 32 Fed. 754, followed.

2. SAME.

Although the statute allows no solicitor's docket fee upon a discontinuance, yet, following the analogy of the common law, a fee of five dollars is allowed in equity.

3. SAME—SOLICITOR'S FEE FOR DEPOSITIONS.

It is not proper to tax a solicitor's fee under that portion of section 824 which allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause," unless the depositions are admitted in evidence in that cause. It is not sufficient that the court, by order, provides for their use in any future suit.

4. SAME—COPIES OF PAPERS.

A taxation for copies of papers cannot be allowed where the copies are not actually used on the trial or final hearing. *Wooster v. Handy*, 23 Fed. 49, followed.

Dyer & Driscoll, for complainant.
F. W. Smith, Jr., for defendant.

TOWNSEND, District Judge. This is an appeal from the taxation by the clerk of the following items in defendant's bill of costs: Solicitor's docket fee on final hearing, \$20; solicitor's fee on seven depositions, \$2.50,—\$17.50; disbursements for copies of patents, \$10.50. The bill, answer, and replication were duly filed, issued, and served, and proofs were taken. After defendant had closed his case, the court, upon motion of complainant for a discontinuance, made an order "that this cause be, and the same is hereby, discontinued, without

prejudice, upon the payment of defendant's costs to be taxed; and, further, that certain testimony taken on behalf of defendant, and now on file with the clerk of this court, may be used by this defendant in any suit brought by this complainant against this defendant on the patent here in suit." The conflicting cases bearing upon the question of what constitutes "a final hearing" upon which such docket fee is taxable under the provisions of section 824 of the Revised Statutes, are collected and discussed by Judge Hammond in *Louisville & N. R. Co. v. Merchants' Compress & Storage Co.*, 50 Fed. 449, which seems to have been overlooked by counsel in this case. The decisions of Judge Wheeler in *Manufacturing Co. v. Colvin*, 14 Fed. 269, of Judge Blatchford in *Wooster v. Handy*, 23 Fed. 49, of Judge Lacombe in *Ryan v. Gould*, 32 Fed. 754, and the definition of a final hearing by Judge Wallace in *Andrews v. Cole*, 20 Fed. 410, as one where "the cause has been finally determined, and its determination involved a hearing by the court," are controlling in this circuit.

It is urged on the authority of *The Alert*, 15 Fed. 620, that the order of court as to the use of depositions filed herein made this a final hearing. But the order in *The Alert* discharged the res from custody in a proceeding in rem on payment of the amount claimed by libellant and his costs. As Judge Blatchford says in *Wooster v. Handy*, supra: "Judge Benedict held that, as an order of court was necessary to obtain the release of the vessel and to cancel the libellant's stipulations, the hearing on the motion to that effect was a final hearing." Judge Blatchford, in said opinion, expressly says "that, to constitute a final hearing in equity, there must be a hearing of the cause on the merits." See, also, opinion to same effect of Mr. Justice Gray, cited and followed by Mr. Justice Brown in *Cleaver v. Insurance Co.*, 40 Fed. 863. In these circumstances the docket fee of \$20 must be disallowed. I understand, however, that while the fee bill allows no solicitor's docket fee upon a discontinuance, it has been the practice in this district, following the analogy of the common law, to allow a fee of \$5 in equity, and said sum is therefore allowed. The item for \$17.50, for seven depositions, was allowed under that portion of section 824 which allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause." These depositions, although taken in this cause, were not admitted in evidence therein. The order of court only provided for their admission in evidence in such suits as might thereafter be brought. The taxation for depositions is disallowed. The taxation for copies of patents must be disallowed, under the rulings of Judge Blatchford in *Wooster v. Handy*, supra. The copies were not "actually used on or in the trial or final hearing."

UNITED STATES v. EINSTEIN et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERIES—"DOTTED SWISSES."
 "Dotted Swisses," being white, bleached, woven, cotton fabrics in the piece, embroidered after leaving the loom by an additional process of manufacture, though not known in commerce as "embroideries," are dutiable as articles embroidered, under paragraph 276, Act Aug. 28, 1894, and not under the countable clauses of the cotton schedule.
2. SAME.
 The provision in paragraph 257, Act Aug. 28, 1894, that "cotton cloth," as used in the preceding paragraphs, shall include "all woven fabrics of cotton in the piece, whether figured, fancy, or plain," etc., does not apply to embroidered cotton cloth, which was not embroidered in the loom.

Appeal from the Circuit Court of the United States for the Southern District of New York.

James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith, for the importers.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The firm of Einstein, Wolff & Co. imported, in September, 1894, into the port of New York, embroidered cotton cloth in the piece, known as "dotted Swisses," which were returned by the local appraiser as "cotton embroidery," and duty was assessed thereon by the collector at 50 per cent. ad valorem under the provisions of paragraph 276 of the tariff act of August 28, 1894. So much of the paragraph as relates to the subject is as follows:

"276. Laces, * * * embroideries, * * * and articles embroidered by hand or machinery, * * * composed of flax, jute, cotton or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem."

The importers protested against the assessment upon the ground that the goods were dutiable under the provisions of paragraph 252-256, inclusive, in the schedule relating to cotton manufactures, of the same act, according to the number of threads to the square inch, the number of square yards to the pound, and the value per square yard. These paragraphs are generally known as the "Countable Clauses." Paragraph 254 is the one applicable to the number of countable threads in the merchandise in question. The decision of the collector was affirmed by the board of general appraisers, but their decision was reversed by the circuit court, which held that the merchandise was dutiable as cotton cloth, under the provisions of paragraph 254. The merchandise consisted of white, bleached, woven cotton fabrics in the piece, and contained between 100 and 150 threads per square inch. They were not known in commerce as "embroideries," but were embroidered by an additional process of manufacture after they left the loom. At and before the date of the act of August 27, 1894, there were known, and dealt in the trade and commerce of this country, figured woven fabrics of cotton in the piece and

fancy woven fabrics of cotton in the piece, the figures or fancy designs on which were made by the shuttle in the process of weaving the cloth, and which did not exist as plain cloth before such figures or fancy effects were made. This fact, which came into the case by stipulation, is important, in view of the new statutory definition of "cotton cloth" contained in paragraph 257 of the act of August 28, 1894, which is as follows:

"257. The term 'cotton cloth,' or 'cloth,' wherever used in the foregoing paragraphs of this schedule, shall be held to include all woven fabrics of cotton in the piece, whether figured, fancy, or plain, not specially provided for in this act, the warp and filling threads of which can be counted by unraveling or other practicable means."

The merchandise is concededly woven cotton cloth in the piece, embroidered after it left the loom, and is an embroidered "article." *Junge v. Hedden*, 146 U. S. 233, 13 Sup. Ct. 88. The question whether it is dutiable as an article embroidered composed of cotton, or as cotton cloth, as defined in paragraph 257, depends upon the meaning of the definition. The importers insist that it means woven cotton cloth in the piece, plain, or figured or fancy, however and by whatever means the ornamentation is made. The government insists that it means woven cloth which is, in the weaving, either figured, fancy, or plain, and that this construction is called for by the history and object of the new provision. The "countable clauses" in regard to cotton cloth came into the tariff acts in 1883, and have been construed by the supreme court in *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, and in *Hedden v. Robertson*, 151 U. S. 520, 14 Sup. Ct. 434. Each case related to the effect which figures and designs, which were made in the weaving, had upon the dutiable character of the cloth. In the latter case, "the goods in question were called 'Madras mull,' and consisted of woven cotton cloth, the groundwork of which was uniform, and upon which were figures or patterns woven contemporaneously with the weaving of the fabric. These figures or patterns were woven into the groundwork by means of a machine called a 'Jacquard attachment.'" The question was whether the "Madras mulls" should be classified under the "countable" provisions, or as "manufactures of cotton not specially enumerated or provided for." As they were not embroidered, the paragraph in regard to embroidered articles had no part in the case. The supreme court held that, although the figures were profusely scattered over the groundwork, so that the number of square threads differed in different parts of the fabric, yet that the ornamentation, which was woven into it, did "not change its character as cotton cloth, subject to the countable clause of the statute." The case was decided February 5, 1894, and overruled a previous decision of the circuit court, which was made in October, 1889. 40 Fed. 322. In the preparation of the new tariff of 1894, it is exceedingly probable that the definition of "cotton cloth" was introduced for the purpose of removing any vagueness in the former paragraphs in regard to the character of woven cloth. But in determining whether the words "figured" and "fancy" were intended to include an embroidered cloth which was not embroidered in the loom, reference must also be had to the embroidery par-

agraph, where embroidered articles of cotton were separately classified. The words, "not otherwise provided for in this act," are contained in each of the paragraphs under consideration, and are therefore not important in this case. We have, then, woven cotton cloth, whether figured, fancy, or plain, of which the threads can be counted, in one paragraph, and in another, embroidered cloth of cotton. It seems most reasonable that neither paragraph was intended to include the goods which had been classified in the other, and that the intent in paragraph 257 was only to describe as "woven cotton cloth" that which is plain, figured, or fancifully woven. The embroidery paragraph, 373 of the tariff act of 1890, was very like the corresponding paragraph 276 of the act of 1894, but contained the following proviso, which is omitted in the later act:

"Provided, that articles of wearing apparel and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

The importers regard the omission of this proviso as signifying that textile fabrics of embroidered cotton shall not pay the duty upon embroidered articles, but shall be classified as cotton cloth. This proviso was for the purpose of making it certain that no embroidered article of wearing apparel, or embroidered textile fabric, however named or provided for in the act, should escape an embroidery duty. The act of 1894 omitted this proviso, and therefore an embroidered article of wearing apparel, or an embroidered fabric, is not compelled to pay an embroidery duty, if it is specially or otherwise provided for elsewhere. This omission by no means decides the present question, which is whether an embroidered piece of cotton cloth is or is not included in the cotton-cloth paragraphs. The circuit court thought that the question was governed by the language of the supreme court in *Hedden v. Robertson*, *supra*. As has been said, that case did not touch the embroidery provisions, the controversy being whether a woven cotton cloth in which figures were woven should pay a duty as cotton cloth, or under the general provision in regard to manufactures of cotton not otherwise provided for. The general language in that opinion related to a controversy which is different from the one in this case. The decision of the circuit court is reversed.

UNITED STATES v. IRWIN et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—SHOTGUNS—IMPORTATIONS IN PARTS.

Gun barrels and gun stocks, with locks, etc., constituting all the parts of complete breech-loading shotguns, and so adapted to each other in the process of manufacture as to be made into complete shotguns by inserting the barrels into the stocks, are dutiable, when shipped to the same person, on the same vessel, under the tariff act of 1890, as shotguns, and not as manufactures of metal not specially provided for, though the barrels and stocks are separately packed and invoiced. *U. S. v. Schoverling*, 13 Sup. Ct. 24, 146 U. S. 76, distinguished.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for appellant.

Comstock & Brown, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an adjudication by the circuit court affirming the decision of the board of general appraisers, and reversing that of the collector of the port of New York in assessing duty upon certain importations of merchandise made by various entries during the years 1891 and 1892. The merchandise consisted of parts of breech-loading shotguns, and was classified and assessed for duty by the collector under that provision of the tariff act of October 1, 1890, subjecting to a specific and also to an ad valorem duty "all double-barrelled, sporting, breech-loading shotguns." The importers protested against the classification and assessment upon the ground that the articles of merchandise were not breech-loading shotguns but were only parts thereof, and were dutiable as manufactures wholly or in part of metal, not specially provided for. The board of general appraisers found that the merchandise consisted of parts of incomplete firearms, and that there was no evidence that they were ever assembled or brought together as entireties before importation; that metal was the component material of chief value in the gun stocks, as well as in the barrels,—and the board decided that the merchandise should have been assessed for duty under the metal provision. Upon the appeal by the government from that decision to the circuit court, further evidence was introduced. That evidence, together with such as was before the board of general appraisers, shows that many entries comprise gun barrels and gun stocks coincident in number, shipped for the importer on the same steamer, under separate invoices; the barrels being in cases by themselves, and invoiced as gun barrels, and the stocks being in cases by themselves, and invoiced as gun stocks. Thus, in the entry of August 1, 1891, there were 3 cases each containing 50 gun stocks, and 3 cases each containing 50 pairs of gun barrels. The stocks were equipped with the locks, the action, the trigger plates, and all the parts requisite to constitute a complete breech-loading shotgun upon inserting the barrels. The barrels and the stocks were marked with identifying numbers, so that the appropriate barrels could be selected for the appropriate stocks, respectively, and the two parts be united into a complete gun, merely by inserting the barrels into the stocks. There were other entries in which the barrels and stocks were shipped in separate cases, and invoiced separately, but were not coincident in number; in some entries there being more barrels than stocks, and in others more stocks than barrels. The evidence taken in the circuit court upon the appeal shows—what was not shown before the board of general appraisers—that in the manufacture of guns the barrels and stocks are made separately, and, at

various stages before completion, are assembled together and accurately adjusted. It is a matter of common knowledge that the barrels and stocks of breech-loading shotguns, when the guns are not in use, are detachable; and the ordinary sportsman's gun case is so constructed that the barrels must be detached when the gun is put into the case.

Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced separately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.

It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws.

In *Merritt v. Welsh*, 104 U. S. 694, the tariff act imposed a duty upon sugars, the rate of which was graduated according to their color, and the question was whether sugars which had been artificially colored during the process of manufacture so as to impart to them a color characteristic of a lower grade of sugars were dutiable according to their actual color or according to the normal color of sugars of that grade. The court held that the sugars were dutiable according to their actual color. After observing that congress had fixed the dutiable grade of sugars by a standard of colors which originally supplied a valid test of their real grade, and that in the new processes of manufacture the standard had come to be a precarious one, the court said:

"It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does, namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred."

In *Seeberger v. Farwell*, 139 U. S. 608, 11 Sup. Ct. 650, and in *Magone v. Luckemeyer*, 139 U. S. 612, 11 Sup. Ct. 651, the tariff act imposed a duty upon dress goods composed in part of wool, and a higher duty upon goods composed wholly of wool; and the question was whether woolen goods, into which, during the process of manufacture, a small percentage of cotton threads had been introduced for the purpose of securing their classification for duty as goods composed in part of wool, were subject to that duty, or to the duty upon woolen goods. The court held that the goods were subject only to the lower duty and adopted the view—

"That manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small per-

centage of cotton, for the purpose of making them dutiable at the lower rate," and that, "although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved by the admixture of even a small percentage of cotton, if they could do so."

As was declared in *Worthington v. Robbins*, 139 U. S. 341, 11 Sup. Ct. 583:

"In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported."

Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments merely for the purpose of escaping the duty upon shotguns. This conclusion is enforced by the case of *U. S. v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24. In that case gun stocks with mountings complete, ready for attachment to barrels, were imported. The importing firm had arranged with another firm to import the barrels. It was held that the articles were not subject to duty as shotguns. The court said:

"The intent of the importers to put the gun stocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gun stocks as a separate importation."

The court added:

"The dutiable classification of the gun stocks imported must be ascertained by an examination of them in the condition in which they are imported."

In the *Schoverling Case* it did not affirmatively appear that the stocks and barrels had been assembled together previous to importation, and in this respect that case differs from the present case. But surely it cannot be that the physical act of attaching and then detaching the stocks and barrels before exportation can change the dutiable character of the goods. Many articles made by machinery are made in separate parts, and are never put together as an entirety until it becomes desirable to use them. Nevertheless they are completed articles, in a commercial sense, and for all practical purposes. A breech-loading shotgun is a complete article in the sportsman's hands when he has detached the barrels for a temporary purpose. It is no less one notwithstanding the parts have never been assembled, provided they have been made so as to be attachable and detachable without requiring any adjustment. The *Schoverling Case* does not decide that when the stocks and corresponding barrels are imported together, shipped by the same vessel for the same importer, and entered at the customhouse at the same time, duty is to be assessed upon the fragmentary parts. Under such circumstances, we think the parts are dutiable as a whole. The form of invoice which the importer may adopt, or the mode of packing which he may adopt, are immaterial

matters. If he prefers to send the barrels in one case and the stocks in another, he is at liberty to do so, but the fact that they are packed in separate cases cannot affect their dutiable character. Machines and many cumbersome articles are frequently transported with the sections or parts in different packings. If the importers had procured a policy of insurance against loss by fire or the perils of the sea, describing their goods as "shotguns on board the steamship Obdam," the policy would have covered the stocks and barrels in separate cases.

When the barrels and stocks are shipped upon different vessels, it may happen that they can never be assembled together again as a complete gun. The dangers of navigation and other contingencies may intervene to prevent it. It is not for the customs officers, in imposing duties, to speculate upon these contingencies. They must take the articles as they find them to be upon examination. If they cannot, by assembling them together, discover that they are really a different thing, it is their duty to classify them as the article they purport to be.

Undoubtedly, with this understanding of the law, importers will be able to escape the duty upon shotguns by sending the stocks and barrels in different vessels, and entering them at different times. The remedy, however, is with congress; and it may be that such a practice upon the part of importers would expose them to the penalty of a condemnation of their merchandise under that statute of congress relating to entries of merchandise by means of any "false or fraudulent practice or appliance."

These conclusions lead to a reversal of the decision of the court below.

SELBACH et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 18, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—ALIZARINE.

A substance which responds to the alizarine tests, and which is commercially known and dealt in as "alizarine," or "alizarine yellow," is free, under paragraph 595 of the tariff act of March 3, 1883, as alizarine, natural or artificial, though not chemically alizarine.

This was an application by E. Selbach & Co. for a review of the decision of the board of general appraisers, affirming the decision of the collector of the port of New York as to the classification of certain merchandise. The merchandise in question was invoiced as "alizarine blue," "anthracene brown," and "anthracene yellow." The collector assessed duty thereon at 35 per cent. ad valorem, under paragraph 82 of the tariff act of 1883, as coal-tar colors. The importers' protest claimed that the merchandise was entitled to free entry, as alizarine, natural or artificial.

Hartley & Coleman, for the importer.
J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question is anthracene or alizarine yellow, claimed to be free, as alizarine,

natural or artificial, under paragraph 595 of the tariff act of March 3, 1885, but assessed for duty under paragraph 82 of said act as a coal-tar color or dye, by whatever name known, not specially provided for. That this article is not chemically alizarine seems to be immaterial. The evidence is undisputed that it responds to the alizarine tests, and was commercially known and dealt in as "alizerine" or "alizerine yellow" at the time of the passage of said act. The decision of the board of general appraisers affirming the action of the collector is reversed.

KAUFMANN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 18, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—MILLET PULP.

Millet pulp, from which the hull has been removed, though adapted for use as food and not for agricultural purposes, and which will not germinate, is dutiable under paragraph 206½ of the tariff act of 1894, as seeds. *Boving v. Lawrence*, 1 Blatchf. 616, Fed. Cas. No. 1,712, followed.

Comstock & Brown, for importers.

Henry C. Platt, for the United States.

TOWNSEND, District Judge (orally). The merchandise in question is millet pulp from which the hull has been removed. It will not germinate, and is not used for agricultural purposes. It is used for bird food or in the preparation of food for man. It was assessed for duty under section 3 of the tariff act of August 28, 1894, as a nonenumerated manufactured article. The importer protested, claiming that it was dutiable under paragraph 206½ of said act, directly or by similitude to "garden seeds, agricultural seeds, and other seeds, not specially provided for." Were it not for the decision of Mr. Justice Nelson in *Boving v. Lawrence*, 1 Blatchf. 616, Fed. Cas. No. 1,712, I should sustain the decision of the board of general appraisers. The product in question is not included in the common understanding of the word "seeds," nor in the meaning given to "seeds" in the dictionary. It has been advanced by manufacture so as to pass from the group of garden or agricultural seeds to the group of food products. It is not only dissimilar to such seeds in condition and the purpose to which it is applied, but it has been, by a process of hulling, deprived of the germinative quality essential to its use as garden or agricultural seeds. The article is, however, commercially known and dealt in as seeds. In *Boving v. Lawrence*, supra, the court held, construing a similar provision, that, as the articles had always been bought and sold and known in trade as "seeds," they were free under the clause, "garden seeds and all other seeds not otherwise provided for." The decision of the board of general appraisers is therefore reversed.

UNITED STATES v. GIESE.

(Circuit Court, S. D. New York. February 18, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—CARBONATE OF POTASH.

The enumeration, in paragraph 595 of the free list of the tariff act of 1894, of "potash, crude, carbonate of, or black salts," includes the three articles, crude potash, carbonate of potash, and black salts; and carbonate of potash, from which impurities have been removed by leeching, is accordingly entitled to free entry.

Hartley & Coleman, for importer.
J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The article in question is carbonate of potash. It was classified for duty under paragraph 60 of the tariff act of August 28, 1894, as a chemical salt not otherwise provided for. The importer protested, claiming it was free under paragraph 595 of the free list of said act, which is as follows: "Potash, crude, carbonate of, or black salts." The board of general appraisers sustained the protest, and the United States appeals. This product has been subjected to a leeching process, whereby certain impurities have been removed. It is neither crude potash, crude carbonate of potash, nor black salts. Counsel for the United States concludes that this provision should be read with the word "crude" qualifying the whole paragraph, and that congress intended thereby to admit free of duty only one product, namely, crude carbonate of potash, also known as "black salts." The importer has proved, and the board of general appraisers, sustaining his protest, has found, that there are distinct articles known respectively in trade and commerce as "crude potash," "carbonate of potash," and "black salts." I think congress intended, by this language, to provide that each of these articles should be free. The decision of the board of general appraisers is affirmed.

H. B. CLAFLIN CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 18, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—NONMETALLIC PINS.

The word "metallic," in paragraph 170 of the tariff act of 1894, qualifies the whole paragraph; and pins which are not metallic are not within its provisions.

Comstock & Brown, for importer.
J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). It is admitted or stipulated as to the articles in question, as follows:

"(1) The goods were imported after August 28, 1894, and are finished articles of collodion. (2) They are popularly and commercially known as hairpins. (3) They are not pins metallic, and are not commercially known as jewelry."

They were assessed for duty at 45 per centum ad valorem, under paragraph 15 of the tariff act of 1894, as finished articles of collodion.

The importer has protested, claiming that they were dutiable as pins, under paragraph 170 of said act, which is as follows:

"Pins metallic, including pins with glass heads, hairpins, safety pins, and hat, bonnet, shawl and belt pins, not commercially known as jewelry, 25 per centum ad valorem."

The only material difference between this paragraph and paragraph 209 of the act of 1883 is in the change of location of the word "including." I do not think that congress thereby intended to change the effect of the word "metallic" as qualifying the whole paragraph. The decision of the board of general appraisers affirming the action of the collector is affirmed.

UNITED STATES v. E. L. GOODSSELL CO.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—IMPORTS UNDER PRIOR LAWS.

Merchandise, imported before the tariff act of 1894 went into effect, but which remained in the custody of the customs officers, and was not delivered to the importer until after that act went into effect, is subject to the rates of duty imposed by that act.

This was an application by the collector of the port of New York for a review of the decision of the board of general appraisers, reversing the decision of the collector as to the rate of duty on certain lemons imported by the E. L. Goodsell Company. The permit to land and deliver the goods was not indorsed by the examiner until August 29, 1894. The enacting clause of the tariff act of 1894 imposes duties on articles "imported from foreign countries or withdrawn for consumption" after its passage. The treasury circular of September 20, 1894, says that, "if it shall appear that the goods are in customs custody on the 28th ult., and that no permit had been presented for the delivery thereof, the same would fall under the new act." The entries of the goods were made on August 23 and 25, 1894, and the collector assessed duty under the tariff act of 1890, which was in force at that date.

Henry C. Platt, Asst. U. S. Atty.

W. W. Smith, for importer.

TOWNSEND, District Judge (orally). On August 23, 1894, the merchandise in question arrived at the port of New York, and was entered for duty, and a written permit to land, designating it for examination on the wharf, was issued. It was examined August 29, 1894, and the entry was liquidated September 8, 1894. The importer protested, claiming that it was dutiable under the provisions of the tariff act of 1894. The board of general appraisers sustained the protest, and the United States appeals.

The tariff act of 1894 went into effect on August 28, 1894. On that day the merchandise was in the custody of the customs officers. The contemporaneous construction of said act by the treasury department followed by said board herein seems to be in harmony with

the decision of the supreme court of the United States in *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, construing similar provisions in the tariff act of March 3, 1883. I am not sufficiently familiar with the term "withdrawn for consumption" to satisfactorily determine what scope it would be given in said act. If it is to be strictly construed as applied to merchandise entered in a government warehouse, and afterwards withdrawn therefrom, the merchandise in question was not so withdrawn, and the act of 1894 does not apply. But if, as contended by counsel for the importer, it may mean, generally, goods withdrawn from the control of the customs officers, and delivered into the custody of the owner, then I think it must have been the intent of congress to provide that merchandise which, as in this case, did not come under the control of the owner until after August 28, 1894, should pay duty according to the provisions of the act of 1894. In these circumstances the doubt, under the familiar rule, will be resolved in favor of the importer. The decision of the board of general appraisers is affirmed.

WIEBUSCH et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—FLAX MEASURING TAPES.

Measuring tapes of flax, in cases of leather and metal, flax being the component material of chief value, are dutiable under the tariff act of 1883 as manufactures of flax or of which flax is the component material of chief value, and are subject to the duty of 40 per cent ad valorem imposed by paragraph 336 of the act, and not to the duty of 35 per cent. imposed by paragraph 334.

This was an application by Wiebusch & Hilger for a review of the decision of the board of general appraisers as to the assessment of duties on certain merchandise imported by them, consisting of linen measuring tapes in cases of leather and brass, flax being the component material of chief value in the completed articles.

Paragraph 334 of the tariff act of 1883 imposes a duty of 35 per cent. ad valorem on "brown and bleached linens, * * * or other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, not specially enumerated or provided for." Paragraph 336 imposes a duty of 40 per cent. ad valorem on "flax or linen thread, * * * and all manufactures of flax or of which flax shall be the component material of chief value, not specially enumerated or provided for."

Comstock & Brown, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are measuring tapes. The importer contends that they should be classified for duty under paragraph 334 of the tariff act of 1883; the United States contends that paragraph 336 should be applied. Each of these paragraphs provides for "manufactures of flax, or of which flax shall be the component material of chief value, not specifically

enumerated or provided for." It is conceded that these articles fall within said classification. There would be considerable force to the argument on behalf of the importer claiming the application of the doctrine of ejusdem generis, were it not for the provisions in said act that, where two or more rates of duty should be applicable, the articles should be classified under the highest of said rates. These provisions were construed and applied to similar articles by Judge Lacombe in *Dieckerhoff v. Robertson*, 40 Fed. 568. The highest rate of duty was imposed therein, and it will accordingly be imposed in this case. Let a judgment be entered accordingly.

RUSSELL v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—IMPORTATIONS FOR TEMPORARY USE—FAILURE TO RE-EXPORT—RATE OF DUTY.

Articles admitted free of duty for temporary use, under paragraph 596 of the tariff act of 1894, do not become subject to any duty until the importer, within or at the end of the period allowed by law, has elected not to export them; and are then subject to the rate of duty in force at such time, and not to that in force when they were imported.

Comstock & Brown, for importer.
Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). On October 27, 1894, Miss Lillian Russell imported into the port of New York certain theatrical woolen wearing apparel, which was admitted free of duty for temporary use upon bonds being given in accordance with the provisions of paragraph 596 of the tariff act of August 28, 1894. The entry was liquidated May 3, 1895. The time for exportation was extended for six months. The duties assessed under provisions of paragraph 396 of act of 1890 were paid October 30, 1895, under protest, which protest was lodged with the collector November 1, 1895. The board of general appraisers, affirming the action of the collector, overruled the protest. The importer appeals, claiming that the merchandise did not become subject to duty until after January 1, 1895, by virtue of the provisions of paragraph 297 of the tariff act of 1894, which are as follows: "The reduction of the rates of duty herein provided for manufactures of wool, shall take effect Jan. 1, 1895." I think the importer is correct in this contention. It does not appear what form of bond was exacted by the collector, but upon the assumption that he fulfilled his legal duty it was "for the payment to the United States of such duties as may be imposed upon all such articles as shall not be exported within six months (or one year) after such importation." Section 596 expressly provides that "for temporary use * * * these articles shall be admitted free of duty." During the period of six months, or one year, the importer had her election to determine whether she would or would not export said articles, and, until she exercised such election, the collector, at least in the absence of proof of bad faith, had no au-

thority to impose any duty on such free goods. If during or at the end of said period she elected to assert her prerogative, and change her mind, then, and not until then, did the collector acquire the right to impose a duty upon such articles as should not be exported. As the reduction of rates of duty provided for manufactures of wool took effect January 1, 1895, such rates were the ones imposed by law when these articles first became dutiable. The decision of the board of general appraisers is reversed.

WIEDERER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—MIRROR PLATES.

Mirror plates, not framed, but intended to be put in frames or cases, are dutiable as mirrors, under paragraph 102 of the tariff act of 1894.

Comstock & Brown, for importers.

Henry O. Sedgwick, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are commercially known as "mirror plates." They were assessed for duty as mirrors, under paragraph 102 of the tariff act of August 1, 1894. The importer protests, claiming that they are dutiable, under paragraphs 92 and 97 of said act, as "cylinder glass, polished and also beveled, not exceeding 16x24 inches square." The word "mirror" has no commercial or trade meaning. There is no such trade term as a "framed mirror," or a "mirror with frame," or "mirror without case." The word must be taken in its ordinary sense. The evidence shows that these plates are sold to be put in frames or cases. These plates are mirrors without frames. There is considerable evidence that they are known as "mirrors." They are not parts of mirrors. The addition of a frame or case neither changes their character or use nor advances them into a new article. This conclusion renders it unnecessary to consider the further forcible contention of counsel for the United States that the paragraphs relied upon by the importer do not cover this class of silvered cylinder glass articles. The decision of the board of general appraisers is affirmed.

BORGFELDT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—GLASS ATOMIZERS.

Atomizers, consisting of ornamented glass vessels, with metal and rubber tops which are essential parts of the articles, the glass being the most valuable component, are dutiable under paragraph 102 of the tariff act of 1894 as manufactures of glass or of which glass is the component material of chief value, and not as articles of glass or glass bottles, under paragraphs 88-90.

This was an application by George Borgfeldt & Co. for a review of the decision of the board of general appraisers affirming the decision of the collector of the port of New York as to the rate of

duty on certain atomizers, consisting of bottles or vessels of glass, cut or ornamented, and surmounted with a metal top to which is attached a rubber bulb.

Comstock & Brown, for importers.
Henry S. Sedgwick, U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are atomizers. They were assessed for duty under paragraphs 88, 89, and 90 of the tariff act of 1894 as "articles of glass,—cut or ornamented," or "glass bottles." The importer protests, claiming that they are dutiable, under paragraph 102 of said act, as manufactures of glass, or of which glass is the component material of chief value. Inasmuch as the earlier paragraphs of said act contain exhaustive provisions for specific articles of glass, and inasmuch as India rubber and metal are substantial essential elements in the construction of these completed articles whereof glass is the component material of chief value, I think they should have been classified under the specific provisions of paragraph 102, which was apparently inserted in order to provide a different rate of duty for a great variety of articles made in part of glass and in part of other materials. The decision of the board of general appraisers is reversed.

WARREN CHEMICAL MANUF'G CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—FREE LIST—COAL-TAR PRODUCTS.

Coal-tar products, not shown to be oils in fact or to be chemically, commercially, or commonly known as distilled oils, are free, under paragraph 443 of the tariff act of 1894, as products of coal tar not specifically provided for, and are not dutiable as distilled oils, under paragraph 60.

Comstock & Brown, for importers.
James T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question is known as "coal-tar product" or "dead oil." The finding of the board of general appraisers that it is a product of coal tar is supported by the preponderance of the evidence, and is affirmed. It was assessed for duty at 25 per centum ad valorem, under the provision for "products known as distilled oils," in paragraph 60 of the tariff act of August 28, 1894. The importer has protested, claiming that it is free as a "product of coal tar, not a color or dye, not specifically provided for," under the provisions of paragraph 443 of said act. Counsel for the United States contends that the term "distilled oils" has in the trade a definite meaning, synonymous with "essential oils," or oils derived from vegetable substances; and that, as congress has included in paragraph 60 both the terms "essential oils" and "distilled oils," it must thereby have intended to include under the two terms something more than the commercially known distilled oils, namely, oils in fact distilled from nonvegetable

substances, such as oils distilled from coal tar. Whether the contention of the importer that the word "known" necessarily means, in this connection, "commercially known," it is unnecessary to determine. It has not been shown, however, that this article is an oil in fact, or that it is chemically or commercially or commonly known as "distilled oil." The decision of the board of general appraisers is therefore reversed, and the article should be admitted free under paragraph 443 of said act.

HANIFEN v. E. H. GODSHALK CO. et al.

(Circuit Court, E. D. Pennsylvania. December 16, 1896.)

1. PATENTS—DATE OF INVENTION—INVENTION ABROAD.

As against an infringer, the owner of a patent may, to avoid alleged anticipation or prior use, carry back the invention by proving the actual date thereof, though the same was made in a foreign country.

2. SAME.

In the case of two patents, each for a knitted fabric as an article of manufacture, one for an improvement in plush goods, and the other for "Astrakhan Cloth" (articles of distinct species), the former would not be an anticipation of the latter, even if the only change necessary to produce the Astrakhan cloth was the substitution of one kind of yarn for another.

On Rehearing.

3. SAME—KNITTED FABRICS—ASTRAKHAN CLOTH.

The Bywater patent, No. 374,888, for an improvement in knitted fabrics, whereby Astrakhan cloth is produced, *held* anticipated by the Booth British patent, No. 756, of 1881.

This was a suit by John E. Hanifen, trading as John E. Hanifen & Co., against the E. H. Godshalk Company and Edward H. Godshalk, for alleged infringement of a patent for an improvement in knitted fabrics.

Joseph C. Fraley and Wm. P. Preble, for complainant.
Strawbridge & Taylor, for defendants.

DALLAS, Circuit Judge. The bill in this case prays the usual relief for the alleged infringement by the defendants of patent No. 374,888, dated December 13, 1887, issued to Levi Bywater, assignor to the complainant, for an improvement in knitted fabrics. The claim sued upon is as follows:

"(2) A knitted fabric composed of face and back yarns of different materials, the face yarn being looped at regular intervals and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth, as described."

The only defenses which need be discussed are anticipation and prior use. The application was filed on December 22, 1883, but the plaintiff claims that the date of actual invention has been carried back to November, 1880. The defendants, on the other hand, insist, as matter of law, that, inasmuch as the date set up is of invention made in England, it would not, even if established, be material; and also, as matter of fact, that the invention of the patent has not been shown

to have been made at any place before the time at which the application for the patent was filed.

There is no statute which warrants the suggested distinction respecting inventions made abroad and those made in the United States. Section 4886 of the Revised Statutes enacts that "any person who has invented or discovered any new and useful art, * * * not known * * * before his invention or discovery thereof, * * * may * * * obtain a patent therefor." The right to a patent is thus made to depend, as to the point under discussion, wholly upon the time of invention as related to then-existing knowledge, etc., and nothing whatever is said with respect to the place of invention. The learned counsel of the defendants have argued that it would be incongruous to permit a public use and sale abroad, more than two years before application, to save a patent by establishing date of invention, when such use and sale, if it had occurred in this country, would have operated to defeat the patent. A sufficient answer to this argument would be that the supposed incongruity is one which the lawmaking power has seen fit to create, but a more satisfactory one is that no dilemma whatever is really presented. There is no inconsistency between the substantive law which provides that a foreign public use shall not, in itself, invalidate a patent, though a similar use and sale here would do so, and the law of evidence under which such foreign use and sale may be shown to fix date of invention. The same evidence which for one purpose would be inadmissible may for another be competent. An offer to prove public use and sale in a foreign country more than two years before the filing of the application would, if made to invalidate a patent, be manifestly irrelevant, for the reason that it could not have that effect; but a like offer, if made to show date of invention, would, quite as manifestly, be relevant, because it might, at least, tend to establish it. If there is anything in this state of the law which is extraordinary, I fail to perceive it. Several decisions of the patent office, extending from 1872 to 1888, have been examined. They show a consistent view of the law to have been there adopted and established, from which I certainly would not dissent without much hesitation and very full consideration. But those decisions do not relate to the precise question which is now before the court, and will not be affected by the conclusion which I have reached respecting it. They were all enunciated in interference proceedings, and the principle upon which they all rest is well stated in that one of them which is first cited below, thus:

"The distinction recognized by the law between an invention made in a foreign country and one made in the United States is this: The single fact that the invention was previously made in the United States, whether by a citizen or a foreigner, is a bar to the grant of a patent to any subsequent inventor, whether such subsequent inventor is a citizen or a foreigner, and whether he made the invention in the United States or in a foreign country; but the single fact that the invention was previously made in a foreign country, whether by a citizen of the United States or a foreigner, is no bar to the grant of a patent to a subsequent inventor, whether such subsequent inventor is a citizen or a foreigner, and whether he made the invention in a foreign country or in the United States."

In other words, what has been held is that the single fact of previous invention in the United States is but that mere previous inven-

tion in a foreign country—i. e. without patent or printed publication—is not a bar to the grant of a patent; but it has not been held that, where an uncontested application is founded upon invention abroad, the grant of a patent is invalid if a sufficiently remote date of invention cannot be established without acceptance of the time when the invention had been made in a foreign country; and it seems to me that, while the actual rulings of the patent office conform to the law, they could not, without conflicting with it, be made applicable to the present subject. They are supported by the terms of section 4923, but the inference now sought to be deduced from them is quite as plainly inhibited by section 4886. *Thomas v. Reese*, 17 O. G. 195; *Hovey v. Hupland*, 2 O. G. 493; *Chambers v. Duncan*, 10 O. G. 787; *Lauder v. Crowell*, 16 O. G. 405; *Rumpff v. Kohler*, 23 O. G. 1832; *Boulton v. Illingworth*, 43 O. G. 508.

I know of no case in which this point can be said to have been judicially determined. I believe it was not argued, and am sure it was not investigated by the court, in *Uhlman v. Brewing Co.*, 53 Fed. 485. That case seems to have been presented as one of conflict between two patents, and in such manner as to direct attention only to the inquiry whether the Stockholm or the Klein invention "was first known or used in this country." It appears to have been assumed that the inquiry stated was in that case the material one, and the particular question which is now for solution was, apparently, not then discussed, and certainly was not considered. Reference has been made to several opinions delivered by Judge Coxe, but which, when read together and in connection with the observations made upon them by the court of appeals for the Second circuit, do not, I think, indicate that the view of the law which I have expressed is at variance with that which is entertained in that jurisdiction.

In *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. 117-128, Judge Coxe said:

"The evidence of prior invention by Charles F. Brush is now to be considered. In determining this question, Faure, being at that time a citizen of France, is not permitted to claim the invention earlier than the date of his French patent, which was October 20, 1880," etc.

The learned judge did not state the ground on which he rested this proposition, and cited no authority for its support. The gist of it seems to be that Faure's French citizenship (not the place of invention) precluded him from claiming his invention as of a date earlier than that of his French patent; but, in the absence of explanation, I infer that it was section 4923, and not section 4886, which was in contemplation, and that what was really meant is that, under section 4923, the patent of Brush should not be held to be void on account of prior invention in a foreign country, "if it had not been patented," etc. When the same subject-matter was again in litigation (*Brush Electric Co. v. Electrical Accumulator Co.*, 47 Fed. 48-51), the same learned judge referred to the fact that Brush was a patentee who had produced an invention of real merit, and whom, therefore, it was the policy of the law to reward, and the duty of the courts to be sedulous to protect; and, upon appeal, the court of appeals for the Second circuit (*Electrical Accumulator Co.*

v. Brush Electric Co., 2 C. C. A. 682, 52 Fed. 130-134), speaking of Faure, said:

"His French patent was dated October 20, 1880, and, inasmuch as he was a citizen of France, he is not permitted to claim his invention before that date, as against a citizen of the United States, who, being also an original inventor, subsequently received a patent for his own invention in this country."

Thus it appears that the circuit court and the court of appeals both regarded as an important circumstance the fact that Brush was an original inventor and a patentee; and there is no difficulty in reconciling the ruling that, as against such a party, prior invention abroad, without patent or publication, is of no consequence (section 4923), with the position that as against one who is neither an inventor nor a patentee, but an infringer, the owner of a patent may show that the invention was made, though in a foreign country, at a time when it was not known or used in this country, nor patented or described in any printed publication in this or any foreign country (section 4886).

I have reached the conclusion that it was competent for the complainant to prove the actual date with reference to invention made in England; but I cannot find that he has succeeded in doing so with the requisite degree of certainty. The evidence as to what was really done in 1880-1881 is not entirely satisfactory; and it utterly fails to establish the essential fact that the precise and completed invention which was patented in this country had been, at any place, conceived by Bywater before the filing of the application. The fabric which was made in England differs materially from that of the claim, and therefore cannot be accorded any significance. This finding requires the admission of all the patents which have been set up as anticipatory; but of these only two are particularly discussed in the defendants' brief, and to them only it seems necessary to refer.

The Kent and Leeson patent is for a knitted fabric. Its specification presents one mode in which that particular fabric may be produced, and it is contended that by that mode Astrakhan cloth also can be made, by merely substituting one sort of yarn for another, to constitute what in the Bywater material is the face, and in that of Kent and Leeson is the back. This contention is not supported. I do not overlook the fact that such a feat seemed to be performed during the argument, but that Astrakhan cloth could not be commercially so made, and that the defendants themselves do not so make it, has, I think, been made evident. But, even if the only difference in the two methods of production consisted in the use of a single different yarn, yet, in my opinion, the two patents would not conflict, inasmuch as neither of them is for a process, but each is for an article of manufacture, and the articles themselves are not the same, but are of distinct species. The invention of Kent and Leeson was of an improvement in knitted plush goods, which were old. These, no doubt, they improved; but, in doing so, they did not even suggest Astrakhan cloth, and if they had made it, instead of plush, they would neither have attained their object, nor have entitled themselves to the particular patent which they obtained. I fail to

find in that patent any intimation that they had conceived the Bywater invention, and it certainly does not disclose it. In their appearance, in their uses, and in trade contemplation, the two articles are absolutely distinct. It may be conceded that the employment of a yarn not before used for the same purpose, in making an old fabric, would not amount to invention; but here a new fabric was created, and that it is which was patentable and was patented. The very ingenious argument which has been submitted for the defendants respecting this Kent and Leeson patent is substantially epitomized in one of the propositions which it affirms, viz.: "Knitted fabrics had previously been manufactured by providing them with loops of one kind of yarn, and it cannot be said to constitute invention to provide said fabrics with loops formed of a different kind of yarn." Waiving discussion of any question as to the accuracy of the statement of facts embodied in this proposition, it is enough to say of it that it is fallacious as applied to this case, because it is not propounded in the terms of the claim. If it could be truly said that knitted Astrakhan cloth had previously been made in all respects as Bywater made it, except that, in part, it had been composed of a different yarn, it might, as I have said, be conceded that his patent was erroneously issued; but that the fact, if admitted, that other knitted fabrics had been so made, would defeat it, I cannot agree.

Respecting the British patent No. 756, of February 22, 1881, to James Booth, the defendants have adduced testimony that, by following its instructions, Astrakhan cloth can be made, and their expert has said that he finds that a fabric is disclosed by it which is substantially like that referred to in the claim in suit. This evidence, if accepted without scrutiny, would, of course, be sufficient for the defendants' purpose; but when carefully scanned, and tested in accordance with well-established principles, it cannot be regarded as adequate for the overthrow of a patent. The practical knitters who have said that they have succeeded in manufacturing Astrakhan cloth under the Booth patent evidently intended to succeed if they could find it possible to do so. They were familiar, not only with the art as it had pre-existed, but also with the fabric of Bywater, and with the method suggested by him for its production; and I am persuaded that they could not have made it but for knowledge derived, mediately or immediately, from his patent. That the Booth patent did not supply all the requisite information, and did not show the Astrakhan fabric, seems to me to be perfectly plain. In fact, it shows no fabric whatever, and it contains no language which defines or describes Astrakhan cloth. Some terms it uses which are also used by Bywater, but the differences in their language are distinguishing, and, as a whole, they designate and refer to wholly different things. The "ornamental appearance" produced by Booth is not the Astrakhan-like appearance created by Bywater; and that Booth did not suppose it to be so is evident upon the face of his patent, and from the fact that neither he nor any one else had ever made any material having the curly and matted features which pertain to Astrakhan cloth prior to the application of Bywater.

It cannot be said that either Kent and Leeson or Booth described the peculiar fabric in question so as to enable those skilled in the art to make it, for neither of them described it at all, and that they may have come near doing so is not enough. Knitted Astrakhan was created by Bywater, and this he accomplished, not by merely applying the skill of the knitter to effect a change in either of their products, but by the exercise of his own inventive faculty.

The defense of prior use or sale, within the United States, more than two years prior to application, has not been maintained. The effort to support it substantially rests upon the evidence introduced by the defendants respecting the importation of certain samples of "Kyle" by H. Herman Sternbach & Co., of New York, in May, 1881. There is at least room for very grave doubt as to whether these "samples" should be regarded as Astrakhan cloth, but it is not necessary to resolve that doubt, for, whatever they may have been, I am unable to find that they passed into public use or were put on sale. The fact that they were forwarded from the New York customhouse to Sternbach & Co. was a relevant one, as also was the evidence to show the usage of that firm to exhibit goods of that character promptly. But evidence which is unquestionably admissible may yet be utterly insufficient to alone establish either side of the issue, and such is the case in the present instance. The burden of proof was on the defendants, and the degree of proof required of them was not attained by submitting evidence from which the existence of the fact which it was intended to establish might, with doubt and hesitancy, be inferred. The proof of prior use must be "clear, satisfactory, and beyond a reasonable doubt." Case of the Barbed-Wire Patent, 143 U. S. 284, 12 Sup. Ct. 443, 450. The proof in this case is not of that character. Decree for complainant.

On Motion for Rehearing.

(December 28, 1896.)

This case having been heard upon pleadings and proofs, I filed an opinion on December 16, 1896, and directed a decree to be prepared in favor of the complainant. The defendants immediately gave notice of their intention to move for a rehearing, and for a reopening of the case, with leave to them to adduce additional evidence. Upon December 23, 1896, and before decree entered, that motion was duly presented and argued. No adequate ground has been shown or sufficient reason advanced for permitting the introduction of further evidence. All that is known to the defendants now they knew during the taking of the proofs, and what they propose to offer seems to be cumulative merely. Upon the evidence as it stands, they deliberately rested their case; and the fact that, if they had foreseen that it would be regarded insufficient, they could and would then have made additions to it, does not entitle them to do so now; and a due regard for the right of the complainant to have this litigation regularly proceeded with and reasonably terminated forbids, under the circumstances, the granting of the retrogressive order which is asked for. Upon the evidence already taken, however, I will further

consider the single question upon which a rehearing is sought, but only to the extent and in the manner following:

I will be pleased to be further advised upon two points, namely: (1) Does the Booth patent, on its face, disclose the invention of the patent in suit? And (2) did Booth, or any one else, prior to the application of Bywater, make any material which, in the sense of the patent law, is the same as the Bywater patented fabric? I do not desire any additional aid from counsel, except upon the points stated; and, in view of the very full discussion of which I already have had the benefit, I do not purpose to hear any further oral argument. What is called for, and will be considered, is a condensed brief on each side, directing attention specifically to the evidence bearing upon the above questions, and the positions and propositions of counsel with respect thereto. No affidavits will be received. Eight days are allowed for filing defendants' brief, and for service of two copies thereof on complainant's counsel; and, for filing and like service of complainant's brief, eight days from time of service of defendants' brief are allowed. Subject to the limitation and restrictions imposed by this memorandum, the defendants' motion for a reargument is granted.

On Rehearing.

(January 19, 1897.)

An opinion was filed in this case on December 16, 1896. Thereupon the defendants asked for a rehearing upon the issue of anticipation as affected by the Booth British patent of February 22, 1881, and on December 28, 1896, a reargument was allowed on two questions, namely: (1) Does the Booth patent, on its face, disclose the invention of the patent in suit? (2) Did Booth or any one else, prior to the application of Bywater, make any material which, in the sense of the patent law, was the same as the Bywater patented fabric?

The second of these questions was, of course, not supposed to be important, except as the answer to it might throw some light upon the first. In my former consideration of the subject, my judgment was strongly influenced by the conviction then impressed upon my mind respecting this auxiliary inquiry. I believed that no true knitted Astrakhan had ever been made prior to the application for the patent in suit, and mainly upon that ground was led to think that the defendants' expert and practical knitters must be at fault in supposing that the Bywater fabric was disclosed by the Booth patent. Now, however, upon a careful review of the whole matter, aided by the very thorough additional briefs which have been submitted, I have become convinced that my original conclusion was erroneous. It is not necessary to pursue here the elaborate arguments of counsel. No useful purpose would be subserved by doing so. It is sufficient to say that I am satisfied that the uncontradicted evidence of the defendants' witnesses was not correctly dealt with in my disposition of this case in the first instance, because, as I now view the first of the questions which have been reargued, it is one which can safely be determined only upon the testimony of those

familiar with the art. By adducing such testimony, the defendants discharged themselves of the burden of proof, which at first rested upon them. They thereby established, at least *prima facie*, the identity of the fabric disclosed by the Booth patent with that of the patent sued on; and, this being so, the absence of any answering evidence on the part of the plaintiff must be regarded as decisive against him. The direction for a decree for the complainant is vacated, and the bill is dismissed, with costs.

THE MIAMI.

HOLMAR v. THE MIAMI.

(District Court, S. D. Alabama. October 26, 1896.)

No. 769.

ADMIRALTY JURISDICTION—SUITS IN REM— ASSAULT BY MASTER.

A libel in rem will not lie to recover damages for intentional and unlawful violence inflicted by the master on a stowaway. The latter being a mere trespasser on board, there is no breach of any contractual or maritime obligation; and the suit is not in the nature of an action on the case, but is for an assault and battery.

This was a libel in rem by A. A. Holmar against the steamship Miami to recover damages on account of personal violence inflicted upon the libelant, a stowaway, by the master. The cause was heard upon exceptions to the libel.

Smith & Gaynor, for libelant.

Pillans, Torrey & Hanaw, for the Miami.

TOULMIN, District Judge. The contention on the part of the libelant is that this suit is in the nature of an action on the case, and it is stated in the libel that it is an action on the case for the breach of a duty by the master and owners of the vessel to the libelant; but the facts of the case, as alleged, fail to show that, from the breach of the duty complained of, any right of action on the case arose. An action on the case is a concurrent remedy with assumpsit for many breaches of contract, whether the breach is nonfeasance or malfeasance; and, when a cause of action is stated in the complaint as arising from a breach of duty growing out of a contract, it is *ex delicto*, and case—an action on the case—will lie. 1 Brick. Ala. Dig. pp. 40, 41, pars. 5, 18. But the libelant sustained no relation to the vessel and owners by contract. All that can be said is that the act complained of happened on board the vessel, but it cannot be held that there was any breach of any maritime duty or obligation on the part of the master of the vessel. The libelant was not rightfully on the vessel. He came aboard clandestinely, and hid away on the vessel. He was, as he calls himself, "a stowaway," and was such wholly without the consent or knowledge of the master. He was a trespasser. There was no contract between any one representing the vessel and the libelant, and there was no duty to the libelant on the part of the officers and crew of the vessel. The *Germania*, Fed. Cas. No. 5,360. When I speak of "duty" here, I

mean maritime duty,—such duty as would grow out of some contractual relation between the libelant and the vessel and owners. There was a duty on the part of the master not to injure or cruelly treat the libelant,—a duty not to allow him to die or suffer from starvation, if he was able to relieve him; but this duty rested upon principles of common humanity, and in no way arose from his duties or obligations as master of the vessel. This is not a suit in the nature of an action on the case. The facts alleged show it to be a case of assault and battery by the master. It appears from them that the master intentionally inflicted unlawful violence upon the libelant. This is assault and battery. The Lord Derby, 17 Fed. 265. This suit cannot be maintained against the vessel. Admiralty Rule 16. The exceptions to the libel are sustained, and the libel is therefore dismissed.

THE CHICAGO.¹

THE ALVENA.

ATLAS S. S. CO. v. THE CHICAGO et al.

PENNSYLVANIA R. CO. v. THE ALVENA.

(District Court, S. D. New York. January 27, 1896.)

COLLISION—FERRYBOAT—TUG AND TOW NEAR THE SLIPS, OBSTRUCTING EGRESS—CONFLICTING TESTIMONY—TUGS LIABLE—TOW DISCHARGED.

As the ferryboat C. was leaving her New York slip near a long covered pier which obstructed the view above, the tug G. having the S. S. Alvena, 275 feet long, in tow astern upon a hawser 175 feet long, suddenly appeared near the mouth of the slip. On very conflicting testimony as to the distance of the collision from the end of the pier: *Held* (1) that the circumstances and the superior position for observation of the witnesses for the ferryboat outweighed the greater number of witnesses opposed, and that the collision was not over 200 feet from the end of the pier: (2) that the tugs were in fault for navigating with an unwieldy tow so near the slip without excuse: (3) that the ferryboat was proceeding along the covered pier at moderate speed, and having reversed as soon as she was aware of the presence of the tow behind the tug was without fault: (4) that the Alvena, though the instrument of the wrong, and though the navigation was for her benefit, yet being in charge of the tugs, was not, under the decisions, to be charged with blame; *sed quere?*

In Admiralty. Collision.

Wheeler & Cortis, for the Alvena.

Robinson, Biddle & Ward, for the Chicago.

Wing, Putnam & Burlingham, for the Wendell Goodwin and the Richard J. Barrett.

BROWN, District Judge. About half past 7 o'clock in the morning of October 28, 1895, the steam ferryboat Chicago, just as she got out of her slip at the foot of Cortlandt street on a trip to Jersey City, came in collision with the steamship Alvena, coming down a short distance outside of the piers in tow of the tugs Goodwin and Barrett. The latter was on the steamer's starboard side, and the tug Goodwin was ahead, towing upon a hawser about 175 feet long. The bow of the ferryboat, very near the center, came

¹ Affirmed in circuit court of appeals. See 78 Fed. 924.

in collision with the stem of the steamer, doing damage to both, for which the above libels were filed. The steamer was 275 feet long. She was not under her own steam. Her navigation was in charge of the pilot of the Barrett, who was on the bridge of the steamer along with the captain.

The ferryboat gave a long whistle on leaving the bridge. About the time that whistle stopped, the Goodwin gave her one whistle, having seen the Chicago only a moment or two before. The Goodwin was then seen from the ferryboat, but not the hawser, or the Alvena, as they were obscured by the shed. On seeing the hawser a few moments later, the ferryboat reversed full speed, and got three revolutions astern at collision. The contention of the ferryboat is that the collision took place within 50 or 100 feet of the end of pier 13, called Starin's pier, which forms the upper side of the ferryboat slip. This pier is about 750 feet long by 100 feet wide, and is covered by a shed up to within about 22 feet of the outer end, which obstructs the view of boats above. The other witnesses contend that the collision was from 250 to 500 feet from the end of the pier.

If the place of collision was as near the end of Starin's pier as the ferryboat's witnesses testify, I should have no doubt that the time was insufficient for the ferryboat to avoid the collision after the tow was discoverable. The testimony as respects the distance of the collision from the end of the pier is, however, very conflicting. The greater number of witnesses are opposed to the ferryboat. But the estimates of distances are not very trustworthy. Besides the differences in the estimates themselves, there is such frequent lack of consistency in the testimony of several of the witnesses as greatly to diminish confidence in these estimates. Four witnesses on the part of the steamer and the tugs, testify that at the time of collision they could see clear water between the stern of the ferryboat and Starin's pier; and they estimate the breadth of clear water seen at from 50 to 100 feet. The ferryboat was headed at the time of collision from 2 to 4 points up river; so that if any considerable space of clear water was visible between that pier and the stern of the ferryboat at the time of collision, her bow must have been at least 200 feet outside of the pier, since the ferryboat herself is 200 feet long. I cannot give credit to the testimony of the Goodwin's captain on that point, as he could not have been in a position to see any such clear space, if there was any, if his other testimony as to his position is correct; and as respects the other witnesses below the place of collision, I am not at all sure that the space of clear water they say they saw was not between the stern and one of the shorter piers below Starin's pier.

In the very unsatisfactory state of the direct testimony as respects the distance from the piers, I am inclined to place more reliance upon what may be deduced from the testimony of the principal witnesses as to their positions, and the bearings of the vessels a little before the collision, especially as the principal witnesses are in accord on that point. The captain of the Goodwin states that when he blew a blast of one whistle to the ferryboat,

he was abreast of the upper line of Starin's pier, and saw the ferryboat in the slip over the lower corner of Starin's pier, i. e. outside of the shed. He could not see the steamer over the shed. He also stated, in answer to a question by the court, that the ferryboat's bow at that time was about 100 feet inside of the outer end of Starin's pier, and heading straight for his boat, i. e. about 3 points up river. This agrees with the statement of the captain of the ferryboat that when he first saw the tug's hawser and rang to stop and reverse (which he says was 3 or 4 seconds after the Goodwin's whistle), he saw her across the lower end of Starin's pier, a little on his starboard bow—the steamboat being at that time headed about 2 points up, and her bow about 100 feet inside the end of the pier. Other witnesses place the Alvena in accord with this distance up river.

On placing models upon a diagram of that part of the shore line drawn to scale in accordance with this testimony, it becomes evident that if the Goodwin was as much as 300 feet outside of Starin's pier, the ferryboat, in order to be seen across the lower corner of Starin's pier, would have to be placed in a position which it is impossible she could have occupied at that time. Coming out from the lower bridge, as she did, any reasonably possible position for her would not permit the Goodwin, when abreast of the upper line of Starin's pier, to be placed at the utmost more than 200 feet outside of that pier; and a distance of 150 feet or less would be much more probable, if not almost certain; and if the place of collision was also 50 feet below the lower side of Starin's pier, as some of the tug's witnesses say, the course of the tugs must have been much nearer than 150 feet from Starin's pier, in order to keep good the range on which both agree.

The witnesses Kenny and O'Neil, who were standing at the end of a float 50 feet wide, moored on the southerly side of Starin's pier, about 150 feet inside of the outer end, were in the best position of any of the disinterested witnesses to observe the exact place of the collision, and the position of the ferryboat. They could not see over the shed at all, and the Alvena would not come within range of their vision until her bow had got near the lower corner of Starin's pier. They both testify that they saw the collision, and that it was a trifle below the lower side of Starin's pier. O'Neil says it was 15 or 20 feet below; and that the ferryboat passed within about 25 feet of the corner of his float as she went out, and was headed up stream 2 or 3 points; and that the stern of the ferryboat, at the time of the collision, was inside of the pier. These witnesses had not noticed the boats until a few moments before. They were not subject to any such excitement as would hinder correct observation; and the very limited range of their vision makes it improbable that there could be much confusion in their recollection, or much liability to error. As this testimony accords with the positions required by the range before referred to, I must find that the place of collision was less than 200 feet from Starin's pier, probably not over 175 feet, if so much.

This finding further agrees with the testimony of many of the

witnesses to the very short interval between the time when the Goodwin gave her whistle and the collision. With an ebb current of one or two knots, such as there must have been along the docks three hours and a half after high water, I have no doubt from the testimony that the Goodwin and Alvena were going down at the rate of upwards of 5 knots. As she traversed only about 350 feet from the time of her whistle to the collision, the interval of time would be less than three-fourths of a minute. The ferryboat had slowed soon after starting, and could not have acquired her full speed; and she reversed when the tug's hawser came in sight a few seconds after the whistle, when her bow was about 75 or 100 feet inside of the end of Starin's pier. During this interval, with the engines reversed, it is not probable that she could have moved over 250 feet.

Upon this conclusion as to the place of collision, I think the necessary result is that the Chicago must be freed from blame, and the fault be charged upon the tugs for coming down river so near to the wharves and obstructing egress from the ferry slip. Even if the collision had been 300 feet from the end of the pier, I do not see how the tugs could have been exempted from blame. The suggestion that they gradually worked in shore to go astern first of another tow, and then of a sail lighter, is not a sufficient excuse. There is no evidence that they could not have gone farther out in the river; and the evidence shows that no serious attempt was made to regain their previous position farther from shore. A steamer like the Alvena, 275 feet long, without steam of her own, is an unwieldy tow, and there is no justification for bringing such a tow so near the slips, except some actual necessity, and that is not shown in this case.

The clear primary fault being upon the tugs, the Chicago cannot be held in fault, unless it clearly appears that she had notice of the tow, and of its dangerous character, in time to avoid collision, or that she ought by a good lookout to have seen it; and that she failed either in the observance of some specific rule, or in the exercise of reasonable prudence to avoid collision. The burden of proof in this regard, in a situation like the present, falls upon the tugs. They have not sustained that burden. The testimony of the witnesses upon the ferryboat in respect to the reversal of her engines, must be accepted, rather than the testimony of persons at a distance, as to what they think they saw in regard to the movement of her paddle wheels. The testimony of her own witnesses is also confirmed by disinterested persons in that regard. I see no reason to discredit the officers of the ferryboat as to the management of their boat from the time she left the bridge.

In the case of *The Monticello*, 15 Fed. 474, the ferryboat was held in fault on the finding that the boats outside the slip could have been seen from the time the former left the landing. That is not so here. The shed on the pier above obstructed the view above until the time when the Goodwin whistled and then the ferryboat's bow was nearly out of the slip. When the Goodwin first came in view, moreover, neither the hawser nor the tow could

be seen. There was no danger to the Goodwin, and the ferryboat at that moment had no apparent reason for stopping; and when a little afterwards the hawser first hove in sight, which was the first notice that the Goodwin had a tow, the ferryboat's officers testify that they reversed full speed. I do not see sufficient reason to discredit that testimony. In the interval that remained before collision, three revolutions astern, to which the engineer testifies, are quite as many, considering the slower movement astern at first, as would naturally be expected. They were not sufficient to stop the way of the ferryboat before the collision. It does not appear that there was any delay in reversing after the presence of the tow was visible. There was nothing else the ferryboat could do to avoid collision. Starboarding would naturally have produced a more destructive collision, by bringing the Alvena's stem into the starboard side of the ferryboat, with greater danger to the lives of her passengers.

If the evidence warranted the finding that the ferryboat, when within 100 feet of the end of Starin's pier, was going at her full speed of 12 knots, or at nearly that rate, I should have no hesitation in finding her partly to blame for this collision. Such a rate of speed in passing along a covered pier which obstructs the view of other vessels above, must be held to be most imprudent if not reckless navigation, not merely with reference to the frequent practice for vessels to come down unjustifiably near the piers, but also with reference to other vessels that, in pursuit of their legitimate right of entrance to the slips, might be approaching unseen near the piers above. And if the ferryboat was going at nearly full speed when the Goodwin, or her hawser, was first visible, the fact that she had reduced her speed to a comparatively small rate at the time of collision, which the nature of the injuries to the two boats shows to be the case, would be conclusive evidence that had she been going at the moderate speed, say of six or seven knots, as was manifestly her duty when coming along such a covered pier, she would have been wholly stopped before reaching the line of the Alvena's course, and the collision thereby avoided. But the evidence of her officers, is to the effect that after starting from the bridge under a jingle bell, she soon slowed, and proceeded under one bell only. This would give her but a moderate and justifiable speed in going out of the slip. There is not sufficient evidence, as I have said above, to discredit the officer's testimony in this regard; and the circumstances are in harmony with this testimony.

It does not appear that the captain, who was on the bridge of the Alvena, took any part in the responsibility for her navigation. Though the navigation was procured by the Alvena, and was for her benefit, and was with the acquiescence of the master, and though the damage was done by her, yet, under the existing decisions of the appellate courts in this country, as I understand them, I am not at liberty to hold the Alvena responsible, however much this result may seem to me to be impolitic and unjust, and neither in accord with the generally accepted principles of the maritime law elsewhere, nor harmonious with our own decisions as respects

the liability of chartered steamers. The *Doris Eckhoff*, 32 Fed. 558, 560, 50 Fed. 135, and cases there cited; The *Express*, 46 Fed. 860, 863; *Id.*, 3 C. C. A. 342, 52 Fed. 890.

Decrees dismissing the libel as against the *Chicago* and the *Alvena*, with costs; and decrees for the libellants against the tugs, with costs.

THE F. W. WHEELER.

THE F. W. WHEELER v. CHURCHILL et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 424.

1. COLLISION—STEAMER AGROUND—SIGNALS.

If a steamer which, with the barge in her tow, is aground in a channel, and unable to move, shows the lights prescribed for vessels under way, and, upon the approach of another vessel, responds to signals in a way to indicate that she will keep out of the other vessel's way, and gives no warning of the danger of the actual situation, she is in fault, and responsible for damage ensuing.

2. SAME—STEAMER WITH TOW—SHEER BY TOW.

The steamer *W.*, with a barge, *A.*, in tow, was proceeding, at night, up a narrow channel, and met the steamer *C.*, coming down the channel, also with a tow. The steamers were approaching nearly head on, at a combined speed of about 10 miles an hour. At about the time they met, the barge *A.* took a sharp sheer across the channel and across the course of the *C.* The *W.* did not stop nor throw off her tow line when the sheer began, nor until the *C.* had about passed her. *Held*, that she was in fault in not doing so, and was responsible for the ensuing collision between the *A.* and the *C.* and her tow.

3. SAME—FAULT OF TOW.

Held, further, that inasmuch as the *A.*, if properly manned, equipped, and navigated, would have taken no such sheer into the course of the *C.*, she would be held, in the absence of explanation, to be in fault, and also liable for the collision.

4. SAME—ERROR IN EXTREMIS.

Held, further, that it was at most an error in extremis (for which she was not responsible) for the *C.*, instead of stopping or reversing, while coming down with a current with a tow behind her, to put on steam, in an effort to avoid collision with the *A.* by crossing her bows.

Appeal from the District Court of the United States for the Eastern District of Michigan.

The steam barge *Porter Chamberlain* and the barge *Comstock*, while in tow of the former, came in collision with the barge *Ashland*, while in tow of the steamer *Wheeler*. This collision occurred in Lake St. Clair, in what is known as the Grosse Pointe Channel or Cut. That channel is about $1\frac{1}{2}$ miles long, and about 900 feet wide. It is marked on the upper end by a black stake and the Grosse Pointe Lightship, and at its lower end by a black stake and a spile or tripod light, as it is sometimes called. The collision occurred on November 13, 1891, at about 4:30 a. m. The night was dark, but clear. The *Chamberlain* was coming down the lake, and had in tow three lumber-laden barges, which were held by lines about 450 feet in length between each vessel. The *Comstock* was the first in the tow, and the only one of the tow which received injury. The *Chamberlain* was about 134 feet in length, and drew about 11 feet 6 inches, and was lumber laden. The *Wheeler* is a large steamer, 285 feet in length, was loaded with coal, and was drawing 14 feet and 10 or 11 inches. The *Ashland* was a large four-masted barge, 218 feet long, and was drawing about 15 feet. She was in tow of the *Wheeler* by a line about 900 feet long. The *Wheeler* and her consort were proceeding up the lake. At a point between the tripod light and the Grosse Pointe Lightship, the *Chamberlain* came into collision with the *Ashland*, and in a moment later the *Comstock* also collided with the same vessel. When about

2,000 feet from the Wheeler, and upon a course "nearly head on" with the Wheeler, the Chamberlain sounded a signal of one blast, to which the Wheeler replied with one blast. The Chamberlain was then in charge of her first mate who was on deck at the time of this exchange of signals. The wheelman was at the wheel, and the watchman was with the mate on the forecastle deck. Her speed was between five and six miles per hour. The Wheeler was coming up the middle of the channel at a speed, as claimed by the libelants, of from three to five miles per hour. She was exhibiting two bright headlights, indicating she had a tow, and was showing to the Chamberlain both her side lights. The libelants claim that the Ashland was apparently following her steamer, and that both of her side lights were visible to the Chamberlain, and continued to show until the bows of the passing steamers were lapping, when it was noticed that the red light of the Ashland was shut out, and that her green light was sheering to the westward across the course of the Chamberlain. The steamers passed port to port about 100 feet apart, and, as they passed, a colloquy occurred between the mate of the Chamberlain, who was still on watch, and the master of the Wheeler, who was on his deck. Just what was said, and who first hailed, are matters of dispute. For the libelants it is said that the mate of the Chamberlain, referring to the green light sheering across his course, asked, "Is that your consort?" to which the officer on the Wheeler's deck replied, "Yes; look out for her." The mate then asked, "Have you still got hold of him?" and the reply was, "Yes." This mate and the other witnesses for libelants from the deck of the Chamberlain say that, as they passed the Wheeler, they could see the towline of the Wheeler, and that it was taut, and that the Wheeler was forging ahead, and pulling on the line. These witnesses also say that, when the Ashland's red light was shut out, the wheel of the Chamberlain was immediately put hard a-port. Just as this was done, the captain of the Chamberlain, aroused by the colloquy between his mate and the captain of the Wheeler, came on deck in his night dress, and took charge of her navigation. Four or five sharp blasts of the whistle were sounded as a signal to the engineer to open up his engine, with the hope of avoiding a collision under a wheel still harder a-port. The effort was in vain. According to the libelants' witnesses, the Ashland continued to approach under a sheer to the westward, at a speed of from three to five miles per hour, right across the course of the Chamberlain, and struck the port side of the Chamberlain abaft of midships, her bowsprit sweeping off the Chamberlain's after-cabin, heavy iron davits and yawl. After striking the Chamberlain, the same witnesses say, she continued her sheer, and ran into the Comstock, which was following the Chamberlain under a hard a-port wheel, striking the Comstock on her port bow, and doing some damage.

For the respondents below, who are appellants here, quite another story is told. Their witnesses, being the men and officers from the deck of the Wheeler and her consort, say that the Chamberlain, when approaching the Wheeler, did blow one blast, and that this was replied to by one blast. But they say that, when this agreement to pass port to port was made, both the Wheeler and Ashland were aground; that the Ashland was then aground some four or five hundred feet off the port quarter of the Wheeler, and was showing only her green light to the Chamberlain. This position would place the Ashland westward of both the Wheeler and the Chamberlain, and upon the westward side of the channel, the Wheeler being aground about the middle of the channel. They also say that the towline of the Wheeler was 900 feet in length, but was then slack, and on the bottom, though it had not been thrown off or cut. What occurred when the Chamberlain and the Wheeler were passing, as detailed by Capt. Ivor, of the Wheeler, was this: He says: "I sung out, 'Where are you going there?' and he says, 'Is that him showing the green light?' and I says, 'Yes,' and he says, 'Have you got his towline?' and I said, 'Yes, but I shall let go of it. Run aft, and let go the towline.' And the mate started on the run, and went aft, and let it go,—let the towline go." He then says that the Chamberlain kept "right along down on their course until they got abreast of the boiler house of the Wheeler. Then I noticed him sheer off to the westward, heard him blow his whistle, heard his exhaust working strong, as though his engine was working stronger. He bore off to the westward, and ran across the Ashland's bow, and the next thing I heard was the crash," etc. He says that, when he gave the order to let go the towline, he also stopped his engines. Touching the positions of these different crafts, this witness says that,

when the Chamberlain gave one blast, she was a little below the lightship, and the Wheeler some 600 or 700 feet above the tripod. He says the Wheeler was not going ahead, but that his engine was working, trying to work off the bottom; and that, before the whistles were sounded, the green light of the Ashland was showing, "just by the port quarter of the Wheeler." He was then asked if there was any change in the bearing of the Ashland's green light after the exchange of signals. He answered: "There was." Question: "What was it?" Answer: "Well, it opened out a little more from me, from my quarter." When asked if, when the Chamberlain was passing the Wheeler, the latter was moving, he said she was not. He also says the Ashland was not moving. The witnesses from the Ashland all concur in saying that, in their opinion, the Ashland was aground on the bank on the western side of the channel when passing signals were exchanged, and that she remained fast at the same spot until the next morning, and until pulled off by a tug. To account for this position off the port quarter of the Wheeler, the respondents' witnesses say that just when entering the lower end of the Grosse Pointe Channel, and when about abreast the tripod light, the Wheeler went aground; that she was at the time running under a check. To prevent being run into by the Ashland, an alarm whistle was sounded, and the Ashland ran up on the towline until her stem was about abreast the starboard quarter of the Wheeler. The master of the Ashland says that, while in this position, the whaleback steamer Bartlett, which was coming up the lake with a tow, passed on his starboard side, so close as to strike the Ashland a very severe blow on her starboard bow; that the immediate effect of this blow was to start the Ashland swinging westward, and that she continued to so swing until she fetched up aground off the Wheeler's port quarter some four or five hundred feet; and that she was fast aground when first the Chamberlain and then the Comstock ran into her, and remained aground on the same spot until pulled off the next morning. He further says he had been aground in the same position for some five or six minutes when the Chamberlain ran into him, and was so aground when the Wheeler and Chamberlain exchanged passing signals. Respondents' witnesses say that the Wheeler remained aground near the tripod light until after she was passed by the Bartlett and her tow, but pulled off and slowly forged ahead for about 100 feet, when she again went aground, and was fast aground, and not moving, when she exchanged signals with the Chamberlain, and when passed by the latter vessel, though her engines were working in an effort to get off, which she did not succeed in doing until the collision; that, from the time the Ashland ran up on her towline at the tripod light, she had not pulled on the towline; and that it was on the bottom when the Chamberlain passed.

The principal faults charged against the Wheeler by the libel were that she did not stop and check, as she should have done, when the Ashland took her sheer. The faults principally charged against the Ashland were, that she did not follow her steamer, but carelessly and negligently sheered off to port, and was negligent in not casting off her line to the Wheeler when she found she was sheering across the course of the Chamberlain. The district court held that, on the theory of the respondents, the Wheeler was guilty of a fault in accepting a passing signal when unable to control her own movements or those of her consort, and in not sounding an alarm to the Chamberlain to put her on guard against the known dangerous situation of both herself and her consort. But that court also held on the evidence that neither the Wheeler nor the Ashland was aground when the agreement to pass port to port was established, and that the Wheeler did not seasonably notice the sheer taken by the Ashland. The Ashland was held in fault for taking the sheer she did, and in failing to follow her steamer. The court further held that neither the Chamberlain nor her consort, the Comstock, were in fault, and assessed their damages against both the Wheeler and the Ashland. From this decree the respondents have perfected this appeal.

Frank H. Canfield, for appellants.

Wm. V. Moore, for appellees.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Judge Swan, who heard this case in the district court, was of opinion that the Wheeler was to be condemned, "whether she was under command, and making headway through the water, as claimed by the libelants, or whether she and her consort were practically aground, as contended by the defense." "If," said the learned and careful judge, "the Wheeler was aground when she exchanged signals with the Porter Chamberlain, it was clearly a fault on her part to accept that signal, and give her answer to assure the Chamberlain that she was under command." We are strongly disposed to agree to that conclusion upon the circumstances of this case. It is true that the district judge seems to base this conclusion upon the theory that the act of March 3, 1885 (23 Stat. 438), adopting "the revised international regulations for preventing collisions at sea," was operative on the great inland lakes and connecting waters. In this he erred inasmuch as section 2 of article 27 repeals all laws in conflict with that act "except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States." This exception operated to leave the rules of navigation found in section 4233 of the Revised Statutes in force as to the great inland lakes and rivers. The construction placed by the supreme court upon the term "high sea," in the case of *U. S. v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, has no application in the determination of the question as to whether the act of 1885 is operative upon the inland lakes, they being expressly excepted therefrom by the clause in the repealing article cited. This is the view taken by this court in the case of *The North Star*, 22 U. S. App. 242-250, 10 C. C. A. 262, and 62 Fed. 71. This construction of the act of 1885 is strengthened, and is made more evident by an examination of the subsequent acts of August 19, 1890, of May 28, 1894, of August 13, 1894, and of June 10, 1896. The rules of navigation found in section 4233 of the Revised Statutes furnish, therefore, the rules under which this case must be tried.

What was the duty of the Wheeler if the situation was that claimed for respondents when the Chamberlain was seen to be coming down this narrow channel, on a course so nearly parallel to that of the Wheeler, as inevitably to result in a collision, if persisted in, with the Ashland, then aground, as claimed by respondents, off her port quarter? The Wheeler, when signaled, was carrying at her masthead two bright white masthead lights, which are the lights prescribed by rule 4 for steam vessels "towing other vessels." So she was showing on her starboard side a green light, and upon her port side a red light, as prescribed by rules 4 and 5, for vessels "when under way." These rules are in terms for vessels "when under way," and their display implied that both the Wheeler and her consort were "under way," and this the approaching Chamberlain had a right to understand. When the Chamberlain signaled the Wheeler, the latter was then showing two white vertical lights at her masthead, and her two proper side lights, both indicating that she was "under way," and was "towing" a vessel behind. The single blast was a proposition to pass

port to port, and was a proper signal, for these vessels were "meeting head on" or "nearly end on." They were meeting in a narrow channel, where they must pass on nearly parallel courses,—courses so close as that each was showing to the other both side lights. They were on courses not exceeding one-half point apart, and were therefore "meeting head on," or "nearly end on," so as to involve risk of collision, within the meaning of rule 18 of section 4233. The Nichols, 7 Wall. 656-665.

Rule 1 of the pilot rules, adopted by the supervising inspectors, on page 53 of the general rules and regulations prescribed by the board of supervising inspectors of steam vessels, as amended January, 1891, provides as follows:

"When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right, or port side, of the other; the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle and thereupon such steamers shall pass to the right, or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left, or on the starboard side of each other."

The establishment of an agreement to pass port to port, which was clearly the proper proposition under rule 18, and under the supervising inspectors' rule above set out, for the Chamberlain to propose, placed each vessel under the equal obligation of keeping to the port of the other. The Chamberlain was under no higher obligation to go to the westward of the Wheeler far enough to pass her at a safe distance than was the Wheeler to go to the eastward far enough to pass the Chamberlain safely. The obligation of the Wheeler was also the obligation of her tow, and her agreement implied that her tow should likewise do all that was reasonable to enable the Chamberlain and her tow to pass, port to port. We think the acceptance of the signal was as if the Wheeler had said: "I am directing my course to starboard, am under way, and am in control of my own movements, and those of my tow."

Rule 24 provides that:

"In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

The inability of the Wheeler to control her movements, or those of her consort, which had sheered across the course of the vessel coming down, imposed on the master of the Wheeler the duty of warning the approaching vessel of the danger of the situation. He had no right by lights and signals to give the Chamberlain to understand that her course was clear to pass port to port without greatly changing a course which was manifestly so "end on" or "head and head" with himself as to certainly bring him in collision with his helpless consort off his port quarter,—a collision which neither the Wheeler nor the Ashland could avoid by any

movement of their own. Special circumstances existed, known to the Wheeler, and not known to the Chamberlain, which required prompt attention, and warning should have been given to the Chamberlain that she might adopt proper precautions. The acceptance of the signal given by the Chamberlain was clearly misleading, for it gave her the right to understand that she could pass safely on the port side of the Wheeler, and that her consort was under control, and would be no hindrance if she passed as proposed. The suggestion of counsel that the Wheeler was compelled by the rules of navigation to reply to the single blast whistle of the Chamberlain by a like signal, regardless of her inability to control her own movements or those of her tow, and regardless of the fact that her tow was then lying aground across the course of the approaching steamer, has no foundation. The application of the rule requiring vessels approaching end on or nearly end on to pass port to port is one which must be modified by rule 24, requiring regard to be given to all special circumstances and dangers of navigation. It has been more than once said that:

"The question of culpable negligence is not determinable absolutely by any rule of navigation; that these rules are not inflexible, and a vessel which adheres to them in form may still be at the same time guilty of a tortious injury to another which fails to observe them." *The Pilot*, 19 Fed. Cas. 691; *The Santa Claus*, Fed. Cas. No. 12,327.

In the case first cited, Justice McLean further said:

"It is eminently proper that a strict observance of any of these regulations should be avoided when there is a plain risk in adhering to them, and it is entirely in the power of either vessel to escape a collision by departure from the methods provided by the rules." 19 Fed. Cas. 693.

It is no answer to say that the Wheeler had a right to presume that the Chamberlain meant to go beyond the western bounds of the deep water channel. That well-marked 16-foot channel was the ordinary course pursued by vessels in passing down the lakes, even though drawing less water, and therefore able to traverse the shallower waters east and west of the dredged channel. The master of the Wheeler when he accepted the Chamberlain's signal did not know the draught of the Chamberlain nor of her tow. According to the claims now made for him, he knew the channel was obstructed on his port side by his grounded consort, and yet by his reply signal he in effect said: "I am in control of the movements of my own vessel and of my consort, and am directing my course and that of my tow to the starboard, so that you may safely pass me on my port side, as you propose, provided you direct your course to starboard far enough to leave me at a safe distance on your port side." If the Chamberlain knew, or ought to have known, that the Wheeler and her tow were fast aground, much would be expected of her in avoiding vessels so situated, and much less would be required of vessels so disabled or at anchor. The burden of proof in such a case would be upon the vessel in control of her movements. *The John Adams*, 1 Cliff. 404-413, Fed. Cas. No. 338; *The Rockaway*, 19 Fed. 449.

There were no circumstances to indicate to the Chamberlain that the Wheeler was fast or not under control until too late to avoid

collision. That she was not given this notice was the fault of the Wheeler. The duty of the Chamberlain under the circumstances was to provide for a sufficient margin to safely pass the Wheeler and her tow under the dangers of navigation known, or which ought to have been known under all the circumstances. She did pass safely on the port side of the Wheeler, and would have so passed the Ashland if the latter had followed her steamer, as she was bound to do. It is not a case where she failed to make allowance for contingencies which ought to have been provided against, as in the cases cited by counsel for respondents of *The City of Springfield*, 29 Fed. 923, and *Wells v. Armstrong*, Id. 217.

From this view of the rightful meaning of the signals displayed by the Wheeler, and of the agreement to pass port to port, it is not probable that the situation of the Wheeler and her consort was other than that indicated by her lights and signals. The improbability that an experienced and expert navigator would have invited the Chamberlain to continue on a course which would enable her to pass the Wheeler at a safe distance, but which, if followed, would inevitably bring her in collision with the Ashland, is so great as to lead us to doubt the reliability of the evidence relied upon to show that neither the Wheeler nor Ashland was under headway or control when signaled by the Chamberlain. The improbability of such a gross fault in navigation as the failure to give notice by alarm whistles of the danger of the situation claimed to exist by the respondents leads us to concur in the holding of the district court that the Ashland was not aground when signals were exchanged, and that the Wheeler was also under headway, though possibly her speed was retarded by the shallowness of the water. The story told by the witnesses for the libelants is much more probable than that we are asked to credit in order to exonerate the Wheeler and her consort. That the Wheeler did go aground about the time she entered the Grosse Pointe Channel is satisfactorily shown by the evidence of the master of the Bartlett, who was following behind the Wheeler, and who observed the Ashland run up on her towline until she was nearly abreast of the Wheeler, and off her starboard quarter. The evidence of the same very intelligent and disinterested witness indicates that the blow the Ashland received on her bow quarter was a comparatively light one, and had no immediate effect in turning her head to the westward, for he says he watched her until his entire tow had passed her, and she was showing only her red light, which clearly indicated that she was still heading eastward. The probability is that this running up on her towline continued until the Ashland lost her steerage way, sheered to port, and continued this sheer when the Wheeler again forged ahead, and began to pull on the towline. The probability, on all the facts and circumstances, is that this sheer to port had about straightened out the Ashland behind the Wheeler when the Chamberlain proposed to pass port to port, and that at that time she was showing both side lights to the Chamberlain. The sheer, however, continued, and was not broken until after she had collided with both the Chamberlain and the Comstock. That the Wheeler got under way after

she went aground near the tripod light, and was proceeding on her way when the Chamberlain passed her, is, in our judgment, established. That her speed was retarded by the shallowness of the water is likely, but that she was pulling on her towline, as testified to by the officers and men on the Chamberlain, we have little doubt. The effect of the forging ahead of the Wheeler was only to make matters worse. It gave impetus to the Ashland, and caused her to progress up the lake under a strong sheer to the westward, and pulled her more and more across the course of the Chamberlain. That the Ashland was not aground when the collision occurred, and that she continued her sheer until she afterwards went aground west of the channel, is strongly confirmed by the evidence of Capt. Glass of the schooner Dauntless. The Dauntless had been lying at anchor off Grosse Pointe for about 40 days, and was a considerable distance west of the channel, and in water only about 13 feet deep. He was on his schooner the night of this collision, but did not see it. He says, however, that early in the morning he observed the Ashland was aground within 100 or 150 feet of the Dauntless, but that the wreckage from the Chamberlain was fully 1,000 feet lower down the lake; that this wreckage was anchored by the heavy iron davits attached thereto, and, in his opinion, lay substantially where it had fallen from the Chamberlain, by reason of being so anchored. The distance between the place where the Bartlett passed the Ashland and where she was found the next morning must be fully one mile. Now, if she had nearly lost her steerage way when hit by the Bartlett, as testified to by both the master of the Bartlett and the master of the Ashland, and if it be also true that she did not have out her staysail nor any other canvas, it is hard to understand how she had made such headway unless she was towed by the Wheeler. Yet this progress up the channel was without sail, and against the current, and occurred within 15 or 20 minutes after the Bartlett passed up. The circumstances strongly indicate that the Wheeler was under way, and was pulling the Ashland, as claimed by libelants.

We need not further discuss the evidence. We agree with the finding of the district court that the circumstances of the collision are substantially as claimed by the libelants. The Wheeler must be condemned for not stopping when the sheer began, or in not throwing off the towline sooner. If she stopped or threw off the towline at all, it was only when the collision was inevitable. If she had closely watched the course of her tow, this collision might have been averted. The channel was narrow. A steamer with a tow was coming down. There was neither time nor room for maneuvering or speculating. The Ashland was 900 feet behind the stern of the Wheeler, and her course not so promptly observable from the deck of the Chamberlain as from that of the Wheeler. The Wheeler does not claim to have stopped her engine or to have thrown off the towline until the steamers had about passed. It was then too late. The collision was inevitable. The Chamberlain and Ashland were approaching each other at a com-

bined speed of probably 10 miles per hour. A little over a minute would bring them together. Indeed, it is not claimed for the Wheeler that she took any steps to throw off the towline or stop the progress of the Ashland until just as the steamers passed. The defense has been put on a wholly different ground,—one which we are constrained to hold is not supported. The Ashland was also grossly at fault. The story that she was swung to the westward solely by the blow of the Bartlett is overthrown by the facts stated by the captain of the Bartlett, namely, that, after he and his entire tow had passed the Ashland, she was still heading to the eastward, and showing only her red light. The theory that her sheer to the westward was due to the blow she sustained from the Bartlett, being thus overthrown by the evidence of a wholly disinterested and capable navigator, leaves its cause wholly unexplained. If properly manned, equipped, and navigated, she would have taken no such sheer. That sheer was the proximate cause of this collision. Such a sudden and improper change of course was a very plain violation of the rules of navigation, and the burden is upon the Ashland to explain its cause. Unless it was the result of inevitable accident, she must be condemned. That is not shown. The *Olympia*, 22 U. S. App. 69, 9 C. C. A. 393, and 61 Fed. 120.

Touching the charge that the Chamberlain was at fault in not stopping or reversing, but, instead thereof, putting her wheel hard a-port, and working her engine with all its power, in order to cross the bows of the Ashland, we quite agree with the district judge, who on this subject said:

"Under the circumstances, this must be regarded as a venial fault, if fault it was. It must be remembered that the Chamberlain was behind her tow of three vessels, all lumber laden, and was coming down with a current of perhaps 2 miles an hour. The combined speed of the meeting tows was probably 10 miles an hour, and, although the Ashland was about 800 feet astern of the Wheeler, her course, the proximity of the vessels, after she had shut out her red light, was such that it would have been impossible for the Chamberlain to have avoided her. The combined speed of these vessels would bring them together in about one minute,—too short a time to have enabled the Chamberlain to have averted the collision. If she had stopped and reversed, she would have hazarded collision with her own tow, which, having no motive power of their own, could not be expected to clear her, and would also have incurred the risk of fouling her towline with her screw as the tow ran up on the steamer; and, in all probability, a much more disastrous collision would have involved, not only the Chamberlain and the Ashland and the Comstock, but the Breton and the Gebhardt as well. The conditions which confronted the master of the Chamberlain when called upon to act in face of the danger threatened by the approach and the course of the Ashland are amply excusatory of any error of judgment or technical violation of the statutory rule that a 'vessel approaching another so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary.' The Chamberlain had scarcely cleared the Wheeler when the Ashland's sheer was observed. In the short distance which separated these vessels, the only measure which promised safety was that taken by the Chamberlain. That it failed of its intended effect does not condemn its wisdom. At most, it was an error in extremis, made in the effort to avoid the greater casualty which any other course would, in all probability, have produced."

The error assigned in respect to an allowance for loss of one voyage while undergoing repairs is overruled. The evidence supports the decree in that regard. Decree affirmed, with costs.

SMITH v. MADDEN.

(Circuit Court, N. D. Ohio, E. D. January 22, 1896.)

GUARDIANS—SUITS IN FEDERAL COURTS.

A guardian appointed by the courts of one state cannot sue, as such, in a federal court sitting in another state.

Bane & Iams and Jones & Anderson, for plaintiff.

J. M. Jones and Kline, Carr, Tolles & Goff, for defendant.

RICKS, District Judge. This is a suit brought by the plaintiff, W. G. Smith, as guardian for Nancy Smith, to recover from the defendant damages for an assault made upon the person of the ward within the state of Pennsylvania. The petition alleges that said Smith has been duly appointed as guardian of the estate of Nancy Smith by the orphans' court of Washington county, in the state of Pennsylvania, and that he and his ward are both citizens of the state of Pennsylvania; and, after setting forth the grievances in the petition, the plaintiff prays judgment against the defendant in the sum of \$25,000. A demurrer has been interposed to the petition, on the following grounds: "First, that the plaintiff has not the legal capacity to sue; second, that it appears upon the face of the petition that the alleged cause of action therein set forth is barred by the statute of limitations; third, that the petition does not state facts constituting a cause of action against the defendant." As a general proposition, it is well settled that an administrator or guardian appointed in one state cannot sue in the courts of another state without authority from the latter. Sections 6279 and 6290 of the Revised Statutes of Ohio provide in what way a guardian may bring suit in this state to recover money or property belonging to his ward. Section 6315 provides how a foreign guardian may dispose of property belonging to his ward in this state. But I fail to find any statute which authorized a foreign guardian to bring a suit of the character set forth in this petition. Counsel for the plaintiff have failed to call my attention to any such statute, and I do not think any exists. But counsel for plaintiff cite the case of *Dennick v. Railroad Co.*, 103 U. S. 17, as supporting this right of a foreign guardian to bring a suit in Ohio for wrongs and injuries received in the state of Pennsylvania, where the guardian was appointed. That was a case in which a new York administrator brought a suit in the New York court to enforce a liability created by a New Jersey statute where the New Jersey statute expressly authorized the personal representative to bring the suit, and where a New York statute had a similar provision. The court, on page 19, say:

"Let it be remembered that this is not a case of an administrator appointed in one state suing in that capacity in the courts of another state, without any authority from the latter. It is the general rule that this cannot be done."

Counsel for plaintiff further rely upon section 4998 of the Revised Statutes of Ohio as supporting his right to maintain this action. That section of the statutes simply provides that "the action

of an insane person must be brought by his guardian," and does not apply to a foreign guardian. The case of *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, states the general doctrine thus: "An administrator appointed in one state cannot, as such, maintain any suit in another state." I fail to find, therefore, any authority for the plaintiff, as a foreign guardian, to bring this action in this court against a citizen of this state.

Counsel for the plaintiff insist that it would be a hardship to deprive the plaintiff of the right to recover in a suit of this kind. This is a question for the legislature of Ohio, and not for the court. No authority exists, by the statute, to maintain this action, and the court must so hold. The first cause of demurrer is therefore sustained, and the action will be dismissed.

MCNEIL v. MCNEIL.

(Circuit Court, N. D. California. January 11, 1897.)

1. JURISDICTION TO ANNUL STATE JUDGMENTS FOR FRAUD—JUDGMENTS OF DIVORCE.

The federal tribunals have jurisdiction of suits to relieve against judgments of state courts obtained by imposition and fraud; and this jurisdiction extends to judgments of divorce.

2. SAME—LIMITATION.

Code Civ. Proc. Cal. § 473, limiting to six months the right of a party to proceed for relief from a judgment taken against him "through his mistake, inadvertence, surprise or excusable neglect," does not apply to relief for fraud.

LACHES IN PROCEEDING TO ANNUL JUDGMENT OF DIVORCE.

A delay of 18 months is such laches as precludes an independent suit to set aside a judgment of divorce upon the ground that it was obtained by fraud.

VOID JUDGMENT.

It not being apparent on the record that the plaintiff in a divorce suit had not been a resident of the state for a sufficient length of time to give the court jurisdiction, the judgment is not void on its face; and, even if it were, it might be attacked by motion in the court which rendered it, and resort to a suit in equity would not be necessary.

Sullivan & Sullivan, for complainant.
Henry C. McPike, for defendant.

McKENNA, Circuit Judge (orally). This is a bill in equity to declare void, and to restrain the enforcement of, a judgment of divorce, and for an injunction to restrain the disposition of property. Demurrer by defendant. The ground of the suit is such fraud on the part of the plaintiff in the judgment as prevented notice to defendant, complainant in the suit at bar. Preliminarily, there are these questions presented by the demurrer: First. May a federal tribunal entertain such a suit? Second. If yes, has the plaintiff lost her rights by laches?

1. It is an established power of a court of equity to entertain suits to relieve against judgments obtained by imposition and fraud (*Freem. Judgm.* § 489, and cases cited); and the power extends to judgments of divorce (*Id.*). But it is claimed that the federal tribunals have no jurisdiction to grant a divorce; hence no jurisdiction to annul one.

The supreme court of the United States, in *Barber v. Barber*, 21 How. 582, said:

"The national power has no jurisdiction in the courts of the United States upon this subject of divorce or for allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo or to one from bed and board."

And Bishop on Marriage and Divorce states the rule to be:

"The national power has no jurisdiction of marriage and divorce within the local limits of the states. Therefore all laws on the subject, whether statutory or common, are within those limits state laws."

But these citations do not state or include the propositions involved here. Here there is no question if parties may be divorced or must forever remain together,—no question of the grounds of divorce. It is a question purely of chancery jurisdiction. For what the judgment was rendered is not essential. It is that it was obtained by fraud, and hence unjust to hold and use, and, because it is, the court has jurisdiction.

In *Johnson v. Waters*, 111 U. S. 667, 4 Sup. Ct. 619, the supreme court, by Mr. Justice Bradley, said, speaking of fraud:

"The court of chancery is always open to hear complaints against it, whether committed in pais or in or by means of judicial proceedings, and in such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it,"—citing *Story*, Eq. Jur. §§ 1570, 1573; *Kerr*, Fraud & M. 352.

This subject was discussed in *Gaines v. Fuentes*, 92 U. S. 10, and *Barrow v. Hunton*, 99 U. S. 80. The object of the latter suit was to set aside a sale of lands of a deceased person which had been made and confirmed by order of a state court having jurisdiction. Jurisdiction of probate of will and the administration of an estate of a deceased is as essentially a state matter as is marriage and divorce. The *Broderick Will Case* is instructive. It was a suit to set aside the probate of a will. Held, that it could not be done, not because the matter was of state regulation, but because the jurisdiction rested in another court. Probates of wills, besides, were held to be an exception to the jurisdiction in equity cases of fraud. The case manifestly depended upon the separate jurisdictions of the courts between probate and equity, and it was held in *California v. McGlynn*, 20 Cal. 233, to be applicable to the district court (a court of equity) of the state. It is also manifest that, if the jurisdiction had been declared in the state district court, it could have been exercised by the federal circuit court, the necessary difference of citizenship existing.

But it is further contended that the limitation of federal jurisdiction is not only as to divorce judgments, but all state judgments. *Randall v. Howard*, 2 Black, 585, and *Nougue v. Clapp*, 101 U. S. 551, are cited. But those cases do not go so far. The principle of both cases is that a federal court will not sit in review of the judgments of a state court, and review or redress its errors. That must be done in the appellate tribunals of the state. In neither case was there the ground of equitable jurisdiction as defined in the cases which I have

cited, and of which the case at bar is an instance. See *Young v. Sigler*, 48 Fed. 182; also, *U. S. v. Throckmorton*, 98 U. S. 61, where the grounds of equitable jurisdiction are stated and precisely defined with Mr. Justice Miller's usual accuracy.

It is further urged that plaintiff has been guilty of laches. The judgment of divorce of which she complains was rendered February 24, 1892, and her allegation as to her knowledge of it is as follows:

"That your orator never received any summons or process of any kind in said action for divorce commenced as aforesaid by said James McNeil, and never knew of the commencement of pendency of said action, until the — day of October, 1893."

The original bill was filed in this court April 10, 1895; that is, the judgment was 20 months old before she heard of it, and she allowed 18 months to elapse after knowledge before filing her bill to set it aside. By section 473 of the Code of Civil Procedure of the state it is provided that the court in which a judgment is rendered may, in furtherance of justice, and on such terms as may be proper, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, but limits the application to the period of six months after the order or proceeding taken. In *Norton v. Railroad Co.*, 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452, passing on this section, the supreme court of the state of California said that it did not apply to relief for fraud, that on the latter ground application could be made within a reasonable time, and intimated that six months might be the limit of such time. If so, her remedy—that is, the remedy of the complainant in this court—by motion in the state court is gone. At any rate, three times the duration of the period intimated by the supreme court would surely be held unreasonable, and hence plaintiff's remedy in the court which rendered the judgment is gone. Has she been guilty of such laches as precludes an independent suit? A judgment of divorce, more than a judgment of any other kind, would seem from its great effects to claim from a party affected, as well as from the insistence of the law, an immediate attention; but the plaintiff, nevertheless, does not account for the delay, but rests upon its period without a supporting explanation. This is, I think, a serious defect in the bill. I do not mean to say that 18 months of itself is laches; but 18 months under the circumstances may be. The judgment was divorce, with its serious consequences, personal and property. More than judgments of other kinds, it would seem to claim from the interest and feelings of a party, and from the interest of the law, a timely attention. Eighteen months do not seem to be timely. An inspection of the record would naturally be made immediately after her knowledge was obtained, and, if made, would have disclosed the grounds of divorce to have been charges made, and which, according to plaintiff, were disproved by her in 1888; made again in the Pennsylvania suit, and abandoned; hence easily exposed and refuted. Eighteen months, therefore, seem like laches, and, against this seeming, something should be alleged. A point is made that, McNeil not having been a resident of the state for a year when he brought his suit for divorce, the court had no juris-

diction. This, however, is not apparent on the record; and hence the judgment cannot be said to be void on its face, and therefore subject to attack at any time. If so, it might be by motion in the court which rendered it, and a necessity to resort to a suit in equity would not exist. The demurrer is sustained on the ground of laches, with leave to amend, alleging causes and excuse for delay.

OWENS v. HEIDBREDER.

(Circuit Court of Appeals, Fifth Circuit. January 26, 1897.)

No. 535.

ACTIONS AT LAW AND SUITS IN EQUITY—FEDERAL COURTS.

The distinction between actions at law and suits in equity in the United States courts is not one of form merely, but of vital substance, and a purely legal action cannot be converted into a suit in equity, or become entitled to be heard as such, by the answer of a defendant asserting equitable rights; but a defendant who has such rights, which he is entitled to enforce against the plaintiff, should resort to equity to arrest or stay the action at law.

In Error to the Circuit Court of the United States for the Northern District of Texas.

M. L. Morris and W. M. Crow, for plaintiff in error.

W. H. Clarke, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. George L. Heidbreder, the defendant in error, brought on January 31, 1896, the Texas statutory action of trespass to try title against George W. Owens, the plaintiff in error, to try the title to the premises described in the pleadings, and for damages claimed. On January 13, 1894, the premises were the property of the Crystal Ice Company, and consisted of a lot of ground, with the proper structures thereon to constitute a plant for the manufacture of ice, for which purpose the plant had been operated by a former owner, but the operation had been discontinued for a time. To discharge an incumbrance on the property, and to put the plant again in operation, the Crystal Ice Company desired to borrow \$6,000 on it, negotiated with the defendant in error, and obtained the money, giving therefor its coupon notes maturing at different dates, and a deed of trust on the premises to secure these notes. Default was made in the payment of the notes, and the trustee duly sold the property. The defendant in error purchased at the sale, and received his conveyance May 7, 1895. After January 13, 1894, the Crystal Ice Company procured materials and the labor of mechanics from the plaintiff in error and others in repairing its plant, and in making an inconsiderable addition to one of the structures, on the accounts for which unpaid balances were due in July, 1894. These were duly fixed as liens under the statute, by the respective parties. Suit thereon was entered in one of the state courts. Successive receivers were appointed in that suit. It pro-

ceeded to judgment foreclosing the liens, to satisfy which the property was duly sold by the receiver, purchased by the plaintiff in error, and delivered into his possession as such purchaser. The defendant in error was not a party to these proceedings. On May 28; 1896, the defendant below, the plaintiff in error here, filed this motion:

"Now comes defendant in the above entitled and numbered cause, and, referring to his first amended original answer filed herein on the 1st day of June, 1896, adopts same, and makes it a part of this motion, and shows to the court that there are issues to be submitted and determined in this cause that require that it should be transferred to the equity docket; wherefore defendant prays the court to transfer this cause to the equity docket, and that the plaintiff be enjoined from further prosecuting this suit on the law docket until all issues in equity have been fully settled and determined; and will ever pray."

The answer referred to in this motion presents (1) a general demurrer; (2) general denial; (3) plea of not guilty; after which the acquisition of the liens and the proceeding to enforce them and the result of that proceeding are set out in the answer. Then the answer concludes thus:

"Wherefore he says he has title to all said property and is entitled to the possession of the same, or, if he is not allowed to hold the lot of land, then he says he has title to the house and machinery on said premises, and is entitled to remove the same; or, if this relief is denied him, then he prays in the alternative that he has a prior and superior lien on said property to that of plaintiff, and that his said lien is still in full force and effect as against the plaintiff herein to the amount of said debt of \$417.27, and his bid of \$1,000 at his purchase under said foreclosure sale, with his interest on the same. All of which defendant is ready to verify and puts himself upon the country. Wherefore he prays judgment for title and possession of said land and the houses, machinery, and all improvements thereon; or, if he is denied a recovery of the land, then he prays that he be awarded the houses, machinery, and all improvements thereon, and be allowed to pay plaintiff the value of the lot of land; else that he be allowed a reasonable time in which to remove the houses, machinery, and improvements from said premises; or, if this relief is denied him, then he prays that this cause be removed to the equity docket of this court, and that all matters between plaintiff and defendant as affecting the priority of their respective liens on said property be adjudicated and settled, and that the lien of defendant for \$417.27 and \$1,000 be declared superior to the lien of the plaintiff on said lot of land, houses, and machinery, and as to so much of said \$1,000 as went to pay receiver's certificates issued to pay interest on the debt of plaintiff against the Crystal Ice Co.: that defendant be subrogated to the rights of plaintiff, and have foreclosure of his lien on said lot of land, for costs, and all general and special relief in law or in equity to which defendant is entitled under the facts."

The first assignment of error is that the court erred in refusing to transfer this cause to the equity docket. If, instead of an action of trespass to try title, the suit had been in equity to foreclose a lien upon the premises, the defendant in the bill could not have had affirmative relief without asking the same by a cross bill. We said in *Wood v. Collins*, 8 C. C. A. 525, 60 Fed. 142, that the rule appeared to be well established that, in order to entitle a defendant in equity to affirmative relief, he should file a cross bill, which should be regularly served, put at issue, and heard as any original bill; citing *Ford v. Douglas*, 5 How. 143-167, *Railroad Co. v. Bradleys*, 10 Wall. 299, and *White v. Bower*, 48 Fed. 186; and quoting from *Railroad Co. v. Bradleys*, supra: "Parties defendants are as necessary to cross bills as to original bills, and their appearance in both cases is en-

forced by process in the same manner." The distinction between actions at law and suits in equity in United States courts is not one of form merely, but of vital substance. An action of trespass to try title in the statutory form in Texas cannot be converted into a suit in equity by the answer of a defendant. Plaintiff below brought a purely legal action. If the defendant had equitable rights which he was entitled to enforce against the plaintiff below, he had a clear, adequate course of procedure to arrest or stay the action at law until his equities could be adjudged by the circuit court. He omitted to do this, and will not be heard to urge that the court erred in refusing what the court would have erred to grant.

The other assignments of error become immaterial. The objections taken to the ruling of the court in reference to admitting and rejecting testimony are fully answered by the view here presented of the case as it stood in the circuit court. We do not feel called upon or justified in this case to express any view with reference to the relation of the liens claimed by the plaintiff in error. It is sufficient to say, as we have already said, that his pleading in the circuit court does not present that question. The judgment of the circuit court is therefore affirmed.

BARTLETT v. AMBROSE et al.

(Circuit Court of Appeals, Fourth Circuit. February 11, 1897.)

No. 189.

1. TAX DEEDS—LACHES.

Laches does not grow out of the mere passage of time, but out of the inequity of permitting a claim to be enforced, arising from some change in the condition or relations of the property or parties. Accordingly, *held*, that a non-resident owner of wild lands, who had reason to suppose the taxes thereon were paid, and had delayed, for a period beyond that of the statute of limitations, to assert his claims against one who had held the lands under a tax deed, without improving them, might not be guilty of laches, although he would be barred by the statute of limitations.

2. SAME—COLOR OF TITLE—ADVERSE POSSESSION.

A tax deed, though void and based upon a void sale, if not showing invalidity on its face, is a sufficient color of title to be a foundation for adverse possession.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Thomas E. Davis and M. F. Stiles, for appellant.

W. P. Hubbard, B. F. Ayers, and H. P. Camden, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia, sitting in equity. The bill of complaint was filed on 15th October, 1895, to remove a cloud on the title of real estate. The facts are these: Frederick Fickey, a resident of Baltimore, had a

controversy with one Cyrus Hall with regard to land situate in the county of Ritchie, W. Va. He employed, as his attorney to conduct the controversy, John R. Kenly, a lawyer residing in the same city of Baltimore. Kenly was to receive one-fourth of the land recovered as his fee. On 4th March, 1872, the suit was compromised, and Hall conveyed to Fickey 468 acres of the land in dispute. Thereupon, pursuant to his agreement, Fickey conveyed to Kenly, by deed dated 19th April, 1872, 117 acres of the land so conveyed to him by Hall,—just one-fourth. The two deeds, that of Hall to Fickey, and that of Fickey to Kenly, were duly admitted to record in the same year, 1872. Both deeds conveyed the land, in each described by courses, distances, and monuments. It is said that the actual amount of land conveyed by the description in Kenly's deed was 165 acres. This is not specially important. Kenly owned no other parcel of land in Ritchie county. The land of Kenly was entered on the tax book of Ritchie county in the name of John R. Kenly as 177 acres, and was so charged with taxes for the years 1873, 1874. The taxes for 1874 were not paid, and the land was returned delinquent. On 11th October, 1875, 34 acres of this land was sold by the sheriff to Thomas Reeves, for the purpose of paying the taxes due for 1874. Reeves soon thereafter assigned his purchase to C. Ambrose. Ambrose, on 26th December, 1876, obtained a deed for these 34 acres from the clerk of the county court, and on 11th May, 1878, sold and conveyed the 34 acres to Richard Wanless, a defendant below, and one of the appellees here. Notwithstanding this sale of a part of the Kenly tract, it was still carried on the land books as 177 acres, and for the years 1875, 1876, 1877, and 1878 was charged with taxes in the name of John R. Kenly. It was again returned delinquent, and on 14th October, 1879, the entire tract of 177 acres was sold by the sheriff to C. T. Harrison and the same Richard Wanless, in order to pay these taxes. On 27th April, 1880, Wanless redeemed the 34 acres from Harrison, taking a redemption receipt, which, however, he failed to record. On 18th February, 1881, having purchased Harrison's interest in the land, he obtained a deed from the clerk of the county court for the whole tract entered in the name of Kenly, Harrison joining in the deed. When Wanless purchased the 34-acre tract, and the whole tract charged in Kenly's name, he was the owner of coterminous tracts of land, and was then and at the commencement of this suit in actual possession of them. In June, 1880, after his last purchase, Wanless extended a fence on his adjacent lands across Elm run, which divided them from the Kenly tract. This extension was three rods in length, and was closed with a cross fence. The inclosure embraced 35 acres of his adjacent lands, and three-fourths of an acre of the Kenly land, and he has used this inclosure every year since then for pasture and grazing purposes. He had the Kenly tract entered in his own name on the land books, has paid the taxes annually thereon, claims to have exercised ownership over the whole tract by cutting and selling the timber on it, and in 1890 leased the land for oil purposes

to one Gracy, who assigned the lease to the other appellees, known as the Cairo Oil Company. In 1894 this company began operations, and were drilling a well when this suit began. In the meantime the whole tract of 463 acres, conveyed by Hall to Fickey, was placed by the assessor in 1873 on the land books in the name of Fickey, and taxes were assessed thereon. This was continued from that time to the year 1889, all the 463 acres being entered each year, except in the years 1883 and 1884, when the land was put down as 351 acres. Fickey paid the taxes each year in his own name on the whole tract, including the 117 acres he had conveyed to Kenly. He had an agent looking after his own interests, and not expressly charged, however, with Kenly's interest. In 1890 Fickey directed that the 117 acres should be deducted from the lands entered in his name. In 1891 Kenly died. No tax was paid by him or his representatives after that on these 117 acres. In December, 1894, the heirs at law of Kenly conveyed the tract of 117 acres to the complainant (appellant here). In 1895 appellant posted the land, claiming as owner, and soon after filed this bill to remove the cloud from his title. A temporary injunction was granted. Answers were filed. The cause was heard on its merits. The injunction was dissolved, and the bill dismissed. The cause is here on errors assigned. These present important questions: Has the complainant by laches deprived himself of the right to relief at the hands of a court of equity? Has the complainant forfeited all title to the land because of its omission from the land books? Are the tax deeds under which the defendants claim title valid? Has the claim of the defendants ripened into title by virtue of adverse possession? Is the Cairo Oil Company protected in its possession under the special laws of West Virginia? These questions have been argued before us.

Laches.

Whether a party has lost his right to come into a court of equity does not depend upon the lapse of time, but upon the question whether, during this time, such changes and circumstances have taken place as made it inequitable to recognize the claim of the party asserting title.

In *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, the court says:

"Laches does not, like limitation, grow out of the mere passage of time. It is founded upon the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relations of the property or parties."

So, also, in *Alsop v. Riker*, 155 U. S., at page 461, 15 Sup. Ct., at page 167, we find the doctrine thus expressed:

"Equity, in the exercise of its inherent power to do justice between the parties, will, when justice demands it, refuse relief even if the time elapsed without suit is less than that prescribed by the statute of limitations. [Quoting many authorities.] The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations;

and the lapse of time must be so great, and the relations of the defendant to these rights such, that it would be inequitable to permit the plaintiff now to assert them."

See, also, *Gildersleeve v. Mining Co.*, 161 U. S. 578, 16 Sup. Ct. 663.

In this case these equitable considerations do not exist. The lands in question were what are known as wild lands,—lands not in cultivation. The appellant has very recently acquired his title. Kenly, under whom he claims, was a nonresident of the state, and up to 1890 the taxes on this land which he claimed had been paid regularly by his grantor. Wanless got the lands at a tax sale, which itself was a strong intimation of the existence of an adverse title. No improvements have been made on the lands, and no expenditure of money thereon, except by the Cairo Oil Company, whose rights stand on a different footing from those of the other defendants. Wanless purchased at tax sales. Upon the deeds obtained from those sales, and upon his possession, he must stand or fall. He has no special claim upon the protection of a court of equity. A crucial question in the case, therefore, is that made under the statute of limitations. But, although statutes of limitations strictly do not bind courts of equity, they will use the analogy of the statute, and will recognize rights acquired thereunder.

Are the Defendants Protected by the Statutory Bar?

Wanless obtained, in 1881, a deed for a whole tract of 177 acres, described by metes and bounds, and placed that deed on record. Assuming for the sake of argument that the tax sale was void, and the deed under it void also, can this operate as color of title?

In *Pillow v. Roberts*, 13 How. 477, the supreme court says:

"Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse, and it is difficult to apprehend why evidence offered and competent to prove that fact should be rejected till the fact is otherwise proven."

And commenting on a law of the state of Arkansas, creating a bar as to tax titles after five years, the court add:

"In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue of lands sold for the

nonpayment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance to the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time of showing the validity of his tax title."

This case was affirmed in *Wright v. Mattison*, 18 How., at page 57. Nor is this doctrine overruled in *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83. In that case plaintiff claimed under a patent from the United States, dated 15th April, 1875. The defendant relied on his possession under color of title of a tax deed executed 11th August, 1871, upon a sale for taxes for the year 1868. The deed was executed for default of payment of taxes on land, the title to which land was in the United States, and so not liable to the tax laws of the state. The grounds of decision on this point are thus stated:

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises, by plaintiff's or defendant's, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed by the patent of the United States, without trenching upon the power of congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent under state legislation, in whatever forum or tribunal such occupation be asserted." Quoting *Gibson v. Chouteau*, 13 Wall. 101; *Rector v. Ashley*, 6 Wall. 142; *U. S. v. Thompson*, 98 U. S. 486.

But the defendant in that case also set up in bar a short statute of limitation intended to protect tax titles. As to this, the court would not treat the tax deed as color of title, because on its face it showed that it was void. In this record it does not appear that the tax deed on its face showed invalidity.

In *Bryant v. Groves*, 24 S. E. 608, a decision by the supreme court of West Virginia, it is said to be settled law that a tax deed, though void, constitutes good color of title.

In *Mullan's Adm'r v. Carper*, 16 S. E. 527, 37 W. Va. 215, it is said that: "Any written instrument, however defective or imperfect, and no matter from what cause invalid, purporting to sell, transfer, or convey title to land which shows the nature and extent of the parties' claim, constitutes color of title, within the meaning of the law of adverse possession." The court add, "This has been held in many cases, especially in cases of void tax deeds," and then quotes and discusses the cases.

This principle is well established by decisions of the supreme court. "Color of title is that which in appearance is title, but which in reality is no title. No exclusive importance is to be attached to the invalidity of a colorable or apparent title if the entry or claim has been made in good faith." *Wright v. Mattison*, 18 How. 50; *Beaver v. Taylor*, 1 Wall. 637. Whenever an instrument, by apt words of transfer from grantor to grantee, whether such grantor act under the authority of judicial proceedings or other-

wise, in form passes what purports to be the title, it gives color of title. Even if invalid, possession under it for the period prescribed by statute bars the right of the true owner. It is an absolute defense to the action of ejectment, and a suit in equity brought after that period will not be entertained, as it is founded on a stale claim. *Hall v. Law*, 102 U. S. 461. An adverse possession under a deed for land previously granted is sufficient to give title, although the deed was void. *Green v. Neal*, 6 Pet. 291. In *Cameron v. U. S.*, 148 U. S. 301, 13 Sup. Ct. 595, many of these cases are recognized and affirmed.

Richard Wanless, under whom the appellees claim, obtained a deed of conveyance in fee for the whole 177 acres, February 18, 1881, and it was put on record, the deed describing the land by metes and bounds. Before that time, but after his purchase at the tax sale, he had extended his fence across Elm run, which separated this land from the contiguous lands some three rods, and inclosed the ends of the fence. He used the lands thus inclosed for his own purposes. This he did in his own right, without permission of any one, asserting title. The land was in his exclusive possession. It is true that Fickey had a man by the name of Hewitt on his land. But the record nowhere shows any agreement between him and Kenly that he or his agents should protect Kenly's possession, nor any instructions or agreement by Kenly with Hewitt that the latter should hold possession for him. If we can infer from the action of the parties, it could easily be concluded that Fickey had not assumed any such office. His first act on getting title to his land was at once to ascertain and segregate the interest of Kenly in it by the execution of a conveyance to him in fee of his share therein. Nor does the record show that Hewitt really acted for Kenly. Wanless, besides inclosing and occupying this piece of land, under color of title of the whole tract, sold timber to one Wilson on that part of the tract outside of the fence, on the boundary line of Fickey, with the knowledge of Fickey and of his agreement. In 1890 he sold timber on the rest of the tract to Dick and Donahue, who were occupied for nine months in getting the timber out. In the same year he leased the land for oil purposes. These were acts of ownership, not fugitive trespasses. His testimony shows that Wanless, having obtained his deed, asserted title at once in the most open and public way by inclosing for his sole use a part of the land so held by him, and by disposing of the timber on the rest. He held from February, 1881, until July, 1895. The statutory bar is 10 years. This will bar relief in equity. *Elmendorf v. Taylor*, 10 Wheat. 152; *Godden v. Kimmell*, 99 U. S. 201; *Hall v. Law*, supra.

The other questions in the case are full of interest, but the result reached renders the consideration of them unnecessary. The decree of the circuit court is affirmed, with costs, without prejudice to any action at law the complainant may be advised to bring.

COX v. MONTAGUE.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 428.

1. INSOLVENT NATIONAL BANK—LIABILITY OF TRANSFEROR OF STOCK.

It is not necessary, in order to hold liable for an assessment upon the shareholders of an insolvent national bank one who has transferred his stock to an irresponsible person, to show that the transferor had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer with intent to relieve himself from individual liability.

2. WITNESSES—PRIVILEGED COMMUNICATIONS.

Upon the trial of a suit brought by the receiver of an insolvent national bank to collect an assessment from one who had transferred his stock, a letter written by the defendant to a bank examiner, in reply to an inquiry about the bank, in which defendant admits his transfer of his stock when the bank was embarrassed, is not a privileged communication, though the bank examiner's letter, to which it is a reply, is marked "Confidential."

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

The appellant sued in the court below to set aside the transfer by the appellee, defendant below, to his sister, Clara W. Montague, of 60 shares, of the par value of \$100 each, of the capital stock of the First National Bank of Johnson City, and to recover against the appellee the sum of \$6,000, with interest, being the assessment levied on said stock by the comptroller of currency in order to pay the debts of said bank. The transfer was made on the 28th of April, 1894. It is averred in the bill that the bank was then insolvent, as was well known to the defendant, T. G. Montague, which fact was the principal inducement to the transfer; that Montague was the president of the First National Bank of Chattanooga, a correspondent of the Johnson City Bank, and that he was familiar with the condition of its affairs; that the Johnson City Bank had long been in failing circumstances, and that the Chattanooga Bank had frequently supplied it with funds to prevent its suspension.

It is further averred that Clara W. Montague, who was made a defendant, was insolvent at the time of the transfer of the stock and at the date of the filing of the bill, and that the transfer to her was made with intent on the part of T. G. Montague to avoid individual liability as a shareholder, and was voluntary and fraudulent. Clara W. Montague made no defense to the bill, which, as to her, was taken for confessed. T. G. Montague, in his answer, admitted that he had held the 60 shares of stock, and that he transferred them to his sister. He denied that the bank was insolvent at the time of the transfer, or that he had information which would lead him to suspect its insolvency, but admitted that the Chattanooga Bank did extend aid and credit to the Johnson City Bank; also that the transfer of stock to his sister was voluntary, but denied that it was fraudulent, averring that it was prompted by and founded upon the consideration of love and affection.

The bank of Johnson City was twice examined by J. M. Miller as a national bank examiner; first on January 22, 1894, and second and lastly on or about November 9, 1894, when he closed the bank. That examination disclosed the insolvency of the bank, its liabilities being about \$100,000, and "its solvent assets" about \$40,000. The examiner testifies that the condition of the bank at that time had not, apparently, much changed since his examination in January, 1894. There had in the meantime been a loss of \$3,000 by the bank in one transaction, and between \$1,000 and \$2,000 on another; but he testifies that he is unable to state how long before the bank was closed it was in fact insolvent, but gives it as his opinion that it was so in January, 1894, and in April, 1894.

Attached as exhibits to the depositions of the complainant are letters from the defendant, T. G. Montague, addressed to the president of the Johnson City Bank; also one letter addressed by him to the examiner. From these letters it appears

that Montague, on the 28th of January, 1893, sent \$800 to the Johnson City Bank; on the 20th of May, 1893, \$5,000, in silver, for which exchange was to be furnished by the Johnson City Bank. On the 18th of July of that year he wrote, calling attention to the fact that the overdraft of the Johnson City Bank on the Chattanooga Bank, which on the 10th of July was \$3,183, had increased to \$5,036, and complains that no substantial collateral had been sent. From a letter written by him on the 29th of July it appears that the Johnson City Bank had mailed them \$2,000 of business paper for discount. Montague said: "You appear to think we are a currency factory. On the 30th of June you overdraw \$1,500 'for a few days at the outside.' Your account has been overdrawn continuously since. On the 17th of July you wrote us that your overdraft might be increased to \$4,400, which would be paid in a few days. After sending the collateral, you continue to overdraw until the amount last night was \$8,070." He refers to New York exchange received that day which reduced the overdraft to \$6,070, but complains that at the same time they sent for \$2,000 additional, which he declined to furnish, and calls for the money that was then charged up against the bank, and desires that it be paid as rapidly as possible. On the 31st of July he telegraphed that he that day shipped to the Johnson City Bank \$2,000 in currency. On the 3d of August, 1893, he made another remittance of \$2,000 in currency. On the 7th, by arrangement with the president of the Johnson City Bank, he expressed \$2,000 silver and \$3,000 exchange to New York City for account of the Johnson City Bank; making the advance to the Johnson City Bank then outstanding, \$10,500. Referring to telegram asking for \$1,000 more, he declines to furnish it, stating that the president had assured him that the bank would get along without additional assistance until what was already owing should be repaid. On the 10th of August he telegraphs to the president of the Johnson City Bank that he had deposited in New York \$2,000. On the 11th he telegraphs and writes declining an application for a further advance. On the 12th he writes to the president of the Johnson City Bank, calling attention to the fact that the account of the bank was then overdrawn \$3,400, and "the \$5,000 loan for five days due and unpaid. I do not see any help for you. You do not seem to have gotten help in New York to keep up. We cannot send you any money. We have all that we can do to meet our own demands, unless you can pay us the balance of account and send us good paper to abundantly cover it." On the 21st of August, 1893, he complains by letter that the Johnson City Bank had made a draft on them for \$500, to be paid in cash, adding: "We need very much the amount of your note which is overdue, and cannot pay checks when you have no funds to your credit. We wish to be accommodating, and do everything possible, but we cannot manufacture money." On the 31st of January, 1894, he writes to the president of the Johnson City Bank that the bank's account was overdrawn \$5,200, that they had collateral for only \$4,800, and therefore declines to make remittances to New York, as requested. On the 4th of September, 1894, asks that the Johnson City Bank reduce its overdraft, which then remained at \$5,070. On the 7th of November, 1894, John M. Miller, Jr., examiner, wrote to Montague a letter marked "Confidential," inquiring concerning the business character and reputation of the president of the Johnson City Bank. To that letter, Montague, after answering the inquiries of Miller, added, "I became alarmed after seeing several of his reports as made to the comptroller showing his cash often below the required reserve, and disposed of my stock some time ago." Referring to Crandall's transaction, he wrote that he had thought that "he was anxious to do more business than the capital stock of his bank would warrant," and that "his capital was largely tied up by loans to parties who could not pay; that any sudden demand upon him for \$1,000 or \$2,000 required that he should get assistance from other banks to tide over"; and stated that he knew "that the failure of railroads and land enterprises in and around Johnson City crippled a large majority of the business men, and that they had been very hard up for the past three years. We hoped from month to month that he would realize on enough of this suspended paper to carry his bank through successfully."

The deposition of Miss Montague was taken by complainant. She states that she first learned from T. G. Montague that the stock had been transferred to her, and that he told her of it, she thought, in May or June of 1894, adding that it might have been in April, and at that time he turned over the new certificates of stock to her. "She never asked for the stock; it was a present to her. He had

never, before telling her of the transfer, had any conversation with her about it. At first she declined to answer whether she had any property in Hamilton county, Tenn., but afterwards admitted that she had not. Said that she did own property somewhere. She thought that that property was in her own name, but did not know whether it was or not. It was not in the state of Tennessee, and she owned no property in that state. T. G. Montague was not a witness. James E. Brading, who was cashier of the Johnson City Bank, was called as a witness for defendant. He testified that on the 27th of April, 1894, R. S. Boyd, who was understood to be insolvent, but nevertheless was said to have good credit in the Jonesborough Bank, offered 50 cents on the dollar in cash for \$1,000 of T. G. Montague's stock in the Johnson City Bank, with the understanding that \$2,000 or \$3,000 more could probably be handled at the same figure, and possibly the entire \$6,000. This offer was communicated in writing to Montague, and by him declined.

Brading testifies that he thinks he communicated by writing Boyd's offer on the 27th of April, the date that it was made. It does not appear to have reached Montague before his letter of the following day, directing the issue of certificates to his sister, had been posted; nor does it appear that Montague gave any reason for declining to accept the offer excepting that which he avers in his answer, which was not called for under oath, but was sworn to. It appears also by the testimony of Brading that at the date of the transfer by Montague of his stock to his sister the general estimate at Johnson City of the value of the stock was from 50 to 75 cents.

Robert Pritchard, for appellant.

Thomas McDermott, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

SAGE, District Judge, after stating the facts as above, delivered the opinion of the court.

Montague's letters and telegrams to the Johnson City Bank make it evident that he knew months before he made the transfer of his stock to his sister that the bank was in imminent danger of insolvency. That transfer was not only without consideration, but, at the time, without even the knowledge of his sister. It was made on the 28th of April, 1894. She testified that, according to her recollection, she was informed of it in May or June, 1894, but added that it might have been in April. Her testimony as to her financial condition is altogether unsatisfactory. Her unwillingness at first to give any testimony on the subject was enough to warrant the most unfavorable inferences. At last she admitted that she had no property in Tennessee. Said that she did own some property somewhere, which she thought was in her own name, but did not know whether it was or not. That she did not take sufficient interest in the case to make any answer, and that she suffered decree against her by default, strongly indicates that she was utterly irresponsible financially, or that she had herself no faith in the integrity of the transaction. She was not even a witness of her own volition, or upon the call of the defendant, but was subpoenaed and examined on behalf of the complainant. Montague himself was not a witness in the case,—a circumstance which, in view of the evidence against him, is of great weight. A like circumstance in *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, cited later in this opinion, was so characterized by the supreme

court. In his answer Montague set up that a few days prior to the transfer of his stock he was offered by a responsible party in Johnson City 50 cents on the dollar for a portion thereof, with the assurance that a great part, if not all, of the residue would be taken at the same price. That averment undoubtedly relates to the offer above referred to, for it does not appear that any other was made. It does not appear from the evidence that the person who made the offer was insolvent, although one person is said to have declared that he had good credit in the Jonesborough Bank. The offer was for \$1,000 of the stock at 50 cents on the dollar. It was not made until the 27th of April. Montague's letter inclosing to the bank the certificates for his shares with an order for their transfer to his sister was dated and mailed the next day, April 28, 1894, at which time the offer to him could not have been received. That fact alone is sufficient explanation of his declination. It may have been also that, while he had abundant reason to apprehend the failure of the bank, he still hoped that it would pull through, in which event the stock could be transferred to him by his sister. If there were any doubt as to the motive which induced him to make the transfer, it would be removed by his letter under date of November 8, 1894, to the bank examiner, who had on the previous day written him a confidential letter inquiring concerning the president of the Johnson City Bank, and asking for the name of some thoroughly reliable and well-posted person at or near Johnson City to consult "on credits," etc. The learned judge who heard the case below was of opinion that this letter could not be properly used against the defendant, because it was a confidential letter, and voluntarily turned over by the bank examiner to the receiver. We do not concur in that view. The letter was in no sense a privileged communication, and the mere fact that it was in answer to a letter marked "Confidential" cannot, in our opinion, be regarded as a legal objection to its use as testimony. The authorities are the other way. In *Wilson v. Rastall*, 4 Term. R. 753, Lord Kenyon said:

"But if a friend could not reveal what was imparted to him in confidence, what is to become of many cases even affecting life, e. g., *Doctor Ratcliff's Case*, 9 State Tr. 582. And if the privilege now claimed extended to all cases and persons, Lord W. Russell died by the hands of an assassin, and not by the hands of the law, for his friend, Lord Howard, was permitted to give evidence of confidential conversations between them." 3 State Tr. 715.

In the same case, Buller, J., said that it was indeed hard in many cases to compel a friend to disclose a confidential conversation, but that the privilege must be confined to the cases to which it extends. In *Loyd v. Freshfield*, 2 Car. & P. 329, it was held that a banker is bound to disclose a communication, however confidential.

The letter to Montague was written by Miller in his official capacity, and signed by him as examiner. Montague's answer is addressed to the examiner in his official capacity. It may well be doubted whether such letter, whatever may have been the intention of the writer, can be regarded as confidential in the sense in which the court below regarded it, and in the sense which counsel for ap-

pellee seek to apply here. Besides, the information called for by the examiner was with reference to the president of the Johnson City Bank. Montague's answer volunteered, in addition, among other things, this very significant statement respecting the Johnson City Bank: "I became alarmed after seeing several of his reports as made to the comptroller, showing his cash often below the required reserve, and disposed of my stock some time ago." We know of no reason founded upon any principle of the law of evidence why this statement, which is a distinct and unequivocal admission of a fact, should be excluded. It tells the reason for the transfer of the stock in plain, direct words, which cannot be mistaken. This statement, taken in connection with the letters first above referred to, the testimony of Clara W. Montague, and the omission of defendant, Montague, to testify as a witness for himself in answer to the evidence against him, brings the case clearly within the rule stated in *Bowden v. Johnson*, 107 U. S. 261, 2 Sup. Ct. 254, that:

"Where the transferor, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder quoad the creditors, although he may be able to show that there was a full or a partial consideration for the transfer as between him and the transferee."

The rule does not require proof that the transferor had actual knowledge of the insolvency of the bank, and that the transfer was made with a purpose to avoid individual liability. It is enough if the transferor had "good ground to apprehend the failure of the bank," and made the transfer to an irresponsible person, with intent to relieve himself from individual liability. Proof of actual knowledge of the insolvency of the bank was not made in *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402, but the court of appeals of the Eighth circuit held the transferor liable. In *Foster v. Lincoln*, 74 Fed. 382, the defendant was president of the National Bank of Lyndon, Vt., and held 25 shares of stock in the First National Bank of Deming, N. M., which telegraphed to the Lyndon Bank, also a stockholder, for \$5,000, to be sent by telegraph, for its aid. Within a week afterwards defendant made a voluntary transfer of his stock to his children, all of whom were financially irresponsible. The facts above stated were put in evidence, and it was shown, in addition, that the telegram for aid, when it was received, came to the knowledge of the defendant, who was sued to enforce his individual liability as a stockholder. That was all the evidence against him. The court regarded the telegram, which was received and came to defendant's knowledge six days before the transfer of his stock, as sufficient warning to him of the straits of the bank, and entered decree for the complainant. That case was not so strong for the complainant as is this case. There the defendant was a witness. Here the defendant was silent, and, al-

though the transfer was voluntary, and made to his own sister, without her knowledge, she being financially irresponsible, and so little interested in the result as to make no defense, he declined to be a witness, made no explanation, and rested solely upon the contention that the complainant had not succeeded in making specific proof of the insolvency of the bank at the date of the transfer of the stock; and that, if the bank was then insolvent, it was not proven that he knew it or had notice of any other facts from which such knowledge could be inferred. That the contention is not well founded is apparent from what has been already expressed in this opinion. The appellant is entitled to decree as prayed in the bill. The decree below will be reversed, with instructions to enter a decree in accordance with this opinion.

TOWNSEND et al. v. P. J. WILLIS & BRO. et al.
(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 456.

ADMINISTRATOR OF COMMUNITY PROPERTY—APPROVAL OF BOND—COLLATERAL ATTACK.

The statutes of Texas provide (Rev. St. 1895, art. 2222 et seq.) that a husband who survives his wife, in order to be appointed administrator of and authorized to sell the community property, must give a bond conditioned for faithful administration of such property and payment of one-half to the persons entitled, which bond shall be approved by the county judge, whose order of approval shall be recorded in the minutes of the court which has general jurisdiction in probate matters. *Held*, that an order so made is in effect a judgment of the court, and is not void or open to attack in a collateral proceeding, although the bond accepted and approved by it does not conform to the statutory requirements.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This suit was originally begun in the district court of Erath county by appellants, all of whom are citizens of the state of Texas, against P. J. Willis & Bro., a corporation duly incorporated under the laws of the state of West Virginia, and F. C. Oldham, a citizen of Texas. On the application of P. J. Willis & Bro., the cause was removed to the United States circuit for the Northern district of Texas, and there, on motion, the court ordered that the pleading should be recast so as to conform to the rules of equity practice, whereupon appellants filed their amended bill, therein alleging that they inherited from their mother an undivided half interest in the lands described in said bill; that their father, F. C. Oldham, after the death of their said mother, undertook to qualify, under the laws of Texas, as survivor of the community, and thereafter conveyed the lands in question to P. J. Willis & Bro., in settlement of indebtedness, all of which accrued, as appellants claim, after the death of their said mother; that the attempted qualification of F. C. Oldham, as survivor, was absolutely void and of no effect whatever; specifically charging as follows:

"And plaintiffs allege: That thereafter, on the 21st day of April, 1890, F. C. Oldham filed in the probate court of Erath county, Texas, an application for appointment as community administrator of the community estate of himself and his deceased wife, M. V. Oldham, which was by said court on said day allowed, and appraisers appointed to inventory and appraise said estate, which inventory and appraisement was returned into said court on April 15, 1890; and thereupon the said F. C. Oldham, being required to enter into a bond as such administrator in the sum of twenty-seven thousand four hundred and eighty dollars, conditioned as the law required, executed and filed with said court a certain pretended bond; and thereupon said court indorsed the same as being filed and approved, and made and had entered on the rec-

ord minutes of said court a certain order as judgment approving said bond, and authorized him to have, dispose of, and sell all the community property of said estate, as shown in said inventory, and which embraced the property hereinbefore described. That said bonds and said indorsements and judgment were and are substantially as follows, to wit:

“No. 113. Bond filed May 13th, 1890.

“The State of Texas, County of Erath. Know all men by these presents, that we, F. C. Oldham, as principal, and H. A. Smith and A. A. Chapman, as sureties, are held and firmly bound unto the county judge of the county of Erath and state of Texas, and his successors in office, in the sum of twenty-seven thousand four hundred and eighty and 00-100 dollars, conditioned that the above-bound F. C. Oldham, who has been appointed by the county judge of Erath county administrator of the estate of M. V. Oldham, deceased, shall well and truly perform all the duties required of him under said appointment.

“[Signed]

F. C. Oldham.

“H. A. Smith.

“A. A. Chapman.

“No. 113. Decree.

“The State of Texas, County of Erath. On this 13th day of May, A. D. 1890, came to be heard the inventory, appraisement, and bond of the survivor of the estate of F. C. Oldham and his deceased wife, M. V. Oldham, the same having been duly considered by the court; and it appearing to the court that said appraisement is fair, just, and reasonable, and a fair valuation placed thereon, and that said bond is sufficient, it is therefore considered, ordered, adjudged, and decreed by the court that said appraisement and bond be, and the same is hereby, in all things approved, and that F. C. Oldham, survivor, be, and he is hereby, authorized to manage, control, and dispose of said community property above inventoried.”

“And which said bond and the order and judgment so rendered and entered was and is erroneous, unauthorized, and unlawful, in this, to wit: (1) Said bond was and is unlawful and void as a bond to protect these plaintiffs, as heirs of M. V. Oldham, because the same shows on its face to be a bond by F. C. Oldham, as the regular administrator of the estate of M. V. Oldham, and not a bond of F. C. Oldham, as community administrator of the community estate of himself and his deceased wife, M. V. Oldham, and there being nothing in said bond or any reference therein to any other writing describing the particular estate that the sureties thereon were liable as such sureties, and nothing in said bond or reference to any writing therein defining and describing the subject-matter of the undertaking of said sureties, and that said bond on its face showing no undertaking on the part of said sureties to be liable in any other way except as shown in said bond, and that said bond is insufficient and incompetent to bind said sureties as sureties for said F. C. Oldham as the community administrator of the community estate of himself and his deceased wife, M. V. Oldham. (2) Said bond was and is erroneous, unlawful, and void, and wholly contrary to law, and insufficient and incompetent as a bond to secure and protect the heirs of M. V. Oldham in their interest in said estate, in this: that said bond is only conditioned that said F. C. Oldham shall well and truly perform all the duties of administrator of the estate of M. V. Oldham, and which is the only condition therein, and is not conditioned, as provided by law in cases of community administration, that said F. C. Oldham will faithfully administer the community estate of himself and his deceased wife, M. V. Oldham, and pay over one-half the surplus thereof, after the payment of the debts with which the whole of said property is properly chargeable, to such person or persons as shall be entitled to receive the same; and therefore said bond is irregular, erroneous, and void, and said sureties were not and are not bound thereby to protect and secure the heirs of M. V. Oldham their interest in said property. And (3) because the facts above set forth as to the irregularity, incompetency, and insufficiency of said bond, and because no bond, in fact, was ever made and delivered to said court provided and conditioned as the law requires, by F. C. Oldham, to entitle him to be appointed and authorized to act as the surviving administrator of the community estate of himself and his deceased wife, M. V. Oldham. The action of the court in approving said bond, and the order and judgment thereon made by said court approving the same, and authorizing said Oldham to act as such administrator, and to sell, control, and dispose of said property, was irregular, erroneous, and unlawful, without authority in the court so to

do, and the same was and is void, and the court has no authority to have the same entered on the minutes of said court, and the entire matter as to these plaintiffs in this proceeding was and is void; and said bond and order of the court, as heretofore set out in this petition, is made part of the allegations here now made as to said bond and order."

The amended bill further alleged that, with full knowledge of the facts, P. J. Willis & Bro. received deeds to the property from F. C. Oldham in payment of debts due by him to them, and which accrued subsequent to the death of their mother, M. V. Oldham; that all the community debts of F. C. Oldham and his deceased wife had been fully paid prior to the conveyances to P. J. Willis & Bro., out of community assets; and that F. C. Oldham, at the time of said conveyances, was insolvent; and that P. J. Willis & Bro. had full notice of all these facts. The prayer of the bill was that said deeds be canceled, and held for naught, and for a partition of the land, and for rents, and for general and special relief.

The defendant P. J. Willis & Bro. demurred to the amended bill on these grounds: (1) That complainants were not entitled to the relief prayed for. (2) That it appeared that administration had been opened on the estate of M. V. Oldham, and the defect in the bond was a mere irregularity, and the bond was in substantial compliance with the law, wherefore the said bill is insufficient. (3) That it appeared by said bill that, if said bond was defective, yet a court having jurisdiction had declared the same sufficient, and had entered an order declaring said F. C. Oldham administrator of the community property of himself and deceased wife, and the same was res adjudicata, and for this reason the bill is insufficient. The court sustained the demurrer, and dismissed the bill. From this decree, appellants prosecute this appeal.

W. M. Sleeper, for appellants.

Eugene Williams, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts). The provisions of the Revised Statutes of Texas in regard to the administration of community property which are pertinent to the issues in this case are as follows:

"Art. 2219 (2194). The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all debts contracted during marriage. And in the settlement of such community estates it shall be the duty of the survivor, executor or administrator, to keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estate."

"Art. 2221 (2166). When the wife dies * * * leaving a surviving husband and a child or children the husband shall have the exclusive management, control and disposition of the community property, in the same manner as during her lifetime * * * subject, however, to the provisions of this chapter.

"Art. 2222 (2167). The husband shall within four years after the death of the wife, when there is a child or children, file a written application in the county court of the proper county stating (1) the death of the wife and the time and place of her death. (2) That she left a child or children, giving the name, sex, age and residence of each child. (3) That there is a community estate between the deceased wife and himself. (4) Such facts as show the jurisdiction of the court over the estate. (5) Asking for appointment of appraisers, to appraise such estate.

"Art. 2223 (2168). Upon the filing of such application the county judge shall without citation, and either in term time or vacation, by an order entered on the minutes of the court, appoint appraisers to appraise such estate as in other administrations.

"Art. 2224 (2169). It shall be the duty of the surviving husband, with the assistance of any two of the appraisers, to make out a full, fair and complete inventory and appraisement of such community estate and the husband shall attach thereto a list of all community debts, due the estate, and such inventory, appraisement and list shall be sworn to and subscribed and returned to the court within twenty days from the date appointing appraisers, and in like manner as in other administrations.

"Art. 2225 (2170). The surviving husband shall, at the same time he returns the

inventory, appraisement and list of claims, present to the court his bond, with two or more good and sufficient sureties, payable and to be approved by the county judge, in a sum equal to the whole of the value of such community estate, as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one half the surplus thereof after the payment of the debts, with which the whole of said property is properly chargeable, to such person or persons as shall be entitled to receive the same.

"Art. 2226 (2171). When any such inventory, appraisement, list of claims and bond are returned to the county judge, he shall, either in term time or vacation, examine the same and approve or disapprove them, by an order to that effect entered upon the minutes of the court, and when approved the same shall be recorded on the minutes of the court, and the order approving same shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter.

"Art. 2227 (2172). When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court shall have the right to control, manage and dispose of such community property, real or personal, in such manner as may seem best for the interests of the estate, and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased, and a certified copy of the order of the court mentioned in the preceding article, shall be evidence of the qualification and right of such survivor."

"Art. 2229 (2174). Any person interested in such community estate may cause a new appraisement to be made of the same, or a new bond may be required of the survivor for the same cause and in like manner as provided in other administrations."

"Art. 1840 (1789). The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary or of administration, settle the accounts of executors and administrators and transact all business appertaining to the estate of deceased persons, including the settlement, partition and distribution of such estates.

"Art. 1841 (1790). The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators and for the transaction of business appertaining to estates, and original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law."

The above articles have long been the law of Texas, and are quoted from the Revised Statutes of Texas of 1895.

The main question raised by the demurrer to the amended bill is whether the proceedings had in the county court of Erath county in the matter of the estate of M. V. Oldham, wife of F. C. Oldham, deceased, wherein the bond required from the surviving husband, F. C. Oldham, under the provisions of article 2225, was duly approved and entered and recorded upon the minutes of the court in accordance with article 2226, were absolutely void, or merely irregular. If void, the P. J. Willis & Bro. corporation acquired no title to the property claimed by appellants. If voidable or irregular only, then in this case the order of the county court of Erath county, approving the bond of F. C. Oldham, survivor, has the force of the thing adjudged, and cannot be collaterally attacked. It is to be noticed that by article 1840 the county court has the general jurisdiction of a probate court; and that by article 2226 the order of the county judge approving the bond of the surviving husband for the administration of the community is to be spread upon the minutes, making it substantially the judgment of the court; and that by article 1841 the district court is restricted to appellate jurisdiction in probate matters, except with original jurisdiction and gen-

eral control over executors and administrators, under such regulations as may be prescribed by law.

Under similar provisions, the supreme court of the state of Texas, in *Buchanan v. Bilger*, 64 Tex. 589, 591, held:

"It is now the well-settled doctrine of this court that the district court has no original jurisdiction to revise and correct the proceedings, orders, and decrees of a county court sitting in matters of probate. Its jurisdiction in this respect is entirely appellate, and to be exercised by means of an appeal or writ of certiorari, as provided in the Revised Statutes."

In *Jordan v. Imthurn*, 51 Tex. 286, *Pratt v. Godwin*, 61 Tex. 334, and *Cordier v. Cage*, 44 Tex. 534, the same court decided that irregularities in proceedings in the county court had by a surviving husband, to qualify himself to dispose of the community estate after the death of his wife, will not vitiate a sale of the community property. In *Jordan v. Imthurn* the court says:

"It was an irregularity to have taken a bond for an amount less than the appraised value of the property, but, in our opinion, not sufficient, under the circumstances, to have rendered the proceedings void. The giving of the bond by the surviving husband, and its approval by the clerk, was in the nature of a judicial proceeding, which should not be held void on a collateral attack. It seems to have been given and accepted in good faith, to have been acted upon and acquiesced in by all parties interested, and no direct proceedings taken to avoid it, and have a new or additional one given."

In *Green v. Grissom*, 53 Tex. 435, in dealing with questions arising under the same statutes, the supreme court says:

"This court has firmly upheld proceedings under this and subsequent statutes on this subject, where they seem to have been taken in good faith, for the legitimate purposes contemplated by these acts, and when in substantial compliance with their spirit and intention."

In the proceedings recited in the bill in this case, in view of the above-quoted statutes and decisions, it cannot be contended that the county court of Erath county was without jurisdiction in the premises, or that the acceptance and approval of the bond of F. C. Oldham, as survivor in community, was beyond its jurisdiction. If the county court had jurisdiction in the matter, it follows that its decision, that the bond in question was good and sufficient, cannot be questioned in any other court except in the exercise of an appellate jurisdiction. As this suit was instituted in the district court of Erath county, not by way of appeal from or by certiorari to the county court, it is clear that the district court of Erath county was without jurisdiction to inquire into and pass upon the sufficiency of the bond in question.

The case concedes that the P. J. Willis & Bro. corporation acquired the property in controversy from F. C. Oldham, survivor in community, after the inventory, appraisement, and bond were approved in the county court of Erath county. Therefore, so far as the amended bill shows, the title acquired by the said corporation was valid as against the heirs at law of M. V. Oldham, wife of F. C. Oldham. The demurrer to the amended bill appears to have been properly sustained. No other questions argued need be considered. The decree of the circuit court is affirmed.

KITTEL v. AUGUSTA, T. & G. R. CO. et al.

(Circuit Court, S. D. New York. February 22, 1897.)

1. RECEIVERS OF FEDERAL COURTS—PROPERTY IN OTHER STATES.

A federal court in one state cannot reach property in another state by means of a receiver.

2. RAILROADS—EXECUTION SALE—RIGHTS OF CREDITORS.

A corporation to which the purchaser of railroad property at an execution sale has conveyed such property cannot be held liable, to creditors of the execution debtor, for or on account of the price paid for the property at the execution sale.

3. CORPORATIONS—DIRECTOR AS JUDGMENT CREDITOR—PREFERENCES.

Defendant, who was a director and also a creditor of the A. Ry. Co., caused its property to be sold under execution upon a judgment against it for his debt, and bought in the property for \$100,000. *Held* that, though he had obtained no more than any creditor not standing in a trust relation could have, he should not, being a director, obtain any preference, and would be required to account to another creditor for a ratable proportion of the \$100,000.

John A. Straley, for plaintiff.

Charles B. Meyer, for defendants.

WHEELER, District Judge. The plaintiff is alleged to be a citizen of New York; the defendant Clark, of New Jersey; and the defendants the Augusta, Tallahassee & Gulf Railroad Company and the Carrabelle, Tallahassee & Georgia Railroad Company, of Florida, doing business in New York. The plaintiff had mortgages of \$29,450 on 109,000 acres of land of the Augusta Railroad Company in Florida, whose road there was partly built; and the defendant Clark, who was largely interested in that road, had advanced to that company \$257,994.19, which had gone into one note of \$235,000, and by mistaken duplication of items, in absence of the plaintiff, into another of \$151,324.10. Suit was brought upon these notes in the circuit court of the United States for the Northern district of Florida, and judgment on default was entered therein for the plaintiff for the full amount of these notes, \$432,228.42, with costs. Execution was issued upon this judgment, and all the property of the railroad company, except the lands subject to the plaintiff's mortgage, was sold thereupon to the defendant Clark for \$100,000. The Carrabelle Railroad Company was organized, the property bought by Clark was transferred to that company, and the construction of the road was proceeded with. The plaintiff, by foreclosure of his mortgages and sale of the property mortgaged, after the plaintiff's judgment, procured a deficiency judgment in the same court against the same company, for \$6,893.05, on which execution issued, and was returned nulla bona. This suit is brought to reach the property which was of the Augusta Railroad Company, and now is in the hands of the Carrabelle Railroad Company, by injunction and receiver, or the \$100,000 for which it was sold, by money decree, for satisfaction of the plaintiff's deficiency judgment.

That the property in Florida cannot be reached from here by a receiver seems quite obvious. It is without the jurisdiction. That the Carrabelle Company cannot be held liable anywhere for or on

account of the \$100,000 seems equally plain, for that company never had anything to do with that money. So the bill must be dismissed as to that defendant. This obviates the question of duplicity, which has been set up on account of these two forms of relief prayed.

If the defendant Clark had assumed enforcement of his judgment beyond what was justly due upon it, he might have made himself liable for any excess so obtained, but he did not. He promptly, on discovering the error, remitted the excess; and the amount realized was so much less than the true amount that the error never has made or could make any difference to any one. He was an active and controlling director, and also a creditor with a just debt. The assets of the corporation should, and on proper proceedings would, be applied equitably, which would be ratably, upon the corporate debts. He did no more than any creditor might do, and got no more than any creditor standing out of any trust relation might have. But, as a director, he ought not to have any preference over any other creditor, and, if he should divide ratably with the plaintiff, he would not have. The \$100,000 so divided would seem to give the plaintiff \$1,901, and leave him \$98,099. The plaintiff should accordingly have a decree for that sum, but—it is so small a part of what he has claimed—without costs.

Let a decree be entered dismissing the bill as to the Carrabelle Railroad Company, with costs; as to the Augusta Railroad Company, without costs; and against defendant Clark for \$1,901, without costs.

BOGARDUS v. GRACE et al.

(Circuit Court, S. D. New York. February 22, 1897.)

CONTRACTS—RESCISSION—SALE OF CLAIM AGAINST GOVERNMENT.

Plaintiff had an undisputed claim of \$96,030 against the government of Peru, which he assigned for collection to defendants, who had accounts with that government. The claim was acknowledged by Peru as due to defendants, and was then charged to that government on defendants' books, which showed at the time a balance due to it from defendants of \$46,557.75. Subsequently, plaintiff, in ignorance of this state of the accounts, sold his claim to defendants for half its face value, of which he received \$24,007.50 in cash, the balance to be paid on collection of the claim. After the entry of the amount of plaintiff's claim in defendants' account with the Peruvian government, other entries were made therein, varying the balances, but the items then standing remained in the account, and no arrangement was shown for keeping them alive distinct from the general account. *Held*, that by charging the claim against the credit to the Peruvian government the latter was in legal effect paid by the mutual extinguishment of the credit and of so much of the claim, and under these circumstances the sale of the claim was not binding upon the plaintiff, but he was entitled to be paid the amount so collected, less the amount already paid him in cash.

J. Hampden Dougherty, for plaintiff.
Frederick R. Coudert, for defendants.

WHEELER, District Judge. The plaintiff appears to have had an undisputed claim of £19,800 sterling, equal to \$96,030, against the government of Peru. The defendants were partners doing business

and having accounts with that government under the name of W. R. Grace & Co. The defendants, with others, were partners, also doing business and having accounts with that government, under the name of Grace Bros. & Co. The plaintiff transferred his claim for collection to W. R. Grace & Co., which was acknowledged by decree of the government to be directly due to them, and on April 9, 1893, was so entered upon their books as a charge against that government for that amount, and credited to the plaintiff by the name of Walter as a suspended account. As this account then stood there was, before these entries, a balance due to that government from W. R. Grace & Co. of \$46,557.75, and after them a balance due from that government to W. R. Grace & Co. of \$49,772.25. In 1886 the plaintiff, in ignorance of the state of these accounts, and supposing that nothing had been realized by the defendants from his account, sold it to them for one-half of its original amount, \$48,015, one-half of which—\$24,007.50—was to be and was then paid, and the other half of which, of the same amount, was to be paid when the claim should be collected, none of which has ever been paid. The bill, after alleging these with other things, in substance prays that the contract of sale of the claim be decreed to be void; that the credit to the Peruvian government, against which the claim was charged, less the amount paid to the plaintiff, be decreed to the plaintiff. In the answer—

"These defendants admit that in the year 1883, and long prior thereto, and prior to the fall of 1882, when the order or decree of the republic of Peru recognizing the claim of the complainant was delivered to these defendants, and prior to the date of said decree, to wit, the 30th day of November, 1880, these defendants had in their possession, under their control, sums exceeding the sum of \$49,750, or thereabouts, belonging to said republic of Peru, being the net proceeds of nitrate sold by these defendants for account of said republic, and that they had said sum in their possession and under their control, and credited in the books of their firm at the city of New York, and the government of Peru, at the time aforesaid order or decree was delivered to them by the complainant; and they further aver that at the time there were large sums due them by the government of Peru, through their branch house at Lima, which sums were not yet entered on the books of the firm at New York. They further aver that on or about the 9th day of April, 1883, at or about which time the complainant caused to be perfected the order or decree hereinbefore mentioned by the addition of certain formalities which had theretofore been wanting, these defendants at once opened in their books of account a suspense account under the title of 'Suspense Account Walter,' 'Walter' being a cable name used by the complainant, to which account they credited the entire amount of the claims of the complainant, to wit, \$96,030.00, and debited that amount to the account of the government of Peru. They deny that they ever placed to the credit of such suspense account the sum of \$49,750 in the bill of complaint alleged."

The answer was traversed, and proofs have been taken, the defendant Flint having been improved as a witness by the plaintiff, and the defendants Grace not having testified at all. The principal question in the case is as to the effect of what had been done towards collecting this claim by the defendants up to the time when it was bought by them of the plaintiff. That neither the figures of \$46,557.75 nor \$49,772.25 or thereabouts were ever entered on the books of the defendants as received from or charged to the Peruvian government on account of this claim is quite clear; but that the first

of these sums, standing on the books as a credit to that government, was met by charging to that government the amount of this claim, is equally clear. The books seem to have so stood for about three years, and, although they have been changed since by adding other items coming from Grace Bros. & Co. varying the balances, these items appear to have stood there in the same places till now. They would be merged in the general balances following and extinguished unless there was some arrangement with the government for keeping them alive. Nothing of that kind is shown. The allegation in the answer that the plaintiff's claim has not been paid to them is understood to mean that, considering the items brought in from other sources, there has always been a balance their due. So much of the credit to the government as was met by the charge of this claim, which was all then directly due to the defendants, was in legal effect paid by the mutual extinguishment of the credit and of so much of the claim. The sale of the claim under these circumstances would not be binding upon the plaintiff. The defendants have offered to reassign the claim upon repayment to them of what they have paid the plaintiff for it. But they have not offered him what they have extinguished of it, nor can they, without the agreement of the government of Peru, restore it as it was. With the sale out of the way, the parties must stand upon the arrangement as it was before. The plaintiff would be entitled to what was collected, \$46,557.75, less the commission, understood to have been 10 per cent., \$4,655.77, and what was paid over to him, understood to have been \$24,007.50. The balance is \$17,894.48. Decree for plaintiff for \$17,894.48.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF RICHMOND.

(Circuit Court, E. D. Virginia. February 24, 1897.)

1. TELEGRAPHS AND TELEPHONES—POST ROADS—ACT JULY 24, 1866—RIGHTS IN STREETS.

A corporation chartered as a telephone and telegraph company, and which maintains a telephone system through which, under contracts with its subscribers and with a company maintaining a telegraph system, its subscribers are connected with and transmit messages to the telegraph company, to be sent to points in other states and foreign countries, is entitled to the rights given by the act of congress of July 24, 1866, to aid in the construction of telegraph lines, and, on complying with the act, has the privilege of running its lines over and through the streets of a city, which are post roads of the United States, and such city has no right to prevent it from so doing, though it must pay its due proportion of taxes, and submit to the ordinary reasonable regulations of the state and city.

2. SAME—MUNICIPAL ORDINANCES.

The rights and privileges given by the act of congress of July 24, 1866, to aid in the construction of telegraph lines, were conferred both on companies then existing and on those thereafter organized; and, upon the acceptance by any company of the terms of the act, the conditions of any municipal ordinance under which it had previously been operating, so far as inconsistent with the act, are abrogated.

Stiles & Holladay and Hill Carter, for complainant.
Q. V. Meredith, for defendant.

GOFF, Circuit Judge. This case is now in my hands for hearing upon the bill of complaint and the demurrer thereto. The demurrer admits the allegations of the bill properly pleaded. Bearing this in mind, we will have but little trouble in reaching a conclusion on the questions now to be disposed of. The allegations in the bill claimed by the defendant to be legal conclusions, from the facts and circumstances set forth, will not be considered as admitted by the demurrer, unless such facts and circumstances are found to clearly sustain the contention of complainant. The complainant is a corporation duly organized, and doing business under the laws of the state of New York, and the defendant is a municipal corporation, existing under the laws of the state of Virginia. The complainant is engaged in the business of a telephone company, in, through, and between the states of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida, and has been so engaged for the past 15 years. It has, in conducting its business, erected and maintained lines of wires and poles, through and along certain of the streets and alleys of the city of Richmond, under and by authority of the common council and board of aldermen of said city, and by virtue of the laws of the state of Virginia and of the United States. It is alleged that the complainant is a telegraph company under the laws of the United States and of the state of Virginia, and that it was chartered as such under the general laws of the state of New York relating to telegraph companies. It is set forth in the bill that complainant, in the city of Richmond, maintains a telephone office, connected by wires with a large number of subscribers, all of whom are connected with the office of the Western Union Telegraph Company in that city, and that all such subscribers may, and many of them do, transmit, through their instruments connected with said wires, and through such office of complainant, to the Western Union Telegraph Company, messages addressed and intended to be sent, and which are sent, to points in other states, the District of Columbia, and foreign countries, under an agreement which has existed for years between the complainant and said Western Union Telegraph Company. Complainant also claims that its wires, poles, and instruments, as located and used along and over the streets of the city of Richmond, are so located and used under the provisions of, and are protected by, the laws of the United States, for the reason that on the 13th day of February, 1889, it duly filed with the postmaster general of the United States its acceptance of the terms of the act of congress entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," approved July 24, 1866, by which it was, among other things, provided that any telegraph company then formed or thereafter organized under the laws of any state, which would file a written acceptance with the postmaster general of the restrictions and obligations of said act, should have the right to construct, maintain, and operate lines of telegraph over and along any of the military roads and post roads of the United States which had then been, or might thereafter be, declared such by law. It is also alleged that the city of Richmond, on the 26th day

of June, 1884, in pursuance of the power given it by section 1288 of the Code of Virginia, passed an ordinance, by which the complainant was granted permission to erect poles, and run wires thereon, for the purpose of telegraphic communication throughout the city of Richmond, on the public streets thereof, on such routes as might be specified and agreed upon by resolutions of the committee on streets from time to time, and upon the conditions and under the provisions of such ordinance. It is also alleged: That the city of Richmond, on the 14th day of December, 1894, passed an ordinance which provided "that the ordinance approved June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone & Telegraph Company, be, and the same is hereby, repealed." That by the fifth section of said ordinance of December 14, 1894, all the privileges and rights granted by the ordinance of June 26, 1884, were to cease at the expiration of 12 months from the approval of said repealing ordinance. Other allegations in the bill set forth it will not be necessary to consider in disposing of the questions now before me.

The defendant insists that the act of congress before mentioned, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," does not apply to the complainant; and that, therefore, the claim made in the bill that the complainant is entitled to the rights and benefits secured thereby is without merit. The insistence is that the complainant is a telephone company, and that said act of congress only embraces telegraph companies. A number of courts, the decisions of which are worthy of our serious consideration, if not binding authority upon us, have held that a telephone company is a telegraph company, and that a company authorized to construct and operate telegraphs was empowered to establish a telephone service. On this question, see *Attorney General v. Edison Tel. Co. of London*, 6 Q. B. Div. 244; *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 42 Fed. 273; *Duke v. Telephone Co.*, 53 N. J. Law, 341, 21 Atl. 460; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 410, 7 Atl. 809. In this case this contention is confidently made by counsel for complainant, and vigorously denied by the attorney for the city of Richmond. I do not find it necessary to decide it, for the reason that, in my judgment, the statements set out in the bill, and admitted by the demurrer to be true, show that the complainant is both a telephone and a telegraph company, and clearly entitled, if the proper action relating thereto has been taken, to claim the benefits, and the protection given by said act of congress. It is distinctly charged, not only that the complainant is a telephone company engaged in such business in a number of states of the Union, but also that it is a telegraph company, chartered as such under the general laws of the state of New York. That being so, then the provisions of the act of congress mentioned are applicable; and, whatever action may be found proper hereafter when all the facts are before the court, I hold that, so far as the demurrer is concerned, this insistence of the defendant is without merit.

The defendant also claimed in its written demurrer filed in this

cause that, if said act of congress was intended to give to a telegraph company the right to erect poles and run wires along the streets of the city of Richmond without the consent of said city, such legislation was unconstitutional and void. This position was abandoned in the argument, and it was conceded that such act was constitutional; that all streets of the city of Richmond which are letter-carrier routes are post roads, within the meaning of said act; and that, under the same, a telegraph company can obtain a right of way for its poles and wires through and along the streets of a city without the consent of a municipality. These admissions are based on the decisions of the supreme court of the United States. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *W. U. Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961; *City of St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Id.*, 149 U. S. 465, 13 Sup. Ct. 990. I think it is plain that the complainant, under the allegations in the bill contained, is a corporation entitled to exercise all the functions granted to telegraph companies under the laws of the state of New York, and that, under the act of congress referred to, it has the privilege of running its lines through and over the streets of the city of Richmond, that are post roads of the United States, and that said city has no right to prevent it from so doing. While it is true that telegraph companies claiming the right under the laws of the United States to enter the territory of a state, and erect their poles and lines therein, must pay their due proportion of taxes, and submit to the ordinary reasonable regulations of the state and municipal authorities whose highways they use, and whose protection they claim and receive, still it is also true that neither the state nor the municipal authorities can prohibit them from entering their respective jurisdictions, nor require them to remove therefrom after they have established their lines. Such companies must submit to proper and reasonable local regulations, but they will not be expected to acquiesce in a city ordinance, not intended to regulate its management, but passed for the purpose of destroying its existence.

I think the bill alleges such facts as show the complainant to be engaged in interstate commerce, and I find that the claim of defendant that the business of complainant company is purely local in character is not sustained. The case made by the pleadings is as I have indicated. What the result may be when the evidence is in is yet to be found.

The defendant also insists that if the complainant erected its poles and lines under the authority of the ordinance of the city of Richmond passed June 26, 1884, it cannot afterwards, by accepting the provisions of the act of congress of July 24, 1866 (14 Stat. 221; Rev. St. § 5263 et seq.), thereby render of no effect the stipulations contained in said city ordinance. To what extent the complainant is bound by the terms of the ordinance of June 26, 1884, it is not necessary to determine; but that it is protected by the act of congress referred to (by virtue of its acceptance of the restrictions and obligations of the same, which was filed with the postmaster general of the United States February 13, 1889), and that it may rely upon it for the pur-

pose of preventing its poles and lines from being removed, and its property destroyed, is, I think, under the circumstances set forth in the bill, so clear that there is not room for doubt. Said act of congress was intended to apply to telegraph companies in existence at the time it was passed, as well as those that might be organized thereafter, provided such companies accepted the terms of the same in manner before mentioned. If such companies had been organized under state laws, and had been transacting business under the provisions of municipal ordinances, and then subsequently accepted the terms of said act of congress, it follows that the state and city laws, in so far at least as they conflicted with such national legislation, were inoperative and void, and for the reason that they concerned matters over which the congress had supreme control by virtue of direct constitutional authority.

Holding as I do on the questions referred to, it becomes immaterial to further consider the matters raised by the demurrer and discussed by the counsel, for the reason that, decide them as I may, still the jurisdiction of the court to hear and determine this case must be maintained. They can be considered hereafter, if necessary, when they have been more fully presented by answer and testimony. I will pass a decree overruling the demurrer, and giving the defendant the usual time in which to answer. The injunction as prayed for by complainant will be granted, to remain in force until the further order of this court.

WHITE v. THACKER et al.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 528.

1. TRESPASS TO TRY TITLE—GOOD FAITH OF CONVEYANCE—EVIDENCE—POWER OF ATTORNEY.

In an action of trespass to try title, in which a substantial issue is the good faith of a conveyance under which the plaintiff claims, the transactions of all the parties touching the land in controversy become material, and deeds purporting to be made under a power of attorney given by the plaintiff are entitled to be considered by the jury, upon the question of good faith, whether or not such power is in a form to make the deeds executed under it sufficient to raise an outstanding title.

2. WITNESSES—PRIVILEGED COMMUNICATIONS.

When a party has introduced in evidence letters written to him by his attorney in reference to the transactions affecting the matters in issue, he thereby opens the door to justify and require the court to admit the testimony of such attorney, when called by the opposite party to testify as to such transactions.

3. REVIEW ON ERROR—WAIVER OF JURY—SPECIAL FINDINGS.

When a case has been tried by the court without a jury, pursuant to stipulation, under Rev. St. § 700, the circuit court of appeals will not make inquiry as to the correctness of special findings of fact made by the trial court. *City of Key West v. Baer*, 13 C. C. A. 572, 66 Fed. 440, followed.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Robt. G. Street and M. F. Mott, for plaintiff in error.
E. P. Hamblin, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. On September 20, 1892, John F. White, the plaintiff in error, brought this action of trespass to try title to about 30 acres of land in Harris county, Tex., against R. J. Thacker, W. J. Coulter, James Winlock, John Woods, and Lem Collins. The petition is in the statutory form. All of the defendants answer with the formal statutory plea of not guilty, and R. J. Thacker pleaded specially the statute of limitations. A jury was waived by stipulation in writing, and the matters of law as well as of fact were submitted to the court without a jury.

The land in controversy, and two other tracts, was purchased on June 2, 1876, and a deed embracing the three tracts was made to Jennie G. White, reciting a cash consideration. Afterwards George White, the father of Jennie G. White and of the plaintiff, together with Jennie G. White, became indebted to John Sweeney, and gave him their note for \$600, secured by mortgage bearing date April 9, 1878, on one of the tracts of land conveyed to Jennie G. White in the deed above mentioned. Default having been made in the payment of the note, Sweeney obtained judgment against the makers, with foreclosure of the mortgage upon the land, on December 8, 1880. Under this judgment of foreclosure the mortgaged premises were sold on February 1, 1881, the plaintiff in the judgment becoming the purchaser at a price that did not extinguish the judgment. An execution on the judgment was run against other property of Jennie G. White, under which the land in controversy was sold, and purchased by the plaintiff in the judgment, June 6, 1882. A sheriff's deed therefor to John Sweeney was recorded June 28, 1882. On March 18, 1880, Jennie G. White conveyed all the property embraced in the deed to her first above mentioned to the plaintiff, John F. White. On August 31, 1883, the plaintiff made a power of attorney to his father, George White, which was recorded in September, 1883, appointing him attorney in fact to represent the plaintiff in all litigation, and undertaking to authorize him "to sell or bargain all that parcel of land on Clear creek, in Harris county and Brazoria county, known as the 'D. C. Hall Headright,' containing 553½ acres; also to bargain and sell the same as if I had been there myself to act upon the Thomas Earle league on ———, near Lynchburg, of 553½ acres; also 125 acres in Polk county out of the Stublefield tract; also about thirty acres out of the Luke Moore league in Harris county, near the city of Houston,—all in Texas; also a tract of 320 acres in Alabama, Lauderdale county, near Florence, known as the 'Hudson Beck Tract.'" On March 9, 1885, George White, purporting to act under the above-recited power of attorney, executed a deed for the three tracts to Trippe & Beaird, of Alabama, reciting a cash consideration, which was filed for record October 2, 1885. On May 2, 1885, also purporting to act under said power, George White executed a deed for the same land to James McEwan, of Detroit, Mich. This deed recited a cash consideration, and was filed for record the day of its execution. In May, 1886, John

Sweeney conveyed the land in controversy to W. J. Coulter. There was proof tending to show that the defendants and those under whom they claim had had successive, continuous possession of the premises from December, 1882, till the institution of this action. Along with other proof offered by the defendants under their plea of not guilty, they offered the power of attorney from John F. White to George White, the deed from John F. White by George White to James McEwan, and the deed from John F. White by George White to William H. Trippe. There was proof tending to show that the cash consideration mentioned in the deed to Jennie G. White was money belonging to her insane mother, and that she took the title charged with a secret trust in favor of her mother. There was proof also tending to show that she transferred this title to her brother, John F. White, the plaintiff, in furtherance of the purpose that the same should be held for their insane mother.

The court made special findings of fact as follows:

"(1) That the plaintiff has no regular chain of title from the sovereignty of the soil, because of defective descriptions and acknowledgments. (2) That Jennie G. White acquired good title to the lands in controversy by deed from A. A. Tucker of date June 2, 1876, and through the partition proceedings in the district court between Emily Ann Tucker and said Jennie G. White, and shown in the abstract of title of defendants. (3) That the common source of title between plaintiff and defendants is Jennie G. White. (4) That the conveyance or deed made by Jennie G. White to John F. White on the 18th day of March, 1880, was made by Jennie G. White to hinder and defraud her creditors and the creditors of George White, and especially to hinder, delay, and defraud John Sweeney, to whom said Jennie G. and her father, George White, were at the time indebted; and that said deed to John F. White was void. (5) That the deed from John F. White by George White, his agent and attorney in fact, to Trippe & Beaird, and the deed from said John F. White by said George White, as attorney in fact, to James McEwan, to the land in controversy, constituted an outstanding title of which defendants could avail themselves. (6) That defendants are entitled to recover upon said outstanding title and upon their pleas of limitation of three, five, and ten years. And to the foregoing findings and conclusions plaintiff duly excepts."

And rendered judgment:

"That the plaintiff take nothing by his suit, and that the defendants go hence without day, and recover of the plaintiff all costs about this suit incurred, and have execution therefor."

The assignment of errors suggests, first, that the court erred in admitting the deeds to the land in controversy from John F. White by attorney, George White, to James McEwan and to William H. Trippe and James P. Beaird. In the abstract of title filed by the defendants Thacker and Coulter in response to plaintiff's demand, the power of attorney and the deeds just mentioned were embraced, and were followed by the memorandum that "these three instruments will be offered principally for the purpose of showing outstanding title against the plaintiff." Plaintiff contends that they do not show outstanding title, because of the patent defect and ambiguity in the description of the land in the power of attorney. The defendant in error suggests and urges that the testimony of the plaintiff—which testimony was taken by deposition—refers to this power of attorney as having been acted upon by his father, George White; that the testimony was taken

long after the transaction, the deed by the attorney in fact described the land in controversy, and the plaintiff's testimony recognizes it as having been conveyed under the power of attorney, and does not question the authority of his attorney in fact, but only insists that the authority was never exercised. It is, however, unnecessary for us to pass on these contentions, for a substantial issue in the case was the good faith of the conveyance from Jennie G. White to the plaintiff, and on that issue the transactions of all the parties touching the land in controversy became material, and the purported dealings under the power of attorney, whether sufficient to raise an outstanding title, were circumstances to be considered by the jury in passing upon this question of good faith.

The plaintiff in error complains that the court erred in admitting in evidence that portion of Thacker's testimony wherein he testifies to the alleged fraud of Jennie G. White and George White and of plaintiff in conveying the land in controversy to any person for the purpose of defrauding their creditors, and particularly John Sweeney, the vendor of W. J. Coulter, because, it being shown by their evidence that Thacker was the attorney and confidential adviser of George White, and a party to said fraud, if any, it was incompetent for him to testify on that subject. Before Thacker's testimony was offered in the case, the plaintiff had given in evidence eight letters written on different dates, beginning May 25, 1887, and ending September 9, 1887, from the witness Thacker to George White, in reference to transactions affecting this land, and Thacker's connection with it as White's attorney, which opened the door so as not only to justify the court in admitting Thacker's testimony, but to constrain the court to admit it.

The tenth specification in the assignment of errors is that the court erred in rendering judgment against the plaintiff, specifying thereunder five grounds as a basis for the assignment, but not specifying that the special findings of fact did not support the judgment. It is manifest to us that the first and the fourth special findings of fact do support the judgment, and for this reason this assignment of error is not well taken. For the same reason, the second and third specifications of error become immaterial.

The fifth, sixth, seventh, and ninth specifications suggest that the court erred in its findings. Touching these assignments, the plaintiff contends that, as this cause was tried by the court without the intervention of a jury, on written stipulations of the attorneys, and all the facts in evidence in the court below have been brought before this court, the case should be considered and reviewed here according to the practice on appeals in equity, and equitable principles in like manner applied to its determination; and in support of this contention he relies upon section 700, Rev. St. U. S., Field v. U. S., 9 Pet. 182, and U. S. v. King, 7 How. 854. The case cited from 9 Pet. was decided in 1835, and that from 7 How. in 1849. The statute was passed in 1865. We have had occasion in a number of recent cases to construe section 700, and to announce the rules of practice under it as deduced by us from the terms of the statute and the subsequent

decisions of the supreme court. Our views on that subject are fully stated in the opinion of the court in the case of *City of Key West v. Baer*, 30 U. S. App. 140, 13 C. C. A. 572, 66 Fed. 440. We must, therefore, decline to make inquiry as to the correctness of the special findings of fact made by the circuit court in this case.

There having been no error in the admission of testimony, and the special findings of fact being sufficient to support the judgment, the judgment of the circuit court must be affirmed.

FERTIG et al. v. BARTLES.

(Circuit Court, D. New Jersey. February 27, 1897.)

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—EXTENSION OF LARGER CREDIT.

A surety is not released from his obligation by the voluntary extension to his principal of a credit greater than that for which the surety has agreed to become bound, when no change is made in the terms of the contract between the principal and his creditor.

2. SAME—ASSIGNMENT FOR CREDITORS.

The rule that a creditor who releases the principal debtor thereby discharges the surety does not apply to a release filed upon a claim made under an assignment for benefit of creditors, and in pursuance of a statute which provides that such releases shall be filed, and that it shall not operate to discharge any surety.

James Buchanan, for plaintiffs.

Paul A. Queen and John T. Bird, for defendant.

DALLAS, Circuit Judge. This case has been heard on three demurrers,—one by the plaintiffs to the third plea; and two by the defendant, namely, one to the replication to the fourth plea, and one to the replication to the sixth plea, and "to so much of defendant's seventh plea as relates to the writings of release in said seventh plea mentioned." The fact alleged by the third plea is that the plaintiffs extended a credit of \$20,000 to the principal debtors, without the knowledge or consent of the defendant, and it avers that he, as surety, was, in consequence, discharged. The demurrer admits the fact, but puts at issue the legal conclusion. If the surety was discharged, it must be because, by extending the principals' credit as stated, the plaintiffs violated some contract of theirs directly with the surety, or because such extension was made in breach of the principal contract, or in pursuance of an alteration thereof. There was no contract by the plaintiffs with the surety limiting the credit. The bonds which he gave of course fix the amount of the surety's liability, but they contain no provision in restriction of the credit to be accorded; and to the primary contract the surety was not a party, nor was the clause thereof upon which he relies inserted for his benefit. By that clause (in its final condition) it was covenanted that a credit should be given to the principals of \$5,000, and that at no time should the amount due by them exceed the amount of the bond which they were to give. By permitting that amount to be exceeded, surely the plaintiffs committed no breach of covenant; and as the plea

does not allege that they had made any alteration in the contract, which required them to do so, it must be assumed that the allowance of credit in excess of the amount stipulated for was wholly voluntary.

There is no doubt that where a change is made in the original contract, without the surety's assent, he is released (*Reese v. U. S.*, 9 Wall. 14); but I think it is also unquestionable that where there is no "modification," no "variance in the agreement," no subsequent "positive contract," changing the original one, the surety remains liable, even though the parties, "without any legal constraint on themselves, mutually accommodate each other." *Benjamin v. Hillard*, 23 How. 149-165; *Reese v. U. S.*, supra; *Insurance Co. v. Hanford*, 143 U. S. 187-191, 12 Sup. Ct. 437. If the contract itself had been varied, the surety would have been discharged, even though the original agreement had, notwithstanding such variance, been substantially performed (*Bonar v. Macdonald*, 3 H. L. Cas. 226-238; *Reese v. U. S.*, supra); and it seems to plainly follow that, where no variance of the original contract is alleged, the fact that more has been done than it required cannot be material. I am, upon the grounds which have been indicated, of the opinion that this third plea is insufficient in law to bar the right of action set forth in the declaration.

The causes assigned for the demurrer to the replication to the fourth plea relate to matters of form, rather than of substance. The replication, however, seems to have been framed in accordance with the law of the state of New Jersey and the practice of its courts. Moreover, I do not perceive that the defendant can be prejudiced by the special character of the replication. Even if the plaintiffs were not bound to state the particulars of nonperformance, their having done so puts the defendant at no disadvantage. He would have occupied, certainly, no better position had there been a joinder of issue on the general allegation of performance. Therefore, and as this court may at any time permit either of the parties to amend, and thereupon proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any defect or want of form which may be cured by amendment (*Rev. St.* § 954), the power to amend will be reserved for exercise hereafter, if requisite, and, subject to this reservation, the replication will be sustained.

So much of the defendant's remaining demurrer as relates to the replication to part of the seventh plea need not be separately discussed. What has just been said with reference to his other demurrer is, in the main, pertinent, and may be readily applied.

The replication to the sixth plea is challenged upon ground more substantial, though, in my opinion, not tenable. It is well settled that, in general, a creditor who releases the principal debtor, thereby discharges the surety; but this rule is not applicable to a release filed upon claim made under an assignment for benefit of creditors, and in pursuance of a statute which provides that such release shall be filed, and that it shall not operate to discharge any

surety. The surety has no cause for complaint of the creditor's effort to recover all he can from the principal, even if, in making that effort, he submits to terms which the law imposes, and which affect the surety as well as himself. Where a creditor claims under an assignment by the debtor, his action is really in relief of the surety, and, if he be required by law to file a release as a condition of maintaining his claim, his compliance with such law cannot be reasonably imputed to him as an act done in derogation of the surety's rights.

The plaintiffs' demurrer to the third plea is sustained. The demurrers of the defendant are both overruled.

UNITED STATES v. HART.

(District Court, E. D. Pennsylvania. February 22, 1897.)

1. VIOLATION OF NEUTRALITY LAWS—MILITARY EXPEDITION—REV. ST. § 5286.

Rev. St. § 5286, creates two offenses: (1) Setting on foot, within the United States, a military expedition, to be carried on from thence against the territory or dominion of any power, etc., with whom the United States are at peace; (2) providing the means for such an expedition, as, for instance, means for transportation.

2. SAME—PROVIDING MEANS, ETC.

To justify a conviction of preparing or providing means for such a military expedition, it must be proved (1) that a military expedition was organized in this country, and (2) that defendant, in the district of his trial, provided means for it, as charged, with knowledge that it was such an expedition.

3. SAME—"MILITARY EXPEDITION" DEFINED.

A military expedition, in the meaning of the statute, comprehends any combination of men, organized in this country, provided with arms and ammunition, to go to a foreign country, and make war on its government. If the men have combined and organized here, though in a rudimentary, imperfect, and inefficient way, voluntarily agreeing to submit themselves to the orders of such persons as they have selected, this is sufficient. It is not necessary that they shall have been organized according to military regulations, or uniformed, drilled, or prepared for efficient service; nor that arms shall be carried on their persons here, or on their way; but only that they shall have been provided for use when occasion requires. And it is immaterial whether the expedition intends to make war as an independent body, or in combination with others in the foreign country.

4. SAME—INDIVIDUALS GOING ABROAD TO ENLIST.

It is lawful for men, many or few, to leave this country as individuals, without combination or organization here, to go abroad, even by the same vessel, with the purpose of enlisting with a body of insurgents to fight against a foreign government; and it is immaterial that the vessel also carries arms, as merchandise, which are to be carried on shore in packages, as merchandise, by the men, who so intend to enlist. And the transportation of such persons, knowing their intent, constitutes no offense.

5. SAME—PROVIDING TRANSPORTATION.

If defendant, knowing that an expedition is an unlawful military expedition, has provided means, in the district of his trial, to carry it from the United States to an island over which the United States has jurisdiction, as one stage of the journey, with knowledge of its final destination, he is guilty.

6. SAME—SECRECY AND MYSTERY IN VOYAGE—INSTRUCTIONS.

The court will not instruct the jury that secrecy and mystery in the departure of the vessel, in the placing of men and arms upon her, are not of themselves evidences of criminality, and are as consistent with a lawful as

an unlawful enterprise, and are not inconsistent with the mere landing of contraband of war on a foreign shore. This subject presents no question of law for the court, but is one of fact for the jury alone.

7. SAME—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

The defendant is entitled to all reasonable presumptions in his favor; and if the jury find that all the evidence and circumstances relied on by the government to show guilt, when taken together, are as compatible with the theory of innocence as with the theory of guilt, it would constitute a situation of reasonable doubt, and require an acquittal.

This was an indictment against John D. Hart, under Rev. St. § 5286, for beginning or setting on foot in the United States a military expedition or enterprise, and also for providing and preparing in this country the means for such an expedition, to be carried on from thence, against the territory or dominions of the king of Spain, a prince at peace with the United States.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.
John F. Lewis and William W. Ker, for defendant.

BUTLER, District Judge (charging jury): Gentlemen of the jury, the trial of this case has occupied a good deal of time. No more, however, in the judgment of the court, than its importance and the numerous facts involved, required. It has been well and ably tried by counsel on both sides, and, what is equally agreeable to the court, it has been tried in excellent temper. I would be glad if I could submit it to you without further detention, but the numerous points presented will necessitate the expenditure of a greater length of time in submitting it than the court usually occupies. I bespeak your very earnest attention.

The defendant is indicted under section 5286 of the Revised Statutes of the United States, which reads as follows:

"Every person who within the territory or jurisdiction of the United States begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominion of any power, prince or state or of any colony, district or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor."

As you observe, the statute creates two offenses, the one setting on foot, within the United States, a military expedition; and the other, providing means for it, as, for instance, means for transportation. Although the defendant is indicted for both offenses, the government is pressing a conviction of the latter only. The case is thus simplified. To justify a conviction it must be proved that a military expedition was organized in this country; and that the defendant provided means here, in Pennsylvania, for assisting it on the way to Cuba, as charged, with knowledge that it was such an expedition. Thus you see two questions are presented for consideration, first, was such an expedition organized in this country? Second, did the defendant provide means for it, here, with knowledge of the facts, as charged?

In passing on the first question it is necessary that you shall understand what constitutes a military expedition, in the meaning of the statute. For the purposes of this case it is sufficient

to say that any combination of men, organized in this country, to go to Cuba and make war upon its government, provided with means,—with arms and ammunition,—(this country being at peace with Cuba,) constitutes a military expedition. It is not necessary that the men shall have been drilled, or put in uniform, or prepared for efficient service, nor that they shall have been organized according to the regulations which ordinarily govern armies. It is sufficient that they shall have combined and organized in this country as a body, to go abroad, and as such make war on the foreign government, having provided themselves with means to do so. If they have thus combined and organized it is not necessary that the arms shall be carried upon their persons here, or on their way; it is sufficient that arms have been provided for their use when occasion requires. It is unimportant that the organization is rudimentary, imperfect, and inefficient; it is enough to meet the requirements of the statute that the men have united and organized with the purpose and object stated; voluntarily agreeing to submit themselves to the orders of such person or persons as they have selected. In the nature of things the organization must be voluntary and imperfect. Obedience to leaders or officers selected here, could not be enforced. The men would be subject to no legal obligation and could not be compelled to obey—at least, until the expedition has left our shores, and the circumstances have become such that they are no longer free agents, but for want of legal protection have become subject to the will of such leaders, supported by the majority of their fellows. Nor is it important whether the expedition intends to make war as an independent body or in combination with others in the foreign country.—If men go, without such combination and organization, to volunteer as individuals in a foreign army, they do not constitute a military expedition, organized here; and the fact that the vessel carrying them under such circumstances, also carries arms as merchandise, is not important.

The defendant has asked the court to charge you as follows:

“(1) It is entirely lawful for any number of men to leave the United States together, with intent to go to Cuba and there join the Cuban army and fight against the Spanish government, provided the men do not in the United States combine and organize themselves into a military body under some leadership for that purpose, and are not supplied with arms and ammunition or munitions of war for their own personal use; and the transportation of such body of men, knowing their intention, does not constitute any offense within the meaning of our statute.”

This point is fully answered by what I have already said. It is lawful for men, many or few, to leave this country with intention to volunteer in the Cuban army, provided they have not combined and organized in this country, as previously described; and the transportation of such individuals would not constitute an offense against the statute.

“(2) It is no offense against the laws of the United States to transport arms and ammunition or munitions of war to Cuba, whether they are to be used in war against the Spanish government or not; and it is no offense to transport such

arms and munitions of war to Cuba, for the use of the Cuban army against the Spanish government, and with the intention thereby to aid and assist the Cuban army."

This is affirmed. Although a part of the statement may be open to question, the circumstances of this case do not call for questioning it, and it is therefore affirmed as written.

"(3) It is no offense against the laws of the United States to transport persons intending to enlist in the Cuban army to fight against the armies of the king of Spain, and upon the same ship to transport arms and munitions of war carried in boxes as merchandise, provided such persons do not in the United States combine and organize themselves under some military leadership for that purpose, and provided the arms and ammunition so transported are not intended for their use, and the intention of the men to enlist when they get to Cuba would not make unlawful an expedition which is otherwise lawful."

This point is affirmed, reminding you in this connection, of the importance of remembering the court's previously stated definition of the term "military expedition."

"(4) Even if the jury find from the evidence that the men who were on board the Laurada did go to Cuba, and did land there the arms and ammunition that had been on board that vessel, yet, if their intention was to land the arms rather than use them, the defendant cannot be convicted as indicted unless he knew that the men intended to fight with the arms against the Spanish government."

This contains nothing that is not covered by what has been said. I will repeat, however, that the defendant cannot be convicted, unless it is proved that when he started the Laurada out from Philadelphia, (if he did start her out) he knew that the expedition was military, such as I have described. Taking arms to, and landing them in, Cuba, is not of itself an offense against our laws.

"(5) If the jury find from the evidence that the men who came on board the Laurada acted as porters or stevedores to handle the arms and ammunition in the packages on the voyage, or to transport the packages on shore, even if those men had the intention of ultimately joining the Cuban army, the defendant must be acquitted."

This point is fully answered by what has been already said. Of course, if the men did not go organized to fight, but simply to handle and land the cargo of arms and other stores, they did not constitute a military expedition.

"(6) It is the duty of the government to prove, beyond a reasonable doubt, that the men taken on board the Laurada had previously combined and organized themselves into a military body, for the purpose of going to Cuba to join the Cuban army and fight against the Spanish government, and that the arms and ammunition were not merely merchandise intended for some other person, but were to be used by the very same men who were on board the Laurada for the purpose of making war in Cuba against the Spanish government, and that the defendant, knowing the expedition to be an unlawful one, did, in the Eastern district of Pennsylvania begin it, or set it on foot or provide or prepare the means for it; and if the government has failed to prove any of these facts conclusively to the satisfaction of the jury, and beyond a reasonable doubt, the jury must find the defendant not guilty."

While I doubt the accuracy of this point in one or two particulars, I affirm it, nevertheless, in view of the facts of the case, or rather the evidence, and direct the jury to follow it, bearing in mind, however, that if the men had organized in this country to go

to Cuba and fight, a strong presumption arises that the arms taken along were taken for their use, to the extent they needed arms, in the absence of evidence to the contrary.

"(7) Even if the jury should find that this was a military expedition they must also find before they can convict the defendant that he knew of its illegal character at the time the Laurada sailed from this district; and the fact that the defendant had some connection with the Laurada, either as agent for the owner, or its charterer, or as president of the J. D. Hart Company, would not be sufficient and conclusive evidence of guilt as to warrant his conviction."

All that is material in this point, and can be affirmed, has been answered, and will, no doubt, be answered again in the course of the charge.

"(8) The mere fact that the defendant knew that men and arms were to be taken on board the Laurada both to be carried together to the Island of Navassa, is not sufficient to convict him, and the transportation of the men and the transportation of the arms and ammunition in boxes from one point in the United States to the Island of Navassa, which is another point within the jurisdiction of the United States is not a violation of law."

Everything stated in this point which should be affirmed, is fully covered by what has already been said. I will, however, repeat that if the defendant had knowledge that the expedition was unlawful, as charged, and he provided the means, here, in this district, to carry it to Navassa, on its way to Cuba, knowing that the latter was its destination, he is guilty of the offense charged. It is not necessary that he should provide the means for carrying it to Cuba. If he provided means here for carrying it any part of the journey, with knowledge of its destination, and of its unlawful character, he is guilty.

"(9) Even if the defendant knew that these men and these arms were to go to, or be transshipped at Navassa, that does not raise a presumption that the defendant knew that they were to be taken from thence to Cuba, and were to be used by these men to fight against the Spanish government."

I do not find anything in this point that has not been sufficiently answered. Of course, as before stated, it is necessary to prove that the defendant had knowledge that the expedition was military and was going to Cuba, to justify a conviction.

"(10) There is no evidence whatever that the defendant provided or prepared the means for transshipping the men and arms from Navassa to Cuba, and transporting the men and arms to Navassa alone, is not a violation of the statute. To convict the defendant the jury must believe beyond all reasonable doubt that the defendant actually knew that the arms and ammunition were to go together to Cuba and that the men intended to use the arms to fight against Spain."

This point has been fully answered in so far as it can be affirmed.

"(11) Secrecy and mystery in the departure of the Laurada, in the placing of the men upon her, of the arms upon her, and her avoiding other vessels, and taking a circuitous route to Navassa, are not of themselves evidences of criminality and are just as consistent with a lawful as with an unlawful enterprise, and are not inconsistent with the mere landing of contraband of war upon the Island of Cuba—a thing not against the laws of the United States."

The subject involved in this point is one for the jury alone. It has been fully discussed by counsel on both sides, and the jury

must pass on the weight that should be given to the circumstances here referred to. The point does not present a question of law for the court, but one of fact, which has been fully considered by counsel, and must be passed upon by the jury. As the jury has observed, the defendant contends that the evidence here invoked by the government justifies a belief that the object of the expedition was simply to carry arms to Cuba, not a military expedition which would be an offense against the laws of this country, though the cargo would be contraband of war and liable to confiscation there. The defendant's counsel argues that all the suspicious circumstances cited by the government are as consistent with that supposition as with the charge of the government that this was a military expedition. The matter is one of fact for you and not for the court.

"(12) The defendant is entitled to all reasonable presumption in his favor; and if the jury find that all the evidence and circumstances relied on by the government to show guilt, when taken together, are as compatible with the theory of innocence, as with the theory of guilt, it would constitute a situation of reasonable doubt, and the jury should find the defendant not guilty."

This is true. The point is affirmed. If all the circumstances cited by the government in this connection are as consistent with a belief of innocence as they are with the government's position and charge of guilt, of course, you will necessarily disregard them. There must be a clear preponderance of inference from these circumstances against the defendant, to entitle them to consideration. Where the circumstances of a case are as consistent with a presumption of innocence as of guilt they cannot be used as evidences of guilt. That is true as a legal proposition, but it will be for you to say whether the circumstances referred to and in part relied upon by the government, the circumstances of suspicion and secrecy, are as consistent with a belief of innocence in the prisoner as a belief of guilt.

"(13) The defendant is entitled to the benefit of all doubt or doubts arising from the evidence or from the application of the law to the evidence, and if such doubt arises or exists in the minds of the jurors, it is their duty to find the defendant not guilty."

This seems to add nothing to the point just read, and is affirmed. It is no more than saying that the government must make out a clear case. Not a case that is proved beyond possibility of mistake; because no case is ever so proved; but a case which thoroughly satisfies the minds of the jury. It means that and nothing more. If the jury is not fully satisfied, but doubts, the prisoner is always entitled to the benefit of the doubt, and must be acquitted. Where the minds of the jury are fully convinced, there is no doubt such as the law recognizes, and in such case it is the duty of the jury to convict.

"(14) Under all the facts and circumstances and evidence in the case, the jury must find the defendant not guilty."

I disaffirm this point.

To avoid misunderstanding, which might arise from reading the numerous points, I will repeat what I said at the outset respecting the law:

To justify a conviction it must be proved that a military expedition was organized in this country; and that the defendant provided means here, in Pennsylvania, for assisting it on the way to Cuba, as charged, with knowledge that it was such an expedition. Thus you see two questions are presented for consideration, first, was such an expedition organized in this country? Second, did the defendant provide means for it with knowledge of the facts as charged?

In passing on the first question it is necessary that you shall understand what constitutes a military expedition within the meaning of the statute. For the purposes of this case it is sufficient to say that any combination of men, organized here, in this country, to go to Cuba, and make war upon its government, provided with means, (with arms and ammunition) this country being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall have been drilled, or put in uniform, or prepared for efficient service, nor that they shall have been organized according to the regulations which ordinarily govern armies. It is sufficient that they shall have combined and organized in this country as a body, to go abroad, and as such make war on the foreign government, having provided themselves with means to do so. If they have thus combined and organized it is not necessary that the arms shall be carried upon their persons here, or on their way; it is sufficient that arms have been provided for their use, when occasion requires. It is unimportant that the organization is rudimentary, imperfect and inefficient; it is enough to meet the requirements of the statute that the men have united and organized with the purpose and object stated; voluntarily agreeing to submit themselves to the orders of such person or persons as they have selected.

Your first inquiry therefore will be, was the expedition which was taken on board the *Laurada* off Barnegat, and carried to Navassa Island, in sight of Cuba, a military expedition, within the meaning of these terms, as I have defined them, set on foot in this country, to make war against the government of Cuba? That the destination of the expedition was Cuba does not seem open to reasonable doubt, though this, as well as all other facts in the case, must be decided by you. The people of the Island of Cuba, or a part of them, are engaged in war against their government. Several of the men composing the expedition said, if the evidence is believed, and that, of course, is for you, that Cuba was their destination, and that they were going there to fight the Spanish; and when transferred to the *Dauntless* at Navassa they went in that direction. The men, according to the testimony, were principally Cubans.—Was the expedition, however, military, such as I have instructed you the statute contemplates? In other words, had the men combined and organized before leaving this country, and provided themselves with arms, as before described, for the purpose of going to Cuba to make war against the government? They came to the *Laurada* in a body, apparently acting from a common impulse, as by preconcert. The arms and other military stores came at the same time, though from New York. The men immediately went to work, transferring the

arms, ammunition and other military stores, from the schooner on which they came, to the Laurada, under the orders of one or more of their number. On the way to Navassa they continued to work about this cargo, opening boxes, assorting ammunition and making sacks from canvas brought for the purpose, as the witnesses described, under the orders of Captain Sutro, who, the witnesses say, conferred with and received orders, or appeared to receive orders, from General Roloff. When approaching Navassa, three of the men, wishing apparently to desert, if the testimony is believed, and that is a question for you, withdrew from the others and hid themselves in a part of the ship where they supposed discovery might be avoided; whereupon, as I understand the testimony, and you will judge whether I am right or not, General Roloff had them sought for, brought out and sent upon the Dauntless with the other members of the expedition. If this latter statement, respecting the desertion of these men, or attempted desertion, hunting them up, bringing them out, and requiring them to go, is true, (and you must judge whether it is or not) it shows that the men were not at that time, at all events, free agents, but were subject to orders which they could not disobey. From these circumstances and from all the evidence bearing on the subject, you must determine whether the men had combined and organized as I have described, in this country, to go to Cuba as a body and fight, or were going as individuals subject to their own wills, with intent to volunteer in the insurgent service there, if they should see fit to do so, on arriving. You must judge from the evidence whether the men had combined, organized and consented to the government of one or more of their number here, in this country, to go to Cuba and make war upon the Spanish government, or whether they were going individually, each on his own account, with liberty to volunteer or not, as they saw fit, when they reached Cuba.

If you do not find that they had so combined and organized before leaving this country, then they did not constitute a military expedition, and the defendant must be acquitted. If, on the contrary, you find that they had so combined and organized in this country, you must next determine whether the defendant provided means for their transportation, not the whole way, but to Navassa. It is not necessary that he should transport them to Cuba, as I have said; if he provided means for their transportation to Navassa, on their way to Cuba, and made this provision here, in Pennsylvania, with knowledge of the character of the expedition and of its destination, he is guilty. The transportation was made by the Laurada. That is an undisputed fact. That somebody here provided her for this service, seems clear, though this question, as other questions of fact, I repeat, is for you. It seems to be beyond room for controversy that somebody here provided the Laurada for that service, and provided her with stores and extra boats. I say it appears so to the court, but still you are not bound by what the court thinks of the evidence. The fact is for you. She started from the port of Philadelphia, taking on here, if the witnesses are believed,

an unusual supply of coal for her alleged voyage, and an unusual supply of other stores. After clearing for San Antonio, she surrendered this clearance, taking another for a coastwise trip to Wilmington; and upon her arrival there immediately took a clearance for Port Antonio again. After passing down the river 20 miles further, she anchored and awaited the arrival of small boats brought down from Camden, on an order given in Philadelphia. She then proceeded to the breakwater and out to sea; but instead of going on a direct course to San Antonio she turned northward and went to the point off Barnegat, where she took on the men, arms, ammunition and other military stores before alluded to. She then proceeded, by the route described, to Navassa, where she transferred the men and other cargo to the Dauntless, together with the boats, or a part of them, taken on down the Delaware. It further appears, as her first officer, Rand, testifies, that her captain pointed out to him on the chart before leaving Philadelphia, the location off Barnegat as their next objective point after passing the breakwater. When she got there she took on the cargo, under circumstances which seem to leave no room for doubt that she expected it. Now, gentlemen, you must judge from these circumstances, and all the testimony relating to the subject, whether it is not reasonably clear that the Laurada and her supplies, including extra boats, were provided here, in this district, expressly to carry the expedition subsequently taken on off Barnegat. If they were so provided you must next determine whether it is proved that the defendant, Hart, made this provision. The vessel was in the service, at the time, as it would seem, of the John D. Hart Company, of which he is president and manager. Who else, or whether anybody else is in the company does not appear, so far as I remember. If there is testimony showing that anybody else is in the company you will remember it. There may be. I remember no such testimony. It is clear, however, according to the testimony, that he was the president of the company, occupied the office and managed its business. The evidence if believed, and it is uncontradicted, shows that the defendant gave several orders respecting the vessel about this time, when she came in before this trip, and when she was going out. Among these orders, was one, if not two, respecting her clearance; it also shows that he directed supplies to be put on board, that he took part in employing her crew, and that while the order to overtake her down the Delaware with extra boats, was not signed by him, nor anybody else, the tug boatman, Smith, usually employed by the John D. Hart Company, who had taken the Laurada out and turned her down the river that day, to whom this order for extra boats was delivered unsigned, executed it, and presented his bill for this service to Mr. Hart, I believe the next day, or soon after, and that Mr. Hart tore it up, did not hand it back, saying he knew nothing about the matter. It was, however, paid a day or two later, by the hands of some one whom the witness says was unknown to him. That Mr. Hart knew that the Laurada was going to the point off Barnegat to take the men on board would seem clear, if the witnesses are

believed, because they testify that he procured the Fox and sent the men on her to the point where they met the Laurada. If this latter statement is true, the inference seems irresistible that he knew the Laurada was going there for the men. From these circumstances and from all other evidence relating to the subject, and with a recollection of what counsel have said, you must determine whether the defendant, here in Philadelphia, provided this vessel and her supplies for the purpose of carrying the expedition to Navassa, on its way to Cuba. If you do not find he did, you will acquit him. If, on the contrary, you find he did you will next pass to the only remaining question in the case: Did he know that the expedition was a military expedition, as charged, when he provided the means for its transportation? To satisfy you he did, the government points to what it calls the suspicious circumstances attending the fitting out of the vessel, her clearances, and voyage from this port to the point off Barnegat. What weight these circumstances should have in deciding the question of knowledge on his part is entirely for you. The government argues that the object was to deceive the officers of the United States, which the defendant could have no object in doing if he did not believe he was violating its laws. On the other side, it is urged for the defendant that it is just as reasonable to believe that the object of these circumstances called suspicious, was simple to deceive the Spanish authorities and Spanish agents hereabouts. You must say whether this position of the defendant is a reasonable one or is not. The government further points, in this respect, with a view of showing knowledge in the defendant of the character of the expedition, to the fact that the defendant had intimate relations, if the testimony is believed, with the men comprising the expedition; that he forwarded most of them from Atlantic City to the point of embarkation; that he knew who were going, those with military titles as well as those without; that he knew arms and other war material were to be taken on with the men, and must have understood the character of the expedition. If he sent the vessel, the Laurada, to the point off Barnegat, the inference would seem to be entirely reasonable that he understood at that time that she was to take these men, because if the testimony is believed he sent the men there, the principal part of them, and that he knew she was to take the military stores, because the vessel took them as if she had previous orders. The vessel was not surprised in finding, so far as appears, that military stores were to be taken; they were taken as matter of course, just as the men were. You have heard and must consider the answer the defendant's counsel have presented to this contention of the government that the defendant, Hart, had knowledge when the Laurada went out from here of the character of the expedition; and from all the evidence bearing on the question, you must determine whether it is proved that the defendant, here furnished the means of transportation for the expedition, with knowledge at the time that it was military, as before described. If he did not, he is not guilty. If he did, he is guilty.

In conclusion, I repeat, if the expedition was a military one, as charged, and the defendant here in Philadelphia provided the means for its transportation, with knowledge that it was a military expedition, he is guilty; otherwise, he is not.

He is entitled to the benefit of any reasonable doubt that may exist, on a careful and impartial examination of the evidence. If your minds are not fully convinced of his guilt he must be acquitted. On the other hand, if your minds are so convinced, he must be convicted. No suggestions of prejudice against or sympathy for him can be allowed to influence your verdict. Your duty and the public interests, as well as the defendant's rights, require that the case shall be decided exclusively on the testimony you have heard here.

I repeat this case has been tried with a great deal of care, most ably, as I think, by the counsel on both sides, with such a degree of good temper as is best calculated to reach a just result; and it is now with you to determine how it shall be decided. I suppose a citizen is never called to the discharge of a higher duty than that of assisting in the administration of justice as a juror. To listen to anything else than the evidence heard from the witness stand, the arguments of counsel and the charge of the court would be to fail in discharging this important duty, and to show yourselves unworthy of the confidence reposed in you. I want you to be thoroughly impressed with the importance of the case and the importance of deciding it according to the evidence. All parties must be satisfied with such a result.

ALLINGTON & CURTIS MANUF'G CO. et al. v. BOOTH.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTIONS—WHEN GRANTED.

That defendant is merely a user of a patented machine, or that complainants grant no licenses, but manufacture and sell the machines themselves, is no ground for refusing a preliminary injunction against a willful infringer, where the validity of the patent has been previously adjudicated. Under such circumstances, it does not lie with the infringer to say that the patent owner will be fully compensated by a money recovery.

2. SAME.

Whenever it is manifest that, on the case made, an injunction will be granted at final hearing, one should be granted preliminarily, in the absence of facts presenting special equities to induce the court, in the exercise of its discretion, to withhold it.

Appeal from the Circuit Court of the United States for the District of Vermont.

This was a suit in equity by the Allington & Curtis Manufacturing Company and the Knickerbocker Company against J. R. Booth for alleged infringement of certain patents for improvements in dust collectors. The circuit court granted a preliminary injunction (72 Fed. 772), and the defendant has appealed.

George B. Parkinson, for appellant.

Albert H. Walker and Charles K. Offield, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an order restraining the defendant pendente lite from infringing the patents upon which the suit is founded. The patents are for improvements in dust-collecting machines, and their validity had been adjudicated nearly two years prior to the commencement of the present suit. *Knickerbocker Co. v. Rogers*, 61 Fed. 297. The complainants do not grant licenses, but manufacture and sell the machines. The defendant was a conspicuous infringer, though only a user of the patented machine. Before the present suit was brought, he had been notified of the complainants' rights, but had refused to recognize them, and invited complainants to bring suit against him upon the patents. He had bought his machine from a mercantile firm of Hartford, Conn., which firm had bought it and others from an Ohio corporation engaged in manufacturing the machines. Suits for infringement of the patents had been brought by the complainants, and were pending against the Ohio corporation and the Hartford firm, when the present suit was commenced. No question was raised by the defendant as to the title of the complainants to the patents in suit, or as to the validity or the infringement of the patents. He insisted, and now insists, that the complainants were not entitled to an injunction because they would not suffer irreparable injury if it were denied, but would be completely recompensed by a recovery of damages and profits.

The rules which control applications for preliminary injunctions in patent causes are so well settled and familiar that it would seem to be quite useless to recapitulate them, much less to cite from text writers or judicial utterances in exposition of them. We are aware of none which disentitle a complainant to the remedy of a preliminary injunction against the infringement of his patent by a defendant who is a user of the infringing article when the facts are such that he would be entitled to it if the defendant were a manufacturer or a seller. Whenever it is manifest to the court that, upon the case made, an injunction will be granted at final hearing to the complainant, one should be awarded to him preliminarily, in the absence of facts presenting special equitable considerations to induce the court, in the exercise of judicial discretion, to withhold it. Under such circumstances there is no reason why the complainant should not have his remedy immediately. Why should a court of equity permit a wrong, indisputable and wanton, to go unredressed longer than necessary? The object of a preliminary injunction is to preserve property rights pending the final determination of the suit.

The principle upon which all injunctions are granted in patent causes, preliminary and final, is that an action at law does not give a complete remedy to the complainant whose property is invaded. The infringement of a patent is a constantly recurring grievance, which cannot be adequately prevented but by an injunction. "It is quite plain that, if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation without ever being able to have a final establishment of his rights." Story,

Eq. Jur. § 931. A decree for damages and profits in an equity cause would fall short of adequate redress to the patentee. He is entitled to an injunction as well as to an accounting of damages and profits. Indeed, the accounting is but incidental to the relief by injunction, and it is the right to this relief which alone gives a court of equity jurisdiction. "A recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from the further use of it." *Suffolk Co. v. Hayden*, 3 Wall. 315, 320. In *Penn v. Bibby*, L. R. 3 Eq. 308, a suit upon a patent against a defendant who was merely a user, the vice chancellor, in awarding an injunction and an account, said: "I cannot in the decree do less than give the plaintiff his full right, and I cannot bargain for him what he may choose or may not choose to do." It does not lie with the infringer to say that the owner of the patent will be fully compensated by a money recovery, and ought to be satisfied thereby. It is for the latter to say whether he prefers an injunction, or a money recovery, or both; and, at his option, he is at liberty, at final hearing, to waive an account, and insist upon his injunction.

We conclude that there was nothing in the circumstance that the defendant was merely a user of the patented invention, or that the complainants derived their profit exclusively from the manufacture and sale of the patented machines, to warrant the court in refusing the injunction. We are also of the opinion that the facts in the case do not disclose any equities upon the part of the defendant, or any oppressive conduct by the complainants, which should have induced the court below to withhold the injunction.

The order is affirmed, with costs.

FARMERS' LOAN & TRUST CO. v. IOWA WATER CO. et al. (OTTUMWA NAT. BANK et al., Interveners).

(Circuit Court, S. D. Iowa, E. D. February 1, 1897.)

No. 195.

1. MORTGAGE BONDS—PRIOR LIEN COUPONS—PAYMENT—TRANSFER.

The I. Co. issued a number of bonds, secured by a mortgage, under the terms of which the coupons of the bonds were a lien prior to the principal. A few days before the maturity of one set of coupons, the I. Co. remitted to the trust company, at whose office they were made payable, a sum less than the whole amount of maturing coupons. On the day the coupons matured, one V., who was under no legal obligation to do so, but who wished to prevent a public default on the bonds, agreed with the trust company that it should buy, for his account, any coupons presented which it had no funds to pay. Accordingly, the trust company turned over to V. 93 coupons, and received from him the money for them. There was no notice, actual or constructive, to the bondholders, of these transactions, but they simply presented for collection their coupons at the place where they were to be paid upon presentation and cancellation, and the coupons were apparently paid. The 93 coupons received by V. were transferred by him, for value, to a corporation of which he was a director, which afterwards, in a foreclosure suit commenced some time later against the I. Co., presented the coupons, and claimed a preference for them. *Held* that, as against the bondholders, neither V. nor his transferee could be held to be purchasers of the coupons, or entitled to a preference over the bonds, but the coupons must be treated as paid.

2. CORPORATIONS—RESOLUTION FOR ISSUANCE OF BONDS.

It seems that a resolution of the directors and stockholders of a corporation, providing for the making of a mortgage to secure an issue of bonds, which should contain such terms and conditions as are generally contained in like instruments, authorizes the making of a mortgage containing a provision for the falling due of the principal of the bonds upon a default in interest.

3. MORTGAGE FORECLOSURES—REDEMPTION—QUASI PUBLIC CORPORATIONS.

Section 3321 of the Code of Iowa, relating to the redemption of property sold under a decree for the foreclosure of a mortgage, does not apply to the property necessary to the exercise of the franchises of a quasi public corporation, such as a company formed for supplying a town with water, but the mortgaged property and franchises of such a corporation should be sold as an entirety, and without redemption. *Hammock v. Trust Co.*, 105 U. S. 77, followed.

On Exceptions to Report of Special Master.

The Iowa Water Company (hereinafter spoken of as the "Water Company"), a corporation organized under the laws of the state of Iowa, upon April 15, 1887, executed its bonds, secured by trust deed wherein complainant, a corporation organized under the laws of the state of New York, is named as trustee, to the face value of \$400,000. The property described in the trust deed included the franchises, rights (real and personal), and all other property at the date of said deed owned by said water company, as well as that which should be thereafter acquired and owned by it. The description, as given in the trust deed, is specific and lengthy, and is accepted by all parties hereto as sufficient. The New England Waterworks Company (hereinafter spoken of as the "Waterworks Company") claimed, by its petition of intervention, to be entitled to payment with preferences on account of certain coupons held by it, while C. H. Venner, in his petition of intervention, claimed to be entitled to have the mortgaged plant sold, subject to redemption, etc., so that he may redeem as holder of a judgment by him recovered against said water company. Hon. W. I. Babb was appointed special master, and, after an extended hearing, has filed his report. The waterworks company and Venner have filed their several exceptions, and the present hearing is on such exceptions.

W. A. Underwood and H. Scott Howell, for complainants.

Wm. McNett and James C. Davis, for Iowa Water Company.

Blake & Blake, for interveners New England Waterworks Company and Clarence H. Venner.

WOOLSON, District Judge. The master's report is specific and complete on the matters referred to him. So far as it relates to the exceptions filed against it by the waterworks company, Judge Babb's report, in its finding of facts, is as follows:

"This company intervenes for 93 coupons, of thirty dollars each, all of which matured on the 1st day of April, 1891, and which were cut from the following bonds of the Iowa Water Company, to wit [describing them]. That said intervener claims payment of said coupons, with interest thereon from April 1, 1891, alleging that these coupons were purchased, and not paid, when they were taken up. This is denied by the separate answer of the complainant, and the facts which I find established by the evidence on this issue are as follows:

"The coupons of the Iowa Water Company are all made payable at the office of the Farmers' Loan and Trust Company, in the city of New York. That, while they became due on the 1st days of April and October in each year, yet there is a provision in the fourth paragraph of the mortgage made to secure the bonds and coupons by which said water company may have 90 days of grace in which to pay any installment of interest after the same becomes due, before default could be claimed against the water company, and before an action of foreclosure could be commenced therefor. That on March 3 and March 28, 1891, the officers of the Iowa Water Company duly remitted to the Farmers' Loan and Trust Company, trustee, in two separate amounts, the aggregate sum of six thousand one hundred ninety-five dollars and forty-five cents (\$6,195.45), on account of and to apply upon the payments of the coupons of the Iowa Water Company which were to mature on the 1st of April, 1891, and which sum so remitted was received by said trust company, and placed to said account on or before the 31st day of March, 1891. That on or about April 1, 1891, C. H. Venner, of the firm of C. H. Venner and Company, called upon the Farmers' Loan and Trust Company, and made inquiry of them as to whether or not they had received sufficient funds to pay the coupons of the Iowa Water Company falling due on that day. He was informed by the vice president of the Farmers' Loan and Trust Company of the amount they had received for that purpose, but it was not sufficient to pay the full amount of interest falling due on said bonds on that date. He was further informed in said interview that they had been advised that the balance would be sent later on. Mr. Venner then tried to induce the Farmers' Loan and Trust Company to make the necessary advances to pay said coupons as they might be presented, and to rely upon the provisions of the mortgage to protect them. This they refused to do. He then stated to them that he was unwilling to advance any money to the Iowa Water Company to pay the balance of said coupons, but that his firm, C. H. Venner and Company, would buy so many of the coupons falling due on that day as the trust company did not have money to pay for, after the funds they had on hand were exhausted. He suggested that the trust company might inform all parties presenting coupons that C. H. Venner and Company, No. 33 Wall street, New York, would pay said coupons. Either Mr. Searls or Mr. Leupp, vice presidents of said Farmers' Loan and Trust Company, said it would be better for the trust company to buy the coupons for the account of C. H. Venner and Company, and, when purchased by them, to then deliver the said coupons to C. H. Venner and Company, and obtain their check for the amount of the purchase price. This plan was agreed to by these parties at that time. In pursuance of that arrangement, the Farmers' Loan and Trust Company took up 112 of said coupons falling due April 1, 1891, said coupons being for thirty dollars each, and which included the 93 coupons involved in this intervention. On or about April 9, 1891, the said trust company delivered to said C. H. Venner and Company said 112 coupons, which included the 93 now in controversy. The 93 now in question were punched as they now appear, and being in a way to indicate that they were paid and canceled. But said coupons were accompanied by a letter

signed by W. D. Searls, as the first vice president of said trust company, a copy of which letter is as follows:

"New York, April 9, 1891.

"Messrs. C. H. Venner & Co., 33 Wall Street, City—Gentlemen: The following numbered coupons of the Iowa Water Company due April 1, 1891, were canceled by us in error, to wit: [Here follows specific enumeration of said 93 coupons.]

The Farmers' Loan and Trust Co.,

"By W. D. Searls, V. P."

—"That upon presentation of said coupons and said letter, after some hesitation, the said C. H. Venner and Company paid over to the Farmers' Loan and Trust Company three thousand three hundred and sixty dollars (\$3,360), being the money paid out by said trust company for said coupons.

"I further find that it was fully understood between the said Farmers' Loan and Trust Company and said C. H. Venner and Company, at that time, that this transaction was a purchase of said coupons by said C. H. Venner and Company, and not a payment of them. I also find that no notice of any kind was ever given to the public or to the bondholders of this fact, and the evidence shows that the bondholders supposed that their coupons were being paid, and not purchased; and I fail to find that there was any fact or circumstance which would tend to give them notice of the fact that the coupons were being purchased, unless the knowledge of the trust company would be notice to them of such fact. I also further find that on June 24, 1891, a few days before the expiration of the 90 days when default would accrue, under the mortgage, for failure to meet the coupons falling due April 1, 1891, the Iowa Water Company, through S. L. Wiley, its president and treasurer, sent to the Farmers' Loan and Trust Company three thousand six hundred and sixty-three dollars (\$3,363), which, with what it had previously sent, was sufficient to take up and pay all coupons maturing on April 1, 1891, which remittance was followed by another letter from him, dated July 6, 1891, in which he forbids the trust company from paying to C. H. Venner and Company anything on account of the coupons which they may have paid or purchased, in which letter and in former letters he claimed that C. H. Venner should pay the interest on 120 of said bonds. The trust company did pay off 19 of the coupons which had been purchased on account of C. H. Venner and Company, and which were presented by the clerk of C. H. Venner and Company to them for payment, and who was known by them to be such clerk, which coupons had not been punched; but they did not pay back to C. H. Venner and Company the money for the 93 coupons now involved in this suit, and they subsequently returned to S. L. Wiley the balance of the money which he sent them on June 24th. I find, under the evidence, that neither C. H. Venner nor C. H. Venner and Company were under any legal obligations to pay the said coupons; that C. H. Venner had originally sold a great bulk of said bonds, and felt an interest in seeing that the coupons were paid when due, and that there should be no default under the mortgage, but that he was under no legal obligations to pay said coupons. I also find that said coupons were sold and transferred to the present intervener the New England Waterworks Company, in 1894, for a full and valuable consideration, and that it is now the legal owner of the same, unless said coupons shall be regarded as paid before said transfer was made to it. I also find that C. H. Venner is the president and one of the directors in the New England Waterworks Company, and has been since some time in 1893."

As conclusions of law, applicable to such facts, Judge Babb finds:

"There can be no question under the facts, I take it, but that as between C. H. Venner and Company and the Iowa Water Company, or as between C. H. Venner and Company and the Farmers' Loan and Trust Company, the transaction by which these different coupons passed into the hands of C. H. Venner and Company was intended by these parties as a purchase, and not a payment of the same. The evidence shows that this was done without the knowledge and without the consent of the bondholders, and that, at the time they received their money on such coupons, they supposed the transaction was a payment of their coupons, and they have never in any manner ratified it as a purchase, and, in fact, had no knowledge of it being claimed to be a purchase until the interventions were filed in this foreclosure proceeding. Under these circumstances, what are the

rights and equities of the parties? These coupons were payable at the office of the Farmers' Loan and Trust Company in New York. They were remitted by the holders of the bonds through their local banks, and sent to New York for collection. They were presented to the Farmers' Loan and Trust Company, not for sale, but for payment. They received their money, and delivered their coupons to the Farmers' Loan and Trust Company. They supposed that their coupons were paid and canceled, but, instead of that, they were delivered to Venner and Company uncanceled. If the bondholders had known this, they could, and it is reasonable to suppose that they would, have refused to sell, and, if they were not paid, would have taken prompt steps to bring about a foreclosure a number of years before this suit was commenced. The payment of the coupons strengthened the security of their bonds, but a sale of such coupons allowed the indebtedness to accumulate, and the income of the mortgaged property to go to other purposes, and the coupons, which were a first lien before their bonds, passed into other hands, and became a prior lien to their bonds. The question was very ably argued by counsel on both sides, and I have considered the various reasons advanced by each, and have examined the authorities cited; and it seems to me, both upon reason and authority, that neither Venner and Company nor the purchasers from them can be held to be purchasers of such coupons as against the bondholders, when they were purchased under the circumstances shown in the evidence in this case."

The exceptions of the waterworks company, as to findings of fact, are as follows:

"To the finding of facts contained on page 19, 'that the bondholders supposed that their coupons were being paid, and not purchased,' for the reason that there is an entire absence of evidence tending to establish any such fact on the part of any bondholder as to all the bonds, and for the further reason that there is an entire absence of evidence of any one as to at least sixteen of said bonds and coupons; and the master should have found that there was no evidence from any bondholder tending to show that such bondholder merely collected said coupons, and particularly as to sixteen of said bonds and coupons."

This is the sole exception as to the master's finding of facts with regard to the intervention of the New England Waterworks Company. On the oral argument, such exception was by counsel for said waterworks company so limited and reduced as to apply to only 16 of the 93 coupons named in the master's report, said 16 coupons being those falling due April 1, 1891, and cut from the bonds Nos. 72, 73, 94, 95, 96, 97, 98, 101, 103, 117, 118, 120, 121, 126, 299, and 361. The exceptions as to the master's conclusions of law which the waterworks company has presented are based on its above-stated exception to findings of fact; and upon the oral argument it was conceded by counsel for the waterworks company that, unless the exception as to findings of fact was sustained, the exceptions to conclusions of law could not be sustained.

Under the facts found by the master, as above given, what is the law to be applied thereto? I leave out of consideration in this matter the fact, found by the master, that, before the expiration of the 90 days of grace allowed under the trust deed, the water company remitted to the trustee, and there was in its hands, sufficient money, in addition to that theretofore remitted, to have paid all these coupons, if the same had remained in the hands of the trustee; for the water company, in so remitting, had attached, as a condition, that no part of this remittance should be paid to C. H. Venner & Co. on account of any coupons that firm had paid for or purchased, and also because the trustee returned to the water

company the balance remaining after payment of the other coupons of that maturity. Neither C. H. Venner nor C. H. Venner & Co. was under any legal obligation to pay these coupons. Thus the master finds. He also finds that the waterworks company is the legal owner of these coupons, for a due consideration, purchased of said Venner & Co., and that its rights, whatever they are, to payment thereof, are the same as Venner & Co. would have possessed had they not sold same.

Two parties are, by the record, resisting the payment herein of these coupons to the waterworks company. One is the complainant trustee; the other, the bondholders, through their committee. It may properly here be stated that the trustee, at the hearing on these exceptions, asked leave to withdraw its resistance and answer. But, the interveners objecting thereto, the court denied such leave. It therefore remains in the record as resisting. If, as to either of these, preferential payment ought not to be made, the exception must be overruled. Whatever might be the holding, if the coupons and bonds stood on the same footing as to payment out of the trust estate, we may not lose sight of the fact that here the coupons had preference in payment. When the bondholder sent his coupon in for payment, and such coupon was "presented and surrendered" to the trustee as having been paid, he knew that this payment lessened the outstanding (possible and probable) indebtedness of the water company,—for that much of the amount secured by the trust deed had been extinguished; while, if the coupon, instead of being surrendered and paid, was sold, transferred to another as an existing indebtedness, this transferred coupon stood between his bond (and its attached coupons) and the trust estate, and must be paid before his bond (and attached coupons) could be paid. Had the bondholders been informed that the trust company was purchasing these coupons for Venner & Co., and not paying and canceling them, they might have refused to sell, and insisted on payment of coupons out of the revenue of the water company, or, in case of nonpayment, compelled foreclosure, before further indebtedness on these bonds had accrued against the trust estate.

The argument on this point, as presented in the master's report, is very clear, and to me convincing. After quoting section 772, 2 Cook, Stock, Stockh. & Corp. Law (3d Ed.):

"When coupons are presented for payment, and are cashed, they are to be held canceled so far as the bonds and other coupons are concerned. Even though a third person was buying them, instead of the company paying them, the bondholders may insist upon their mortgage lien, free from these purchased coupons. The reason is that it takes two persons to make a sale, and, moreover, the coupon holders might have preferred to foreclose, rather than to sell."

—Judge Babb cites *Ketchum v. Duncan*, 96 U. S. 659, and *Wood v. Deposit Co.*, 128 U. S. 424, 9 Sup. Ct. 131, and various other cases. He quotes from the former case (page 662):

"It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that where, as in this case, a sale, as compared with a payment, is prejudicial to the holder's interest, by continuing the

burden of the coupons upon the common security, the intent to sell should be clearly proved."

Having stated the doctrine of these cases to be that:

"It is a question of fact in each case whether or not the transaction between the bondholders and the person paying the money for the coupons amounted to a sale and purchase, or a payment of the same."

—He summarizes the rule of the supreme court as therein stated to be:

"If, under all the facts and circumstances, the bondholders had the right to suppose it was intended to be a purchase, and not a payment, and the person paying the money intended it for a purchase, then, in that event, it would be treated as a purchase. On the other hand, if there was nothing in the transaction by which the bondholders would be placed on their guard, and nothing to indicate to them that it was intended as a purchase, it will be treated by the courts as a payment of such coupons."

As to the question of fact involved, the master says:

"I fail to find anything, and counsel have failed to point out any facts or circumstances, by which the bondholders in this case could have been advised that Venner & Co. were furnishing the money to the trust company to take up these coupons. They were paid at the place where, by their terms, they were to be paid ["presented and surrendered"]; and, to all appearances, they were paid by the party who was to pay them. There was no notice of any kind given of the intent of any one to purchase, or of the inability of the water company to furnish the money to take up, the coupons."

See upon this point, also, for application of rule, *Clafin v. Railroad Co.*, 8 Fed. 118; *Railroad Co. v. Gest*, 34 Fed. 639.

Concurring, as I do, in the master's finding of fact, the exceptions of the New England Waterworks Company must be overruled. And an exception to this ruling is allowed to that company.

The exceptions presented by Clarence H. Venner relate to the sale under the trust deed. Venner intervenes as a judgment lien holder, his judgment bearing date April 23, 1896, for \$9,609.80.

The first exception is to finding of fact in master's report, and relates to whether the property should be sold as an entirety. Upon oral hearing before the court, counsel for Venner expressly abandoned this exception.

The second exception is to conclusion of law in master's report, viz.:

"To the conclusion of law, 'that the Iowa Water Company was authorized, under the laws of Iowa, to execute the bonds and mortgage in question, and that the bonds and mortgage in question were executed under proper authority,' for that the master should have found, upon the facts found, the following conclusion of law, to wit: 'That the Iowa Water Company had no power to execute the mortgage and bonds in question.'"

Upon oral hearing, counsel for Venner abandoned so much of the exception as related to the corporate power of the water company to execute a mortgage or trust deed, such as that in process of foreclosure herein, and conceded that, under the statutes of the state of Iowa, such company was, under its articles of incorporation, empowered to execute the trust deed in question. But counsel contended that the mortgage or trust deed in question had not been legally executed by the water company. His contention was based upon the resolutions adopted by the board of directors and

the stockholders of that company, preliminary to the execution of the bonds and trust deed in question. And, while conceding that in other respects the trust deed was in accordance therewith, counsel insisted that that portion of the trust deed by whose terms the principal of the bonds was made to fall due upon default in payment of interest, as in said deed provided, was not authorized by nor consistent with said preliminary resolutions, and therefore the decree herein to be entered could not find said principal now due, but must order sale only for interest (coupons) in arrears; thereby compelling said Venner, in case he redeem from said sale, to redeem from interest (coupons) sale only, and not from sale for principal. There seems no exception filed which saves this point to intervenor. The point covered by his exception relates to what he claims the master should have found, viz.: "That the said Iowa Water Company had no power to execute the mortgage and bonds in question." If, however, his exception had been so lodged as to cover this point now made, his exception must have been overruled. The resolutions expressly authorized the bonds and trust deed to contain such "terms, conditions," etc., as were generally contained in like instruments, and were consistent with the other parts of the resolutions. And the court might well take judicial notice that trust deeds of the character of that in question generally provide for falling due of principal on default of interest, such as that herein provided. Besides, the bonds and trust deed, in their present form, were submitted to, and formally adopted by, the board of directors of said water company, before the same were executed. Further, under section 3325, Code Iowa, it is provided, on foreclosure of real-estate mortgages, that, "if there are any other payments secured by the same mortgage, they shall be paid off in their order; and, if the money secured by any such lien is not yet due, a suitable rebate must be made by the holder thereof, or his lien on such property will be postponed to those of a later date." The principal of the bonds in question matures on the 1st day of April, 1897. So that, had intervenor lodged and maintained proper exceptions to the master's report in this respect, no substantial relief or benefit could have accrued to him thereunder.

The only exception presented by intervenor Venner which is before the court for consideration is as follows:

"Your intervenor excepts to the following conclusions of law, to wit: 'That complainant is entitled to have a decree authorizing the property sold as an entirety without redemption,'—for that the master should have found, upon the facts found, the following conclusion of law, to wit: 'That said property, when sold under the decree, is subject to redemption under the laws of the state of Iowa, and of the United States, applicable to such cases.'"

Section 3321, Code Iowa, provides:

"When a mortgage or deed of trust is foreclosed by equitable proceedings, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. A special execution shall issue accordingly and the sale thereunder shall be subject to redemption as in cases of sale under general execution."

That a state law conferring the right of redemption under a decree to enforce the lien of a mortgage or trust deed is binding upon federal courts, as to lands within the state in which said court is sitting, is settled beyond dispute by repeated decisions of the supreme court of the United States. *Brine v. Insurance Co.*, 96 U. S. 627; *Orvis v. Powell*, 98 U. S. 176; *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. 433. A decree of foreclosure, ordering sale of mortgaged real estate, must therefore be so entered, in the federal courts, as to conform to the state law, and give full force to this right of redemption, in all cases where the state law applies. So much is conceded by counsel herein. The contention is whether the property upon which the lien of the trust deed in question operates is within the above-quoted statutory provision of this state. If it is, then it must be so sold as that redemption shall be permitted, otherwise the decree must provide for sale without redemption; for, as stated by Justice Harlan in announcing the unanimous opinion of the court in *Parker v. Dacres*, 130 U. S. 43, 47, 9 Sup. Ct. 433, 434:

"A right to redeem after sale does not exist unless given by the statute. * * * We are not aware of any such right existing at common law, or in the system of equity as administered in the courts of England, previous to the organization of our government. * * * This right, when thus given [by state statute], is a substantial one, recognized even in the courts of the United States sitting in equity, because the statute constitutes a rule of property in the state that enacts it."

In his fourth finding of fact, the master finds that the mortgage or deed of trust herein sought to be foreclosed included within its lien the following, among other, property, etc., to wit:

"All its privileges, franchises, easements, choses in action, estates, property, real and personal, which said Iowa Water Company now has or at any time hereafter, during the existence of this mortgage, may acquire," etc.

The master's fourteenth finding of fact is as follows:

"The mortgaged property and premises are so situated that they cannot, nor any part thereof, be sold in parcels without great injury to the holders of said bonds secured by said mortgage; and that said corporation is a corporation of a quasi public nature, and the property mortgaged is in use for the public service, and consists of public franchises, together with real and personal property necessary for the operation of such franchises, and a large part of the value of the real and personal property covered by the mortgage depends upon it being so used and appropriated with said franchises for public purposes."

The master's conclusions of law include the following:

"In regard to the right of complainant to have a decree to have the property sold as an entirety without redemption, I have come to the conclusion that it is entitled to such a decree. * * * I am of the opinion that the complainant is entitled to a decree foreclosing its mortgage, and that the decree should provide that it be sold without redemption."

Upon the hearing, counsel for intervener Venner having expressly abandoned so much of this exception as related to the sale of the property as a whole, and conceded the decree should provide for selling the mortgaged property as an entirety, there remains but the single point, should the decree herein provide for sale subject to redemption? Since the announcement by the supreme court

of their holding in *Hammock v. Trust Co.*, 105 U. S. 77, there seems to have been a very general concurrence by bench and bar in the doctrine that where a railroad has mortgaged its real and personal property, including its franchises, as a whole or as an entire property, a sale, under decree foreclosing such mortgage, must be of the property as an entirety, and without redemption. But counsel for intervenor Venner insists that the decision in the *Hammock Case* is not applicable in Iowa, because, as he contends, of the differing state statutes; and that the *Hammock* decision was based on the Illinois statute, which provided that, where lands were sold under decree of a court of equity for the sale of mortgaged lands, redemption should be permitted "in the same manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law." Rev. St. Ill. 1869 (Gross' Ed.) p. 382, § 27. Counsel further contends that the Illinois statute under consideration in the *Hammock Case*, when construed in the light of the decision in *Gue v. Canal Co.*, 24 How. 257, renders the decision in the *Hammock Case* inapplicable to the Iowa statute above quoted.

In the *Gue Case* (which involved the right to levy, under execution against the property of the canal company, upon certain locks and other like property which was essential to the use of the canal), the supreme court (page 263) use the following language:

"Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect."

In the *Hammock Case* the supreme court (page 90) say:

"We are of opinion that mortgaged real estate, to which is attached the right of redemption, is such, and such only, as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation, mortgaged with its franchise to acquire, hold, and use property for public purposes, and whose chief value depends upon its being so used and appropriated."

From which counsel insists that the doctrine of the *Hammock Case* is not applicable to cases arising under the Iowa statute; section 1086 of Code of Iowa being as follows:

"The franchise of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement."

Whether section 1086 of the Iowa Code applies to the franchise to be a corporation, obtained by adoption of its articles of incorporation (under section 1059 of that Code), or to the franchise to operate the works, etc., of the water company in the city, and through the streets of the city, of Ottumwa (commonly called its municipal or noncorporate franchise), does not appear to have been the subject of construction of the supreme court of Iowa. Apparently, section 1086 relates to the former, since, when such franchise is sold under execution, "the corporation shall not become

thereby dissolved," etc. "This franchise (to be a corporation) is personal, and cannot be assigned, but there is no objection to assigning noncorporate franchises," Circuit Judge Taft declares, in *City of Detroit v. Detroit City Ry. Co.*, 56 Fed. 867, 882.

Justice Curtis, in *Hall v. Railroad Co.*, 21 Law Rep. 138, Fed. Cas. No. 5,948, when treating of the power of a corporation to mortgage its franchise, says:

"Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and, when created, it cannot transfer its existence into another body, nor can it enable natural persons to act in its name, save as its agents or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchise to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

A court of equity, in its decree foreclosing the trust deed in question, might properly decline to hold that the term "franchises," as used therein, included the franchise to be a corporation. The construction for which counsel for intervener Venner contends is not in accord with that generally given to the *Hammock Case*. Counsel has not pointed the court to any case in circuit or supreme court which has adopted his construction. Perhaps the effect of the decision in the *Hammock Case*, *supra*, can be best presented by quoting from the opinion given by Judge Shiras in *Simmons v. Taylor*, 38 Fed. 682, 694. The mortgage in that case was upon a line of railway in Iowa. The learned judge concisely summarizes the doctrine of the *Hammock Case*, as to right of redemption of such property when sold at judicial sale, under foreclosure decree:

"So far the case has been viewed upon the assumption that the property was of such a nature that there existed relative thereto the same rights of redemption that pertain to ordinary realty. The property, however, included in the foreclosure sale, and now sought to be redeemed, was a line of railway, its franchises and appurtenances, consisting of a combination of realty and personalty, which, from its public uses and peculiar nature, require to be sold as an entirety. In ordering a judicial sale of a railway and its appurtenances, a court is compelled to have regard to the peculiar character of the property, and cannot ordinarily treat it as composed of items of realty and personalty, separable from each other, and salable under the distinct rules that usually govern sales of such differing classes of property. Thus, in *Hammock v. Trust Co.*, 105 U. S. 77, the supreme court held that the provisions of the statute of Illinois governing the sale of realty on judicial process, and securing to the debtor, and also to judgment creditors, the right of redemption, were not applicable to sales of a railway and its appurtenances, for the reason that, if the same were held applicable, then the personalty and the franchise would have to be sold without redemption, while the realty would be subject to redemption, which would result in the practical destruction of the value of the whole; and upon considerations of public policy, as well as of private right, the court reached the conclusion that the real estate, franchises, rolling stock, and other property of a railroad corporation, mortgaged as an entirety, may be sold as an entirety, under the decree of a court of equity, without any right of redemption in the mortgagor or in judgment creditors as to such real estate. The reasoning of the court in that case demonstrates the fact that a decree for a sale subject to a right of redemption of the realty, or, in fact, of the whole property, would be deem-

ed by that court an improvident and improper decree. Under the provisions of the statutes of Iowa, if it should be held that the property of a railway company, in cases of mortgage foreclosures, was resolvable into its primary elements of realty and personalty, the purchaser at the sale would be entitled to the immediate possession of the personalty, but the railway company would be entitled to the possession of the realty until the expiration of the year of redemption. During that period, neither the purchaser nor the railway company could operate the road, as neither would have in possession the necessary means to that end. These considerations show the wisdom of the conclusion, reached by the supreme court, that the rules ordinarily governing judicial sales of real and personal property cannot be applied without modification to foreclosure sales of railways, and that it is the duty of the court, when decreeing a foreclosure, to provide for a sale, as an entirety, of the property covered by the mortgage, so that the realty, the personalty, and the franchises, which, combined, form the railway, shall not be separated, and by separation be destroyed in their practical use and value."

In *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43, 45, Judge Jenkins had under consideration the question how, if at all, a mechanic's lien was to be enforced against a waterworks plant, where the lien was claimed for pipe furnished to be, and which was, used in laying down mains through the streets of the city. His decision fastened such lien upon the entire waterworks plant, and provided decree for the sale of the plant as an entirety, including the franchise of maintaining and operating the plant in the city where it was located. In the course of his well-reasoned opinion he says (page 45):

"The plant must be treated as an entirety with respect to any sale under judicial process. The defendant is a quasi public corporation. * * * The plant is an integer. * * * Separation of the parts would destroy the efficiency of the whole, working destruction to all interests concerned. * * * The structure here is of the class of which canals, street railways, railroads, telegraph, telephone, electric light, and gas plants are examples, and can only be dealt with as an entirety," citing a large number of authorities.

The decision was affirmed by the circuit court of appeals for the Seventh circuit. 7 C. C. A. 603, 59 Fed. 20.

In *Columbia Finance & Trust Co. v. Kentucky Union Ry. Co.*, 9 C. C. A. 264, 60 Fed. 794, the circuit court of appeals for the Sixth circuit were considering, on appeal, a case wherein a decree of foreclosure had ordered sale of a railway as an entirety, without redemption. The statutes of Kentucky provided for redemption of real estate when sold under foreclosure decree. Counsel for appellant had attempted, as counsel herein has attempted as to Iowa, to draw a distinction between the statutes of Illinois pertaining to right of redemption (construed in the *Hammock Case*) and the statutes of Kentucky. The latter statutes, as to right of redemption, are not dissimilar to the Iowa statutes. The court declare the distinction is not well taken; and, in overruling the assignment of error that "the circuit court ordered a sale without redemption and without appraisalment," the court say (page 272, 9 C. C. A., and page 802, 60 Fed.):

"The Kentucky statute conferring the right to redeem real estate when sold to foreclose a mortgage, in our judgment, did not contemplate either the severance of a railroad, when sold, into its constituent elements, in order that that part which savored of realty might be redeemable; nor did it contemplate that so peculiar and composite a property should be embraced within the term 'real estate' as used in that statute. The value of such a property consists in its maintenance

as a unit. This unit the state provided might be mortgaged. It would be unprofitable to consider whether an individual, or a group of individuals, could own and operate a railroad without express authority. The franchise to be a railway, to exercise the great power of eminent domain, and to exact tolls for freight and passengers, was a franchise of value, and this, too, the legislature has permitted this company to embrace within its mortgage. Upon its credit has been extended. This is a part of the entirety which the creditors secured by this mortgage, and have a right to bring it to sale, along with the tangible property which it secures and renders valuable. That franchise is not real estate, and is not leviable at law. The controlling reasons which induced the decision in *Hammock v. Trust Co.* sprang from a consideration of the unity of a railroad property. These reasons are as masterful, when we come to construe the Kentucky statute, as they were in the case from Illinois. The distinction between the two statutes, and differences in the general law of Illinois and Kentucky, are not sufficiently marked to justify—certainly not to demand—that this case shall be distinguished from *Hammock v. Trust Co.*”

Accepting as correct the holding of Judge Jenkins above given, that the plant herein to be sold is of the class which courts, in ordering sales under foreclosure, can only deal with as an entirety, and approving the finding of the master herein, that the sale under decree in this case should be of the trust property as an entirety,—against neither of which propositions is counsel now contending,—it necessarily follows, in my judgment, on the authority of the cases above cited, and on principle underlying the reasoning therein, that decree herein should order the sale of the trust property as an entirety, and without redemption, and exceptions of intervenor Venner to so much of the master's report as finds the sale should be without redemption are accordingly overruled, to which said Venner excepts.

WESTENFELDER v. GREEN et al.

(Circuit Court, D. Oregon. February 9, 1897.)

No. 1,941.

ADVERSE POSSESSION—POSSESSION OF GUARDIAN—TRUSTS.

One W. left his wife and children in Germany, and came to Oregon, where he married another woman, and had other children. Upon his death, one S., who had acted as W.'s agent in the management of his real estate, caused himself to be appointed guardian of W.'s Oregon children, and, as such, held possession of the real estate, and applied the rents to the support of these children until their majority, when he turned the property over to them. In the meantime, the German children, who had been informed of their father's remarriage, and one of whom had come to the United States, and lived there many years, made no attempt for over 20 years to assert any interest in their father's property. *Held*, that even if S., at the time of W.'s death, knew of the existence of the German children, and if he could then have been charged with a trust in their behalf, his possession of the real estate as guardian of the Oregon children was adverse, and any rights of the German children were barred by their delay. 76 Fed. 925, reaffirmed.

On Petition for Rehearing. Denied.

For former opinion, see 76 Fed. 925.

G. G. Ames and Wallace Nash, for complainant.

Emmett B. Williams and W. W. Thayer, for defendants.

BELLINGER, District Judge. The complainant files his petition for a rehearing upon the following, among other, grounds: First. That the defense of the statute of limitations should have been raised by demurrer, not by answer. Second. That the evidence before the court shows that J. E. Sedlack was in the control of the property at the death of Jacob Westenfelder, not only as his agent, but as trustee for the German heirs, under an express trust, and continued to act in that capacity down to his appointment as guardian for the Oregon children; and that at the time of that appointment, and thereafter, the existence of the German heirs, although known to him, was by him concealed from the court; and that no proceedings were taken by Sedlack, or by any one else, to administer the estate of Westenfelder, or to divest himself of the trust; and that, consequently, his appointment as guardian of the Oregon children was not only subsequent, but was in subordination, to the previous trust in favor of the German heirs. There are several grounds upon which the petition is based, but those just mentioned embody the substantial grounds of such petition.

The defendants had no opportunity to raise the defense of the statute of limitations except by answer. The facts upon which they rely do not appear in the complainant's complaint, and the defense of the statute could not therefore be raised by demurrer.

In considering the second ground of this motion, I have carefully re-examined the testimony referred to in support of it, and conclude that there is nothing in the testimony that alters the facts from the case as presented in the supreme court, and heretofore referred to in the opinion in this case. It is true that Joseph E. Sedlack was the agent of Westenfelder at the time of Westenfelder's death, but that death terminated the agency. There is no reason for the assumption that Sedlack continued to act in a trust capacity as a trustee of the German children. If he knew of the existence of these children, that fact can make no difference. He does not seem to have recognized any right or interest in these children. On the contrary, his appointment was as guardian of the Oregon children, and his administration of the estate of Jacob Westenfelder was as such guardian, and not otherwise. It does not appear that he was ever appointed administrator of the estate of the deceased, Westenfelder, or that he in any way recognized, as already stated, the German children. There is considerable testimony tending to show that Sedlack knew of the existence of these children in Germany, and the inference is sought to be drawn from the testimony that he recognized some right in them, from the fact that he is said to have been present when the existence of these children was discussed, and on one occasion he inquired of a witness as to the best means of communicating with these children. It does not appear, however, that he ever did communicate with them in any way. On the contrary, it does appear that from the date of his appointment, in June, 1869, up to the time of the final settlement of his trust as guardian of the Oregon children, he collected the rentals of this property, applied it to the payment of the expenses of the administration of the property, and in support of the Oregon children.

Frederick Westenfelder, nominally a defendant in this suit, but whose interests are identical with those of the complainant, and who testifies in the complainant's behalf, admits that his mother was informed of his father's second marriage by letter received from Oregon about 1860 or 1861. He also testifies that a man named Butler visited them at their home in Leopold Haven, and communicated to them the fact of his father's marriage in Oregon. These people therefore knew of the precise location of the elder Westenfelder. Notwithstanding this fact, Frederick left Germany in 1872, when he was 21 years of age, came to this country, and settled in St. Louis, where he remained until 1889, a period of 17 years. He did not find out where his father was, so he testifies, until 1882, when he was informed of his death by a man named Groner, in answer to some inquiries which he had caused to be made in that respect. But even then Frederick Westenfelder did not come to Oregon until after the lapse of 7 years more. Now, during all this time there was no attempt to assert any right on the part of Frederick Westenfelder, who for 17 years was in the United States, or on the part of his brother in Germany, who has never been here.

Suppose it is true that the assertion of a right of control over this property by Sedlack, as the guardian of the Oregon children, would not preclude the German children from insisting that he was charged with a trust in their behalf, inasmuch as they, and not the Oregon children, were the lawful heirs of the deceased, Westenfelder, and were therefore entitled to inherit his real estate; yet it does not follow that this fact will prevent the running of the statute of limitations, where no attempt is made to enforce any such trust, or to have one declared, and where the trustee claims to hold by a title adverse to the heir, to whom the knowledge of such adverse holding is brought by collateral facts from which such knowledge is implied. It is not a question of right, interest, or estate, legal or equitable, in the German children, during the time that Joseph E. Sedlack was managing the property as guardian of the Oregon children, but it is a question of the statute of limitations. In whose behalf, for whose interest, did Sedlack, as a matter of fact, act? It certainly is not open to question that the remedy to enforce a resulting or constructive or any kind of trust may be lost by lapse of time, and by the assertion of interests hostile to the particular trust; and that is what has happened in this case. As stated in the opinion of the court, the death of Westenfelder terminated whatever agency theretofore existed in favor of Sedlack. Thereupon Sedlack appeared in court with a petition to be appointed guardian of the Oregon children, and in that relation, and in no other, assumed to control this property. He might have been charged with a trust in favor of the German children against his own intention, but this was not done; and upon the fact of such intention, and of collateral facts which imply a knowledge of it on the part of the German children, depends the running of the statute of limitations, rather than upon the fact of the right, if right there was. But that the authority exercised by Sedlack was in behalf of the Oregon children is without question. It is shown unmistakably by the acts of the

parties, and by the record of the proceedings had in the probate court. It is wholly immaterial that Sedlack's account is in the form of an administrator's account, and is entitled "In the Matter of the Estate of Westenfelder, Deceased," and that taxes and other charges were charged therein as against the estate of the deceased, Westenfelder. The fact, nevertheless, appears that the Oregon children were treated by Sedlack as the sole beneficiaries of this estate; and, whatever the form of the account, it was in fact his account as guardian, and not otherwise. Attached to that account is his oath, in which he deposes and says that he is guardian herein, and that the foregoing, his final account with the estate of his said ward, is a full, true, and accurate account of all the receipts and disbursements on account of said estate; the estate in question being treated as the estate of the ward. And the order made therein is entitled "In the Matter of the Guardianship of Clementine Westenfelder, a Minor"; and in this order it is recited that Joseph E. Sedlack, guardian of the estate of Clementine Westenfelder, appeared, and fully settled and accounted for the estate of his ward, and that his settlement was approved, and that he was thereby discharged from all further liability as such guardian. Following this is a letter addressed by Joseph E. Sedlack to his ward Clementine Westenfelder, in which he states to her that "now the property is yours. You have only to settle with your stepmother," etc., enumerating some charges against the property, in order to entitle her to come into the full and complete possession and enjoyment of the same. This evidence is conclusive as to the relation in which Sedlack controlled the real estate in question, and shows beyond question that he held it as the guardian of the Oregon children. Assuming that there was a trust, when that trust is repudiated by clear and unequivocal words or acts of the trustee, with the knowledge of the beneficiary, or facts from which knowledge is implied, the statute will run. And, in the absence of a statute of limitations, it has been held that when the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time, and its inability to do complete justice. *Philippi v. Philippe*, 115 U. S. 157, 5 Sup. Ct. 1181. Where a constructive trust is made out in equity, time protects the trustee, though his purchase would have been repudiated for fraud. In few cases can a constructive trust be enforced after 20 years' peaceable possession by the person who claims in his own right, but whose acts have made him trustee by implication. *Boone v. Chiles*, 10 Pet. 177.

Applying this doctrine to the present case, where the prescribed limitation is 10 years, and the right of plaintiff is barred by time: As already stated, upon the death of Westenfelder there was no presumption that Sedlack was in control of his property as agent. If he exercised any control over the property thereafter, it necessarily must have been in some other right. What that right was, was plainly disclosed by his guardianship proceedings. It was

open to whom it might concern that he was thenceforth acting as guardian of the two Oregon children, until the majority of one, after which he acted as guardian of the other until the final settlement of the estate. He accounted to these children for the rentals of the property. He did not at any time recognize any right in the German children, whatever he may have known of their existence. During all this time and the succeeding years, covering a period of more than 20 years, the German claimants asserted no right in the premises. Upon such a case, their claim of title or equities against the possession so held in the right of others is barred. The petition for a rehearing is denied.

JACKSON et al. v. DWIGHT et al.

(Circuit Court of Appeals, Fifth Circuit. November 24, 1896.)

No. 532.

FACTORS AND BROKERS—ACTION FOR COMMISSIONS—DEFENSES.

Defendants, being wool factors in Texas, had certain wool, belonging to customers, in their possession, which they were not then authorized either to buy or consign to others. Without the previous knowledge or consent of the owners, they took the same as purchasers, at the price which had been fixed by the owners, which was the full market price, and afterwards paid to them the full sum due. Defendants took the wool in this manner in order to consign it to plaintiffs as factors, in Connecticut, plaintiffs having knowledge of the facts, and advising the transaction. The net proceeds of plaintiffs' sales failed to equal the amounts of their advances, commissions, etc., and they sued to recover the difference. As one ground of defense, defendants set up that their own purchase of the wool was illegal, both at common law and under the Texas statute forbidding factors to purchase from their consignors without written authority (Rev. St. 1895, art. 2432), and that plaintiffs were in *pari delicto*, and could not recover. *Held*, that there was no room for the application of this doctrine, and plaintiffs were entitled to judgment.

In Error to the Circuit Court of the United States for the Western District of Texas.

During the years 1893, 1894, and 1895, the plaintiffs in error, constituting the firm of Jackson, Cramer & March, were wool factors in San Angelo, Tex., and the defendants in error, who were partners under the firm name of Dwight, Skinner & Co., were wool factors in Hartford, Conn. In May, 1893, H. C. Dwight, of the firm of defendants in error, visited San Angelo, Tex., as a representative of his firm, and, while there, had certain negotiations with plaintiffs in error, who acted through J. N. P. Cramer, a member of that firm, regarding a large lot of wools then in the possession of the plaintiffs in error. As a result of this, plaintiffs in error shipped a large lot of wool to defendants in error, and drew against it, and defendants in error handled this wool in the market at Hartford. This transaction resulted in loss, or, more accurately, the proceeds of the wool were not as much as the advances made on it and the cost of carriage, insurance, and handling. The defendants in error contend that the wools were all consigned to them for sale on commission, and that they were entitled to all advances and expenses made on that account, and also to a stipulated commission, and hence that the plaintiffs in error owe them the difference between the proceeds of the wool and these items. The plaintiffs in error contend: First. That a portion only of the wool was consigned, but that a large part thereof was sold by them to defendants in error at a specified price, in San Angelo; that the prices on these wools were unpaid except the amount advanced; and that the balance due them was several thousand dollars. Second. That, if these wools were not purchased by the defendants in error, they guaranteed the specified prices therefor, net at San Angelo,

and on this ground owe the plaintiffs in error the same amount as if they had bought the wools. And, third, that, if the transaction between the parties was as contended by the defendants in error, then it was unlawful and void, as a violation by all the parties of the principles and policy of the common law regarding factors and commission merchants, and also of the statutes of the state of Texas on the same subject. November 18, 1895, the defendants in error brought suit in the circuit court for the Western district of Texas, at Austin (the defendants agreeing to that venue), on the 12 drafts drawn by the plaintiffs in error against the defendants in error on account of said shipment of wool, the first dated May 26, 1893, the last July 26, 1893, and the others between these dates, aggregating \$45,409.40, allowing credits for the wool of \$44,923.36. The plaintiffs in error answered, setting up the defenses above indicated: (a) Purchase by defendants in error of a portion of the wool; (b) guaranty by defendants in error of prices of said wool; and (c) illegality of the transaction. The case was tried by the court, without a jury, July 10, 1896, and judgment was rendered for the defendants in error for the sum of \$2,812.64, the amount found to be due on the account as stated by the defendants in error. The judge, upon request, filed conclusions of fact and of law, finding against the plaintiffs in error, on the issues as to a sale of wools to defendants in error and a guaranty of prices by them; and, after stating at length his findings of fact as to the issue of illegality, held, as a matter of law, that the facts so found were no defense to the suit upon the drafts. To all this the plaintiffs in error excepted, and filed bill of exceptions and assignment of errors. The record is here on writ of error for revision of the judgment.

The judge's findings of fact and conclusions of law were in full as follows:

Facts.

(1) I find from the testimony in the case that the defendants executed each of the drafts sued on at the time and for the amount as set out in plaintiffs' petition, and that each of said drafts was presented to and paid by plaintiffs, as alleged in plaintiffs' petition. I further find that the defendants are entitled, as credits against the amounts so paid to them by plaintiffs as the net proceeds of the wools mentioned in plaintiffs' petition, to the several amounts set out in plaintiffs' petition as credits to which the defendants are entitled, and that the amounts remaining unpaid on said drafts, principal and interest, aggregate \$2,812.64 at this date.

(2) I find that the testimony does not sustain the defendants' claim that the wools mentioned in Exhibit A to defendants' amended original answer were bought by the plaintiffs from defendants, but that the wools were consigned by the defendants to the plaintiffs, and were sold by the plaintiffs as commission merchants, in due course of business.

(3) I find that the facts do not sustain the defendants' claim that the plaintiffs guarantied to them the price of the wools mentioned in Exhibit A of defendants' said amended original answer.

(4) I find that in the latter part of May, 1893, Mr. H. C. Dwight, a member of the plaintiff firm, was in San Angelo, Tex., at the place of business of the defendant firm, and that, while there, he and Mr. Cramer, of the defendant firm, had negotiations with reference to the wools mentioned in plaintiffs' petition, and which were subsequently shipped to plaintiffs by defendants, and against which the drafts sued on were drawn; that, at the time of these negotiations, defendants were wool factors in San Angelo, Tex., also doing a general mercantile business, and had in their possession, as such factors, the wools mentioned in plaintiffs' petition and defendants' answer; that the larger portion of these wools the defendants were authorized to consign to plaintiffs; that there was a portion of these wools which the defendants were not then authorized to consign, nor to buy from their patrons; that pending the negotiations, and during the inspection of the wools by Messrs. Dwight and Cramer for the purpose of selecting the wools to be shipped, and determining how much should be advanced on each lot, Mr. Cramer advised Col. Dwight that there were certain lots of wools (designating them) which he was not authorized to consign, and which he could not ship without buying them by his (Cramer's) firm, and paying the respective owners of said lots therefor at the prices fixed thereupon by the owners, and that Col. Dwight, with the knowledge of these facts, advised Mr. Cramer to make such

arrangement, and consented to receive said wools upon consignment from the defendants, and to make advances thereon, and that Cramer, for the defendants, agreed to make this arrangement, and ship said wools, and draw against them, and plaintiffs agreed to receive and handle said wools, and to make the advances thereon; that these wools so to be bought by the defendants from their patrons embraced almost all, if not all, of those set out in Exhibit A to the amended original answer of the defendants, and in the tabulated statement in the last count of the defendants' said answer; that, in pursuance of this understanding, these wools were taken by defendants as purchasers thereof, without the then knowledge or consent of the owners thereof, and were shipped to the plaintiffs, and drawn against, and are included in the wools mentioned in plaintiffs' petition, some of the wools so taken being included in each shipment against which the drafts were drawn, excepting the shipment referred to in the draft of date July 26, 1893, for \$187.20. I further find that about thirty days after the agreement between plaintiffs and defendants, made through Dwight and Cramer, was reached, the defendants paid the respective owners of said wools the prices fixed by said owners upon said wools, respectively. The same was the full market price thereof. I further find that there was no intention on the part of either Mr. Cramer or Col. Dwight, or any of the plaintiffs or defendants, to defraud or take any advantage of any of the owners of said lots of wool. It is not shown that the defendants had any written authority from the owners of any of said wools to reconsign them or to buy them. It is shown affirmatively that, as to a number of said lots of wool, they had no such authority, either written or verbal.

Conclusions of Law.

In view of the foregoing findings of fact, judgment is rendered in favor of plaintiffs against the defendants for the sum of two thousand eight hundred and twelve and 64-100 dollars and costs of suit. This, the 11th day of July, 1896, as of the 10th day of July, 1896.

S. R. Fisher and J. C. Townes, for plaintiffs in error.

At common law a factor has no authority to purchase for himself goods consigned to him for sale, or to use such goods in any way for his own benefit. *Kaufmann v. Beasley*, 54 Tex. 563; *McCreary v. Gaines*, 55 Tex. 485; *Wooters v. Kauffman*, 67 Tex. 488, 3 S. W. 465; *Wooters v. Kaufman*, 73 Tex. 395, 11 S. W. 390. By a statute of Texas, factors are forbidden to purchase articles consigned to them for sale or shipment without written authority from the consignor, and heavy penalties are prescribed for violation of the statute. Rev. St. 1895, art. 2432. The statute is as follows: "No factor or commission merchant to whom any cotton, sugar, produce or merchandise of any kind is consigned, for sale on commission or otherwise, shall purchase the same or reserve any interest whatever therein upon the sale of the same, either directly or indirectly, in his own name or in the name or through the instrumentality of another, for his own benefit or for the benefit of another, or as factor or agent of any other person, without express license from the owner or consignor of such cotton, sugar, produce or other merchandise, or some person authorized by him, given in writing so to do, under a penalty of forfeiture of one-half the value of the cotton, sugar, produce or other merchandise so purchased or sold, to be recovered by the owner of the same by suit before any court of competent jurisdiction in the county where the sale took place, or wherein the offending party resides."

When an act is prohibited by statute, a contract to perform or in furtherance of the prohibited act is illegal and unenforceable. *Lawson*, Cont. § 279; 1 Pars. Cont. 458; 1 Story, Cont. § 615; *Mitchell v. Smith*, 2 Am. Dec. 417. The same rule obtains where the contract is in violation of the statute, although not therein expressly declared to be void. See former authorities; also, *Fowler v. Scully*, 13 Am. Rep. 699; *Bowman v. Phillips* (Kan. Sup.) 21 Pac. 230. Where a contract originates in a transaction forbidden by statute under penalty, though it is not expressly declared void, no action will lie thereon. Former authorities; also, *Seidenbender v. Charles*, 8 Am. Dec. 682, and notes; *Woods v. Armstrong*, 25 Am. Rep. 671; *Russell v. De Grand*, 15 Mass. 35. When one is privy to the unlawful design of a party to a contract, and aids, advises, and encourages him to enter into such contract in violation of the statute, and himself agrees to do certain things in pursuance of such contract, he is particeps criminis, and cannot re-

cover for services rendered, advances made, or losses incurred in pursuance of such contract, or in forwarding the transaction. *Irwin v. Williar*, 110 U. S. 510, 4 Sup. Ct. 160; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776; *Harvey v. Merrill* (Mass.) 22 N. E. 49; *Kahn v. Walton* (Ohio Sup.) 20 N. E. 203; *Seeligson v. Lewis*, 65 Tex. 217. A contract in violation of law is void, and the courts will neither enforce payment, nor assist one who has paid money thereon to recover it, if both parties are in *pari delicto*; and, where two parties act together to enable one of them to violate the law in the furtherance of an enterprise in which both are interested, they are in *pari delicto*, and neither can recover from the other. See former authorities, and also *Gray v. Roberts*, 12 Am. Dec. 383, and note on page 385. The courts will not assist any one to derive a benefit from a violation of the law, nor render him aid to prevent loss resulting from such a cause. See former authorities, and also *Suth. St. Const.* §§ 335, 336, and cases cited; 9 Am. & Eng. Enc. Law, 909; *Collins v. Blantern*, 1 Smith, Lead. Cas. 646, and notes on pages 654-692; *Benj. Sales*, § 530 et seq.; *Read v. Smith*, 60 Tex. 379; *Seeligson v. Lewis*, 65 Tex. 217; *Davis v. Sittig*, Id. 497; *Wegner v. Biering*, Id. 506; *Shelton v. Marshall*, 16 Tex. 344; *Aycock v. Braun*, 66 Tex. 201, 18 S. W. 500; *Rue v. Railway Co.*, 74 Tex. 474, 8 S. W. 533; *Wheeler v. Russell*, 17 Mass. 257; *Smith v. Arnold*, 106 Mass. 269; *Prescott v. Battersby*, 119 Mass. 285; *Swann v. Swann*, 21 Fed. 299; 19 Cent. Law J. 303. Where there is one promise based on several considerations, some of which are lawful, and others not, the law will not undertake to separate the good from the bad, but the whole contract is void and unenforceable. *Foley v. Speir*, 100 N. Y. 552, 558, 3 N. E. 477, and cases cited in appellees' brief and opinion of court; *Bank v. King*, 44 N. Y. 87; *Pars. Cont.* 381; *Smith, Cont.* (5th Ed.) 204; *Chit. Cont.* 56; *Lawson, Cont.* §§ 340, 341; *Gage v. Fisher* (N. D.) 65 N. W. 814; *Ohio v. Board of Education*, 35 Ohio St. 327; *Wisner v. Bardwell*, 38 Mich. 278; *Raguet v. Roll*, 7 Ohio, 76; *Filson v. Himes*, 47 Am. Dec. 422; *Widoe v. Webb*, 20 Ohio St. 431; *Perkins v. Cummings*, 2 Gray, 258; *Trist v. Childs*, 21 Wall. 441; *Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Gurlach v. Skinner* (Kan. Sup.) 8 Pac. 257; *Gage v. Fisher* (N. D.) 65 N. W. 809-814; *Lawson, Cont.* §§ 341-343. If any part of a single consideration for one or more promises is illegal, the whole agreement is void. *Lawson, Cont.* § 340; *Bank v. King*, 44 N. Y. 87; *Perkins v. Cummings*, 2 Gray, 258; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299; *Snyder v. Willey*, 33 Mich. 483; *Widoe v. Webb*, 20 Ohio St. 431; *Meguire v. Corwine*, 101 U. S. 108-112; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Ricketts v. Harvey* (Ind. Sup.) 6 N. E. 325; 3 Am. & Eng. Enc. Law, 887, and notes.

W. W. King and Oscar Bergström, for defendants in error.

The court will bear in mind that the cause of action asserted by the defendants in error requires no aid from the illegal contract between the original consignors and Jackson, Cramer & March. It will be seen by the court's conclusions of fact that the plaintiffs in error shipped the wools to the defendants in error, and, within one month of the date of the shipping, accounted to the consignors for the full price of the wool, as fixed by themselves. Therefore the act of Jackson, Cramer & March in shipping the wools may have been illegal in so far as the consignors were concerned, but the cause of action of the defendants in error requires no aid from the original transaction to establish it. The test whether a demand connected with an illegal act can be enforced is whether the plaintiff requires any aid from the illegal transaction to establish his case. The cause of action was upon drafts drawn by the plaintiffs in error upon the defendants in error, and the mere fact that they had drawn said drafts upon wools which they had shipped in violation of Texas statutes is too remote to affect the cause of action. *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526; *Gilliam v. Brown*, 43 Miss. 641; *Simpson v. Bloss*, 7 Taunt. 246; *Roby v. West*, 4 N. H. 290; *Beeston v. Beeston*, 1 Exch. Div. 13; *Owen v. Davis*, 1 Bailey, 315. The transaction between Jackson, Cramer & March and Dwight, Skinner & Co. is independent of the transaction between Jackson, Cramer & March and their consignors. In order to sustain the case of the defendants in error, it is not necessary to go into the original transaction. That being the case, plaintiffs in error will not be permitted to set up the illegality of the original contract in order to defeat a re-

covery. *Brooks v. Martin*, 2 Wall. 70; *Planters' Nat. Bank v. Union Bank*, 16 Wall. 483; *Sharp v. Taylor*, 2 Phil. Ch. 801; *Falkney v. Reynous*, 4 Burrows, 2069; *Petrie v. Hannay*, 3 Term R. 418; *De Leon v. Trevino*, 49 Tex. 93; *Pfeuffer v. Maltby*, 54 Tex. 461.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. In the circuit court a jury was waived by stipulation in writing, and thereupon the court made a special finding of facts in the case. The errors assigned are substantially to the effect that the facts as found by the court, under the pleadings in the case, do not warrant the judgment rendered. A careful examination of the pleadings and findings satisfies us that the findings fully support the judgment, and that there is no room, under the facts as found, for the application of the maxim, "In pari delicto melior est conditio defendentis." The judgment of the circuit court is affirmed.

GERMAN INS. CO. v. CITY OF MANNING.

(Circuit Court, S. D. Iowa, C. D. February 16, 1897.)

1. MUNICIPAL BONDS—SIGNATURES—AUTHORITY TO SIGN

In the absence of any mandatory requirement, by statute or otherwise, as to the manner in which bonds issued by a city shall be signed, such bonds may be signed by any officers of the city whom its governing board designates therefor; and upon demurrer to a complaint setting up bonds which recite that the city has caused the bonds to be signed by certain officers, who have in fact signed them, the city cannot urge that they are not its bonds because signed by such officers without its authority.

2. SAME—NEGOTIABILITY.

Under section 500 of the Code of Iowa, providing that loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, as construed by the supreme court of the state, bonds issued by a municipal corporation pursuant to said statute may be negotiable in form. *City of Brenham v. German-American Bank*, 12 Sup. Ct. 559, 144 U. S. 173, and *Merrill v. Town of Monticello*, 11 Sup. Ct. 441, 138 U. S. 673, distinguished.

The petition herein avers, as cause of action: That on October 23, 1884, the defendant, a municipal corporation organized under the laws of the state of Iowa, and under the statutes of that state known as a city of the second class, issued its five certain bonds of \$1,000 each, a copy of one of said bonds being as follows:

"Number 1.	\$1,000.00
"State of Iowa.	City of Manning, Iowa.

"The city of Manning, in the county of Carroll, and state of Iowa, for value received, promises to pay Freeport Machine Co., of Freeport, Ills., or order, at the Farmers' and Traders' Bank, Manning, Iowa, on the 14th day of October, 1894, the sum of one thousand dollars, with interest at the rate of 8 per cent. per annum, payable at Manning, Iowa, semiannually on the 14th day of April and Oct. 14th in each year, on presentation and surrender of the interest coupons hereto attached. This bond is issued by the city of Manning, Iowa, under the provisions of section 500, chapter 10, of title 4, of the Code of 1873 of Iowa, and in conformity with a resolution of the council of said city of Manning, Iowa,

adopted at a regular session of said council on the 14th day of Oct., 1884. In testimony whereof, the said city of Manning, Iowa, has caused this bond to be signed by the treasurer and countersigned by the mayor of said city of Manning, Iowa, this 23rd day of Oct., 1884.

D. W. Sutherland,

"Treasurer of the City of Manning, Iowa."

"J. W. Martin,

"Mayor of the City of Manning, Iowa."

Indorsed on back:

"Without recourse.

"Freeport Machine Co.

"W. S. Lamb, Treasr."

The other four of said bonds are same as that copied, except as to the number of said bond stated thereon. That plaintiff—a citizen of the state of Illinois—is, by due indorsement, the owner and holder of all five of said bonds, and a bona fide purchaser thereof before maturity. That said bonds are, with interest thereon from October 14, 1894, due and unpaid. Plaintiff asks judgment accordingly. Defendant demurs.

The grounds may be stated in two points, viz.: That the bonds in suit are invalid and void, because (1) no authority existed in the defendant city to issue the bonds in suit, and (2) such bonds, as set out in petition, were issued by the treasurer and mayor of defendant, and not under authority of or by defendant. The present hearing is on this demurrer.

Berryhill & Henry, for plaintiff.

B. I. Salinger and Cummins, Hewitt & Wright, for defendant.

WOOLSON, District Judge. Counsel have not pointed the court to any mandatory requirement of statute or otherwise with reference to the manner in which bonds issued by an Iowa city shall be signed. In the absence of such mandatory requirement, it would seem that the bonds of a city might be signed by any of the officers of the city whom the city council, as the governing board of the city, should designate therefor. The bonds in suit, as issued by said defendant, recite that "the said city of Manning, Iowa, has caused this bond to be signed by the treasurer and countersigned by the mayor of said city of Manning," etc. Upon demurrer to said petition, the defendant city may not—in the face of this recital—successfully urge that the bonds are not the bonds of said city, because signed without its authority therefor by the treasurer and mayor. The recitals in the bonds must be held, certainly when attacked by demurrer, to speak the truth, and, as thus spoken, the truth overthrows the second point of demurrer.

Section 500, c. 10, tit. 4, Code Iowa 1873, is as follows:

"500. Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of three per cent. upon the taxable property of any city or town."

By amendatory legislation this section was somewhat changed as to the amount of loans permitted, such aggregate varying according to population; but these amendments are immaterial as to the point to be

now considered. The contention of defendant is that the section just quoted does not authorize the city to evidence by negotiable bonds a loan made "in anticipation of revenue," and that the bonds in suit, being negotiable bonds, and issued, as in said bonds recited, under the section which authorizes loans to be negotiated only "in anticipation of revenue," were issued by the city without authority therefor, and are invalid and void in the hands of a bona fide holder. Plaintiff does not contest the proposition that, if the bonds were by the city issued without authority of law therefor, they are invalid in the hands of a bona fide holder. But plaintiff maintains the right of the city to issue, under said section 500, the negotiable bonds in suit. The question whose decision determines the present hearing is whether said section 500 authorizes a municipal corporation to issue, in anticipation of its revenues, negotiable bonds of the character of those in suit. There exists no disagreement of counsel herein as to the general rules to be followed in ascertaining the powers granted by the act of incorporation of a city. As was said by Chief Justice Marshall in *Head v. Insurance Co.*, 2 Cranch, 169, when speaking of bodies having only a legal existence:

"The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract; and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

In his valuable treatise on the Law of Municipal Corporations (4th Ed., § 89), Judge Dillon, treating of the powers of municipal corporations, says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, make any contract, incur any liabilities, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

In *Minturn v. La Rue*, 23 How. 435, 436, the supreme court of the United States, speaking through Mr. Justice Nelson, declare:

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

See, also, *Barnett v. Denison*, 145 U. S. 135, 141, 12 Sup. Ct. 819. The same rule of construction is followed by the supreme court of Iowa in *Henke v. McCord*, 55 Iowa, 381, 7 N. W. 623; *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694. The decisions of the supreme court of the United States, as applied to statutes somewhat similar in terms to the Iowa statute above copied, do not present entirely harmonious constructions. A brief reference to some of these deci-

sions may be necessary to a decision herein. *Rogers v. City of Burlington*, 3 Wall. 654, was decided in 1865. That court had theretofore been required to determine various questions relating to bonds issued by Iowa municipal corporations. *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Meyer v. City of Muscatine*, Id. 384. The Muscatine Case upheld the validity of bonds issued by that city, under power, in its charter, "to borrow money," etc. The Burlington Case, supra, involved (1) whether the power conferred on the city "to borrow money for any public purpose" gave authority to borrow money to aid a railway company, and (2) whether such power to "borrow money" gave the municipality the authority to guaranty payment of 20-year negotiable bonds issued by the company. The court (five to four) decided both these points in the affirmative. The decision of the latter point of necessity compelled the court to consider and affirmatively decide that authority to issue negotiable bonds was granted by the charter power to "borrow money." *Mitchell v. City of Burlington*, 4 Wall. 270, involved the same general questions of the power of the city, except that the bonds in question were bonds of the city, signed by its mayor and recorder, and recited they were issued "to provide for procuring and investing the loan of \$10,000 to the city, to be invested in the stock of the * * * Plank-Road Co., and for other purposes." The answer of the city set up as one of its defenses "that the officers of the city had no authority to issue the bonds, and that the bonds, as against the defendant city, were void." To this part of the answer plaintiff demurred. The trial court sustained the demurrer. The opinion of the court (page 273) declares that the pleadings raise the question of the validity of the bonds. The court announce that they are satisfied with the decision reached by the court at the previous term, when the present defendants presented the same question, and the court held "that the power to borrow money for any public purpose, within the meaning of the provision, was conferred by the charter in express terms, and that there was nothing in the constitution of the state which limited the authority so conferred, or rendered it invalid." In the extract just quoted reference is made to *Rogers v. City of Burlington*, supra, and to the charter power of the city to "borrow money for any public purpose." On page 274 the court expressly declare that "the bonds of the corporation, given as the means of raising the money, are within the power conferred by the provision"; i. e. "to borrow money," etc. *Larned v. City of Burlington*, 4 Wall. 275, is along the same lines of decision. It is not necessary here to trace the decisions of the supreme court subsequent to these Burlington Cases, decided in 1865 and 1866, and prior to *City of Brenham v. German-American Bank* (decided in 1892) 144 U. S. 173, 12 Sup. Ct. 559. The intermediate cases are referred to and considered in the Brenham opinion and in the dissenting opinion therein filed. On page 187, 144 U. S., and page 564, 12 Sup. Ct., the court declare, after distinguishing and considering such cases:

"We therefore must regard the cases of *Rogers v. City of Burlington* and *Mitchell v. City of Burlington* as overruled in the particular referred to by later cases in this court."

The act incorporating the city of Brenham provided:

"Sec. 2. The city council shall have power and authority to borrow for general purposes not exceeding fifteen thousand dollars on the credit of the city."

The opinion states (page 179, 144 U. S., and page 561, 12 Sup. Ct.) that:

"The court charged the jury 'that the power in the city to borrow money carried with it the authority to issue the bonds, and that the defendant had capacity to issue the bonds in question as commercial paper, and bind itself to pay them and the coupons. * * * The principal contention on the part of the defendant is that it was without authority to issue the bonds, and that they were void for all purposes, and in the hands of all persons.'"

On page 181, 144 U. S., and page 562, 12 Sup. Ct., the court state:

"That in exercising its power under its charter to borrow not exceeding fifteen thousand dollars on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of nonnegotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a bona fide holder. * * * The power to borrow the eleven thousand dollars would not have been nugatory, unaccompanied by the power to issue negotiable bonds therefor. * * * The confining of the power in the present instance to a borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of the revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum semiannually for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence it ought not to be held to exist in the present case."

The court conclude (page 188, 144 U. S., and page 565, 12 Sup. Ct.), "as there was no authority to issue bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons" (the action was brought by a bona fide holder to recover on said bonds), and the cause is sent back to the trial court with directions to dismiss the case, and render general judgment for the defendant city.

As in part illustrating the force and extent of the decision in the Brenham Case, we may quote a portion of the opinion in *Merrill v. Town of Monticello*, 138 U. S. 673, 691, 11 Sup. Ct. 441, which is approvingly quoted by Justice Blatchford in the Brenham opinion (page 187, 144 U. S., and page 564, 12 Sup. Ct.):

"It is admitted that the power to borrow money or to incur indebtedness carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally in that of a bond. But there is a marked legal difference between the power to give a note to the lender for the amount of money borrowed or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a bona fide holder for value, from equitable defenses. * * * It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds, and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and legal effect, essentially different transactions. In the present case, all that can be contended for is that the town had the power to contract a loan, under certain

specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality."

To the decision announced in the Brenham Case, Justices Harlan, Brewer, and Brown enter a most vigorous dissent. That the decision must have been the result of specially earnest discussion at the consultation table, and after clear consideration of its far-reaching effect, is evident from the dissenting opinion (page 196, 144 U. S., and page 568, 12 Sup. Ct.):

"It seems to us that the court in the present case announces for the first time that an express power in a municipal corporation to borrow money for corporate or general purposes does not, under any circumstances, carry with it by implication authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a bona fide holder for value. * * * But if it [authority to borrow money] may not be exercised by giving negotiable notes or bonds as evidences of the indebtedness so created,—which is the mode usually adopted in such cases,—the power to borrow, however urgent the necessity, will be of little practicable value. Those who have money will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds executed by municipal corporations for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such bonds and notes are void because of the absence of express legislative authority to execute negotiable instruments for the money borrowed, will, we fear, produce incalculable mischief."

The decision announced in the Brenham Case, though rendered by a divided court, appears to be accepted by that court as finally settling the point so decided. Thus, in *Board v. De Kay*, 148 U. S. 591, 601, 13 Sup. Ct. 706, the court, speaking through Mr. Justice Brewer, —who was one of the dissenting justices in the Brenham Case,—say, in a unanimous opinion: "While it is true that the power to borrow money granted to a municipal corporation does not carry with it by implication the power to issue negotiable bonds (*City of Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559)," etc.

The Brenham Case has also been recognized and followed on the point above mentioned by circuit courts and circuit courts of appeals in the various circuits. *Lehman v. City of San Diego* (S. D. Cal.) 73 Fed. 105; *Rathbone v. Board* (D. Kan.) Id. 395, 399; *City of Cadillac v. Woonsocket Inst. for Savings* (Sixth Circuit) 7 C. C. A. 574, 58 Fed. 935, 938; and also *Ashley v. Board*, 8 C. C. A. 455, 60 Fed. 55, 67; *City of Evansville v. Woodbury* (Seventh Circuit) 9 C. C. A. 244, 60 Fed. 718, 720; *Coffin v. Board* (Eighth Circuit) 6 C. C. A. 288, 57 Fed. 137, 141; and *Ashuelot Nat. Bank v. School Dist. No. 7, Valley Co.*, 5 C. C. A. 468, 56 Fed. 197, 199. In the Case of the *Ashuelot Bank*, just cited, the circuit court of appeals, speaking through Circuit Judge Thayer, quote from the dissenting opinion in the Brenham Case that portion which we have hereinbefore quoted and set out, and remark:

"It is unnecessary for us to assert that the decision last referred to [*Brenham Case*] goes to the full extent, last indicated [in extract from dissenting opinion], of holding that a municipal corporation can only acquire authority to issue negotiable securities by a statute which confers such power in express language, and that the power will not be implied under any circumstances. We think,

however, that we may fairly affirm that the two authorities heretofore cited—*Merrill v. Town of Monticello* and *City of Brenham v. German-American Bank*—do establish the following propositions: First, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself carry with it an authority to issue negotiable securities; second, that the latter power will never be implied in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and, third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities, the doubt should be resolved against the existence of any such right."

Counsel have pointed us to no provision in the constitution or statutes of Iowa which expressly confers on a municipal corporation in the state the authority to issue negotiable securities, where a loan is negotiated in anticipation of revenues. If, then, the decisions—hereinbefore referred to—of the supreme court of the United States and of the circuit court of appeals for this circuit are to control the judgment of this court in deciding whether the bonds in suit are valid, judgment must be rendered against their validity. In that event we might adopt the language of the court in the *Ashuelot Bank Case*, *supra* (page 200, 56 Fed., and page 471, 5 C. C. A.), and say:

"We are therefore constrained to hold that the bonds sued on were issued without authority by law, and that no holder thereof could acquire the rights of an innocent purchaser of commercial paper."

Plaintiff, however, insists that the later case of *City of Evansville v. Dennett* (decided March 3, 1896) 161 U. S. 434, 16 Sup. Ct. 613, as applied to the facts averred in petition in case at bar, compels the overruling of defendant's demurrer. To reconcile the opinion in the *Evansville Case* with those delivered in the *Monticello* and *Brenham Cases* is not an easy task. Some portions of the latter case appear to be irreconcilable with the earlier cases referred to. It is probable, however, that this largely arises from the peculiar manner in which the *Evansville Case* was brought before the court. They received it upon certificate from the judges of the circuit court of appeals, accompanied with certain specific questions, to which answers were desired. The supreme court were, in their consideration of the case, largely limited to the scope of these questions, which related to the law of estoppel as applied to recitals in the bonds. None of the questions in express terms bring before the court for their decision the authority of the city to issue the bonds in suit. And yet this point appears involved therein. Justice Harlan delivers the opinion, to which no dissent appears. By act of legislature the city of *Evansville* was, in its charter, expressly authorized "to take stock in any chartered company for making roads to said city"; and "the city council shall have power to borrow money and levy and collect taxes * * * for the payment of said stock." The city issued \$300,000 of negotiable bonds in payment of that amount of stock to railroads. Having decided that stock of a railroad leading to that city came within the terms of the charter, the court inquire (page 441, 161 U. S., and page 616, 16 Sup. Ct.):

"Was a bona fide purchaser of the bonds issued in payment of a subscription to stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed?"

On page 443, 161 U. S., and page 616, 16 Sup. Ct., the court say:

"The charter of the city of Evansville gave authority to subscribe to the stock of these railroad corporations, and, as held by the supreme court of Indiana in *Evansville, Indianapolis & Cleveland Straight-Line Railroad Co. v. City of Evansville*, 15 Ind. 395, 412, the express power given to borrow money necessarily implied 'the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness.' As, therefore, the recitals in the bonds import compliance with the city's charter, etc. * * * With such recitals before them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

The court, in announcing the conclusions reached, say (page 446, 161 U. S., and page 618, 16 Sup. Ct.):

"The city having authority, under the circumstances, to put these bonds upon the market, and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were made in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds in the hands of bona fide holders for value should be met according to their terms, unless some clear, well-settled rule of law stands in the way. No such obstacle exists."

Between the *Monticello Case* (which was also an *Indiana case*) and the *Evansville Case* there exists this difference: that in the latter there was given express authority to borrow money for payment of stock, while in the former such authority was implied only. But the doctrine of the *Brenham Case*, as stated by the circuit court of appeals for this (Eighth) circuit in the *Ashuelot Bank Case*, supra, places express authority in the municipal charter to borrow money on the same level with implied authority to borrow same. Neither is sufficient in itself to sustain the issuing of negotiable commercial bonds. The further possible difference between the *Monticello* and *Evansville Cases* may be stated—though the absence in the *Monticello Case* of citation of titles of *Indiana cases* makes the difference less positive—that the former case refuses to recognize as controlling or to follow the *Indiana cases*, while the latter decision apparently recognizes and is controlled by the same *Indiana decisions*.

Plaintiff points us to certain *Iowa decisions*, which it insists must govern the ruling on the present demurrer. The first case in point of time is *Austin v. District Tp.* (decided in 1879) 51 *Iowa*, 102, 49 N. W. 1051. This was an action brought on a school order purporting to be given for money furnished in the erection of a school-house. The facts appear to be that the defendant school-district township, having voted to build a schoolhouse, incurred some indebtedness in its building. To discharge the same, defendant borrowed of plaintiff the amount named in the order, and therewith paid the debt. Defendant insisted that the directors of defendant, in thus borrowing the money, acted beyond the scope of their official powers, and the defendant is not bound thereby. The court held the defendant liable, regarding the transaction the same (page 105, 51 *Iowa*, and page 1052, 49 N. W.) as though the order had been delivered directly to the creditor of the district in payment of his debt, and he had then sold the order to plaintiff. "If the defendant in case at bar had given its promissory note or order to the original creditor, we presume its power to do so would not have been questioned." This case apparently decides nothing further than was decided in the

Monticello and Brenham Cases, so far as concerns the pending case,—that a corporation may execute valid evidences of indebtedness for valid debts; but it is far from holding that it may, without express authority therefor, issue negotiable commercial bonds, running for a long period of years, etc. It may, however, be regarded as leading up to the next case,—*Sioux City v. Weare* (decided in 1882) 59 Iowa, 95, 12 N. W. 786. This is the only case in the Iowa Reports, so far as counsel have indicated or I have found, wherein is construed section 500,—the section of the Iowa Code under which the bonds in suit were issued. The facts, as stated in the opinion, were that one Greene had recovered a judgment against the city for personal injuries caused by dirt placed in the streets by defendant. The city paid the Greene judgment in negotiable bonds. Having duly notified defendant of pendency, etc., of the Greene action, the city now sued Weare, to recover from him the amount it had been compelled to pay Greene. Weare, as part defense, avers “the bonds were issued without authority of law, and were void, and constituted no payment of the judgment.” The court say (page 98, 59 Iowa, and page 787, 12 N. W.):

“But the defendants rely in part upon a provision of the statute. They say that municipal corporations are authorized to issue bonds only as evidence of a loan of money, and that, if we are to treat the transaction as a loan of money, it cannot be upheld, provided the indebtedness of the city at the time exceeded five per cent. of the value of the taxable property, as the amendment avers it did. The provision of the statute relied upon is section 500 of the Code, and is in these words: ‘Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of five per cent. of the taxable property.’ The transaction in question, while not strictly a loan, comes, we think, within the spirit of the provision authorizing loans. * * * We are unwilling, therefore, to give the statute such a strict construction as to deprive municipal corporations of the exercise of the right in question, which, it appears to us, must often be a valuable one. Now, where a municipal corporation borrows money on time, or does an equivalent act, as, in this case, negotiates for time in the payment of indebtedness, it may doubtless give its written obligation, and there can, we think, be no objection to the obligation being in the form of bonds. *Rogers v. City of Burlington*, 3 Wall. 654. Possibly the statutory limitation would render the bonds invalid if given in excess of the limitation, and that, too, if given for the extinguishment of an antecedent and valid indebtedness; but that point we do not determine.”

The bonds in controversy herein were “six per cent. negotiable bonds.” Page 97, 59 Iowa, and page 786, 12 N. W. “The bonds were made negotiable.” Page 99, 59 Iowa, and page 788, 12 N. W. Their validity was upheld by this decision, in which all the judges concur. The bonds in suit in case at bar were issued in October, 1884. The *Sioux City-Weare* Case was decided in June, 1882. The *Brenham* Case, *supra*, was decided by the supreme court of the United States in 1892. To what test are plaintiff’s rights in case at bar to be subjected? Had no construction been placed upon the Iowa statute by the highest court of that state, there must, under the circumstances, have been a decision against plaintiff; for the *Evansville-Dennett* Case, *supra*, is based on the construction given by the Indiana supreme court to the statute of that state. Here is involved the force and effect of an Iowa statute, under the construction given to it by the supreme court of this state.

So far as contract rights are concerned which accrue under a statute, such statute is to be construed in the light of the judicial construction of such statute which obtained when the contract was entered into. Such construction becomes part of the statute, and is to be read into it as though written therein, when those contract rights are under consideration. *Douglass v. Pike Co.*, 101 U. S. 677, 689; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 362, 6 Sup. Ct. 413; *German Sav. Bank v. Franklin Co.*, 128 U. S. 538, 9 Sup. Ct. 159. The construction announced in *Sioux City v. Weare*, *supra*, validates negotiable bonds when issued as "loans negotiated by a municipal corporation in anticipation of the revenues thereof." This decision appears to have remained undisturbed. Through a period of 14 years has session after session of that court been held, and no change in that construction has been given; nor through session after session of the general assembly has the lawmaking power of the state sought to change the statute as thus construed by the supreme court. Although rendered some years subsequent to the *Burlington Cases*, *supra*, in 3 and 4 Wall., the construction in the *Sioux City Case* is in complete harmony with the views of the supreme court of the United States as declared in those *Burlington Cases*. When the *Sioux City-Weare Case* was decided, the *Burlington Cases* had not yet been formally overruled by the supreme court of the United States. And, as will have been noticed, *Rogers v. City of Burlington*, *supra*, is cited in the *Sioux City-Weare Case* as an authority for the decision there made. That the *Rogers Case* has, in the *Brenham Case*, *supra*, been formally declared to be overruled does not work the overruling of the *Sioux City decision*. As a matter of law, applied, not to statutes, but to the broad field of commercial law, this court would be bound by the latest decision of the supreme court of the nation concerning the right of a municipal corporation to issue negotiable commercial securities, without express legislative authority therefor. But this court is bound to follow the highest court of the state in whatever settled construction it shall give to a statute. "As a rule, we treat the construction which the highest court of a state has given the statute of a state as part of the statute, and govern ourselves accordingly," say the court in *Douglass v. Pike Co.*, 101 U. S. 677, 687. But the decision further declares a different rule may apply where the state court has given varying decisions as to such statute. "This court must recognize this decision of the supreme court of the state as an authoritative construction of the statute, made before the bonds were issued, and to be followed by this court. *Douglass v. Pike Co.*, *supra*; *Green Co. v. Conness*, 109 U. S. 104, 3 Sup. Ct. 69; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 538, 9 Sup. Ct. 159." Commencing with its early expressions by Chief Justice Marshall in 2 Cranch, and continuing with frequent restatements thereof to its latest session, the reported decisions of the supreme court affirm the rule that in all cases depending upon a state statute the federal courts will adopt and follow the adjudications of the court of last resort in the state in its construction, when that construction is well settled. In a note attached to *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, are cited a large number of cases wherein this rule is considered.

Although this *Sioux City-Weare Case*, *supra*, is the only decision of the Iowa supreme court construing section 500 of the Code in the matters here in question, yet that decision has never been in any way questioned in that court, and is the settled law of Iowa in that regard. Thus it is like the Indiana decision cited and followed in the *Evansville-Dennett Case*, *supra*. The decisions in the *Monticello and Brenham Cases*, *supra*, on which defendant relies in support of his demurrer, are not applicable. While those cases establish the binding rule for original construction, the rights of plaintiff, as the holder of the bonds in suit, accrued under the previous interpretation of the Iowa supreme court, and must be preserved herein as to the bonds in suit. The petition alleges that the interest coupons of all of these bonds in suit up to and including the 14th day of October, 1894, have been paid. Thus defendant for 10 years, and up to maturity of the bonds, has semiannually paid interest falling due on these bonds, without any objection being urged, so far as now appears, to the validity of the bonds, thereby, with whatever force it may be entitled, admitting their validity. In the words of Mr. Justice Matthews (*City of Savannah v. Kelly*, 108 U. S. 184, 191, 2 Sup. Ct. 468), "after the lapse of thirteen years, it would be contrary to good faith and common justice to permit defendant to allege a newly-discovered construction of an equivocal power." The language of Mr. Justice Harlan in concluding the unanimous opinion of the court in *City of Evansville v. Dennett*, 161 U. S. 446, 16 Sup. Ct. 618, when so changed as to adapt itself to the bonds in suit, may fitly close this decision, already extended at too great length:

"The conclusion we have reached on legal grounds * * * is the more satisfactory, because of the long time which elapsed before any question was raised by the city as to the validity of the bonds. The city having authority, under the circumstances, to put these bonds upon the market, and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued under section 500 of the Code, viz. for a loan negotiated in anticipation of its revenues, the principles of justice demand that the bonds, in the hands of bona fide holders for value, should be met according to their terms, unless some clear, well-settled rule of law stands in the way. No such obstacle exists."

Let defendant's demurrer be overruled, and defendant be ordered to further plead herein by April 1, 1897; to all of which defendant excepts.

MATHESON v. CAMPBELL.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. PATENTS—MISUSE OF CHEMICAL TERMS.

The use of "nitrate" of sodium for "nitrite" of sodium, in the specifications of a patent for a coloring compound made from coal-tar products, *held not* sufficient to invalidate the patent, it appearing that no one skilled in the art would be misled thereby, and that this particular misuse of terms was common in the earlier patents relating to the art. 69 Fed. 597, affirmed.

2. SAME—OMISSIONS FROM SPECIFICATIONS—PRODUCT PATENT.

In a patent for a coloring compound made from a coal-tar product, the omission, from the description of the specific process, of an express direction for a second diazotization, whereby an amido-azo compound is converted into a diazo-azo compound, *held* immaterial, as any one skilled in the art would

understand that there was to be a second diazotization, because it was so stated in the general formula, and because a reference in the specification to a diazo-azo compound would inform any practical coal-tar manufacturer that it was necessary. 69 Fed. 597, affirmed.

3. SAME—DEFECTS IN SPECIFICATIONS—ERRORS OF SOLICITOR.

The rule that an applicant is bound by the acts of his solicitor does not require the avoidance of a patent on the theory of a fraudulent suppression or misrepresentation, where, through the solicitor's ignorance of the chemical processes involved, some changes were made in the original specifications, during the absence of the applicants in Europe, resulting in immaterial omissions and errors, which could not mislead one skilled in the art.

4. SAME—COLOR COMPOUNDS—COAL-TAR PRODUCTS.

A patent for a coloring compound made from coal-tar products should be so plain in its description that an ordinary manufacturer of aniline colors, having such ordinary knowledge as existed in this country at the date of the patent, would be enabled thereby to carry out successfully its processes. 69 Fed. 597, affirmed.

5. SAME—PRODUCTS OR COMPOSITIONS OF MATTER—IDENTIFICATION.

Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe which is not shown to have been made by that process.

6. SAME—TESTS OF IDENTITY.

When an alleged infringing compound fails to respond to the various specific tests of identity which the patentee himself has selected and set forth in his patent, he cannot fairly insist that it is identical with his product.

7. SAME—ACTS OF SOLICITOR.

When an identifying test has been put into a patent covering a compound or chemical product, by the solicitor, in the absence of his client, and the latter accepts the patent, and applies for no reissue on the ground of mistake, the court, in a suit for infringement, will not, at the patentee's instance, ignore the test altogether, as ridiculous surplusage.

8. SAME—ON REHEARING—CONSTRUCTION—VALIDITY.

The specifications of a patent for a color compound produced from coal-tar products set forth, by a general formula, as the broad invention or discovery, that any sulpho acids of any radical (a group comprising over 100 different substances), when treated according to the process described, would produce the compound of the patent. The patent then set forth, "as an example," a special process by which the compound was produced from one of these substances. In fact, only a few of the substances would produce the compound. *Held*, that the patentees were not entitled to a monopoly of all the substances which might be found, by future experiments, to produce the compound claimed; nor could the patent be construed as covering merely the particular substance used in their "example," and it was therefore void. 69 Fed. 597, reversed.

9. SAME—COLOR COMPOUNDS—COAL-TAR PRODUCTS.

The Hoffman & Weinberg patent, No. 345,901, for a naphthol-black color compound, produced from coal-tar products, construed, and *held* invalid, because it claims an invention or discovery much broader than that actually made. 69 Fed. 597, reversed.

This is an appeal from a decree of the circuit court Southern district of New York sustaining the validity of United States letters patent No. 345,901, dated July 20, 1886, to Hoffman & Weinberg, assignors to Leopold, Casella & Co., for "naphthol-black color compound," and finding infringement thereof by the appellant, John Campbell. A most exhaustive discussion of the many points raised in the case will be found in the opinions of the circuit court on the trial and upon a rehearing. They are reported in 69 Fed. 597, and 77 Fed. 280.

The patent reads as follows, the paragraphs being here numbered for convenience of reference.

"(1) Be it known that we, Meinhard Hoffman and Arthur Weinberg, both residing in Mainkur, near Frankfort on the Main, Germany, have invented certain new and useful improvements in coloring matters, of which the following specification is a full description:

"(2) The present invention relates to a new method for manufacturing blue to violet coloring matter belonging to the azo group.

"(3) We take one of the compounds corresponding to the general formula, $R(SO_3H)x-N=N-C_{10}H_8NH_2$ (a), obtained by the reaction of diazo-sulphonic acids upon alpha-naphthylamine, and convert it into the diazo-azo compound, with the necessary quantity of nitrous acid. This diazo-azo compound is then allowed to react upon naphthol or naphthol sulphonic acids in an alkaline solution.

"(4) As an example, we shall describe the process of carrying out the manufacture of the dark-blue azo coloring matter, which we call 'naphthol-black.' We dissolve thirty-five kilograms naphthylamine disulphonate of sodium in three hundred liters of water acidulated with thirty kilograms of muriatic acid, twenty-one degrees Baumé, and diazotize by addition of seven kilograms of nitrate of sodium in aqueous solution at a low temperature. Thereupon eighteen kilograms of chlor-hydrate of alpha-naphthylamine dissolved in five hundred liters of water are poured into the above mixture, while constantly stirring. The diazo-azo compound thus formed is allowed to act upon a solution of thirty-six kilograms of beta-naphthol alpha-disulphonate of sodium (salt R), kept alkaline by addition of twenty kilograms ammonia, of twenty per cent. The immediately formed coloring matter separates completely by addition of common salt. It is then filtered, and is delivered to the trade as a black paste, or in solid form.

"(5) Naphthol-black produces on the fiber, in an acidulated bath, dark-blue shades. It is very soluble in water, insoluble in spirit, and dissolves in strong sulphuric acid with green color. Reducing agents destroy the color-forming alpha-naphthylamine besides other products.

"We claim, as a new product, the herein-described dye stuff or coloring matter of a black color, and capable of dyeing shades of dark blue, as set forth.

"In testimony," etc.

As a convenient preface to the use in the following opinion of technical terms, the following excerpt from the opinion of the circuit court may be consulted:

"Certain aniline colors derived from coal tar are known as 'azo compounds'; the word 'azo,' derived from 'azote,' or nitrogen, being used to show that these compounds contained nitrogen in the form of nitrous acid. Among the chemical processes used in the creation or development of coal-tar colors is that of azotization. To azotize such a color is to treat it with nitrogen. To diazotize is to unite two nitrogen atoms to a hydrocarbon radical, and to form a diazo-azo compound. A repetition of the process, or rediazotization, forms a diazo-azo compound. The general formula, $R(SO_3-H)x-N=N-C_{10}H_8NH_2$ (a), includes the sulpho acids of any radical, a group comprising a great number and variety of colors."

E. N. Dickerson, for appellant.

Henry P. Wells, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The patent, after the brief statement of invention in paragraph 2, sets forth, in paragraph 3, what has been aptly called a "general description" of the process to be followed in order to obtain the product sought to be patented, and, in paragraph 4, gives a specific description "as an example" of the process of carrying out the manufacture of the product when certain starting ingredients named therein are used. This paragraph has been aptly called the "special process."

To the validity of the patent, it is objected that the specification fails to disclose a process which will result in the product, because of errors and omissions in paragraph 4. If the directions of that para-

graph are literally followed, no dye stuff of a black color, and capable of dyeing shades of dark blue, will be produced. The error consists in calling for the "addition of seven kilograms of nitrate of sodium," instead of the same quantity of "nitrite of sodium." The evidence in the case sustains the finding of the circuit court that this error is immaterial, for the reason that no one skilled in the art would be misled by the mistake, "since it was well known at the date of the patent that it was necessary to use nitrite of sodium to carry out the diazotization in the manufacture of coal-tar colors, and that the use of the word 'nitrate' for 'nitrite' was common in the earlier United States azo patents."

The omission from paragraph 4 is of any express direction for a second diazotization, whereby the amido-azo compound is converted into a diazo-azo compound. On this point, again, we concur with the judge who heard the cause in the circuit court, in the finding that this error of omission is immaterial, since any one skilled in the art would have understood that there was to have been a second diazotization, because it is so stated in the general description or formula of paragraph 3, and also because paragraph 4 itself indicates that the product of the first steps of the "special process" is to be a diazo-azo compound, which would be sufficient "to inform any practical coal-tar manufacturer that a second diazotization was necessary."

It appears that the specification as originally filed called for "nitrite" of sodium, and not "nitrate," and gave specific directions in paragraph 4 to diazotize a second time. Defendant contends that the variance in these respects between the specification as filed and as finally amended cannot be claimed to be inadvertence, but, on the contrary, was a distinct and intentional change, and that the court should find that the patentee, for the purpose of deceiving the public, caused his specification to contain less than the whole truth relative to his invention or discovery, and should therefore hold the patent absolutely and ab initio void. *Simpson v. Holliday*, 13 Wkly. Rep. 577. The applicants for this patent were in Europe and their solicitor here evidently knew little, if anything, about the chemistry of azo products; and there is nothing in the record to suggest that the changes which the solicitor made were due to anything except his own ignorance, or that he had any intent to mislead or to conceal. It is not doubted that an applicant is bound by the acts of his solicitor, but this contention seems to go beyond this wholesome rule when it seeks to void a patent, upon the theory of a fraudulent concealment or fraudulent misrepresentation, because, through the solicitor's ignorance, the specifications, when describing the process of manufacture, contain some immaterial error or omission, which could not mislead a person skilled in the art.

It is next objected that the patent is void because, as is alleged, a person skilled in the art, making the corrections of error and omission above set forth, and following the special process of paragraph 4, would, nevertheless, not succeed in producing the "naphthol-black" which that paragraph asserts to be the product of such process. The issue raised upon this branch of the case is tersely stated in appellant's brief:

"The bodies referred to in the example [of the special process] are, in the first place, naphthylamine disulphonate of sodium; in the second place, the chlorhydrate of alpha-naphthylamine; and, in the third place, beta-naphthol alpha-disulphonate of sodium (salt R). The last two terms relate only each to a single body. The words 'naphthylamine disulphonate of sodium' relate to a number of bodies. Complainant's expert says five were known at the date of the patent,—acid R, acid G, and three other acids. * * * Defendant's expert, a chemist of the highest science, * * * tried in vain to produce the coloring matter of the patent using these acids, and adding thereto the knowledge of the art as known to him. [This, of course, with the corrections above set forth.] In carrying out these experiments, he took the instruction of the art for the making of the acids he used, * * * and [with the acids thus made] entirely failed to produce the results aimed at in the patent."

Complainant's experts, on the other hand, insist that the difficulty with these experiments was that the acids used were not pure; and although they admit that the literature of the art, if followed in the manufacture of these acids, would have resulted in acids more or less loaded with impurities, they insist that one skilled in the coal-tar color art, when instructed, as he was by this patent, to take acid R, or acid G, or what not, would have understood that, before using such acid as starting material for producing an azo coloring matter, he should test it for impurities, and, when found, remove them. Upon this branch of the case, the evidence is voluminous and highly technical. The judge at circuit reviewed it at great length. It is, of course, purely a question of fact, the discussion of which need not be entered into in this opinion. The pertinent rule of law is correctly stated in appellant's brief:

"Patents [such as this] should be so plain under the statute as that an ordinary manufacturer of aniline colors, having such ordinary knowledge as would exist in this country at the date of the patent, should be enabled by the instructions of that patent to carry out successfully its processes."

The weight of evidence seems to support the findings of the trial judge that:

"It was the common practice in coal-tar factories, at the date of the patent in suit, to test the raw materials to be used in the manufacture of colors, in order to ascertain their character and degree of purity."

It appears that, when naphthylamine disulphonate of sodium is used technically pure,—i. e. not chemically pure, but only in that degree of purity which the practice of the art requires,—the reactions of the patent may be affected. It would therefore appear that the circuit court correctly found that:

"The specifications of the patent in suit are sufficient to enable a person skilled in the art to obtain the product of the patent, using the ordinary knowledge of the class of persons to whom the patent is addressed."

A much more serious objection to the validity of the patent arises by reason of what complainant's counsel calls the "effort of the inventors to protect themselves against such as might try to steal their broad discovery." Referring again to the patent, the following analysis of it is found in the testimony of complainant's experts:

"The patent in suit was the first printed publication which described a process by which a black dye could be produced from coal tar. The patentees declared their broad invention, and described it in [paragraph 3]. They said: 'If you take any sulpho acid of any radical, and treat as we direct you, you will get a color producing black.' By this declaration they opened their discovery broadly to the

public, concealing nothing. Then they proceeded [paragraph 4] to take one radical naphthyl, and describe specifically the production of the black color from it. Having done so, they proceeded [paragraph 5] to describe some characteristic relations, other than their use in the art, by which they might be known and identified [the "tests" of the fifth paragraph]. Of course, with the change of the radical there is a change in the chemical composition of the product; but in the art the patent, in effect, declares that one is the equivalent of the other, and may be used as a substitute for the other, and that they are therefore technically the same."

In other words, the patentees, according to this construction of the patent, say:

"We described here a special process, whereby, with one of the general group of chemical compounds which are known as 'sulpho acids' as starting material, we produce a black dye. This, however, we give as an example, for we hereby announce to the world that we have discovered that if you take any sulpho acid of any radical, and treat it according to our process, you will get a coloring producing black; wherefore we shall insist that whatever particular sulpho acid any one may hereafter use to obtain this result is an equivalent of the one we use in the special process."

Now, the evidence shows, and it is not disputed, that the phrase "any sulpho acid of any radical"—which is the translation of the general formula, " $R(SO_3H)_x-N=N-C_{10}H_6NH_2(a)$ "—is a very broad one, covering over 100, possibly as many as 500, different sulpho acids. It is proved and conceded that very many, in fact nearly all, of these, will not, when treated according to the patentee's process, produce the patentee's color. In other words, when the inventors said, "If you take any sulpho acid of any radical, and treat it as we direct you, you will get a color producing black," they made a false statement. Complainant's experts insist that this would mislead no one. They say:

"The preparation of these various bodies [other than what the special process specifically names], and the tests of their capability of forming naphthol black compounds, would require several years; and therefore any one would know that the patentee had never done this, and did not mean to be so understood. * * * The patentee * * * gives a general description of the whole possible scope of his discovery, and thereby intimates that, though he cannot possibly himself have tried all the hundreds of bodies which fall under the general formula, still it is probable that many of them will fit into his process, and produce his product. But he confines his positive assertion to what he has himself actually tried, as set forth in his example; that is, the naphthylamine disulpho acids, or, rather, the sodium salts thereof."

In other words, having himself experimented only with three or four bodies out of a group of hundreds, he proposes to set himself in the pathway of future experimenters with any or all of the other bodies, and, as the result of each new experiment is disclosed, will fire away at it, calculating to "hit it if it is a deer, and miss if it is a cow." That this is precisely what is contended for is manifest from the statement, prominently set forth in appellee's brief:

"The inventors were entitled to protect themselves against such as might try to steal their broad discovery, by the general statement that many of the bodies included in the general formula might, when subjected to their process, produce naphthol-black; and that the products so produced from those that did work were the equivalents of the product resulting from the specific materials set forth in the example. Without this or something of the kind, the real invention could have been appropriated with impunity, and this pioneer patent for a most valuable discovery would have been almost valueless to the inventors."

This assertion at once suggests two criticisms: (1) The patent contains no general statement that "many of the bodies included in the general formula might," etc. The general statement is that "all such bodies will," etc. (2) The inventors did not make any such "broad discovery." They made the specific discovery that some di-sulpho acids, treated according to their process, would produce their product. The broad discovery that all sulpho acids may be thus transformed they certainly did not discover, for it is apparently undiscoverable, since most of them cannot be thus transformed by the process of the patent. Some future experimenter will have to make some new discovery, and invent some new process, before these other sulpho acids can be transformed into naphthol-black. We are referred to no authority, and know of no principle, which will sustain the complainant's contention that he can thus, in the language of the circuit court, "speculate on the equivalents of his claimed invention, and thereby oblige the public to resort to experiments in order to determine the scope of the claims of his patent."

The appellant insisted that the multifariousness of the general formula and description invalidated the whole patent; but the circuit court reached the conclusion that it could be held valid, by limiting it so as to embrace only the product of the special process, definitely stated, and applied to naphthylamine disulphonate of sodium, as specifically claimed. The argument in support of this construction may be best stated in excerpts from the opinion below:

"The general statement may be fairly considered as a disclosure to the public of the general character and scope of the discovery, inserted merely as a help to a better comprehension of the special process of the patent. As is stated by complainant's expert, a chemist would more readily understand the process and reactions from such a graphical formula than from a general description. A comparison of said statement with the special process, and an examination of the claim, show that the general formula only describes the class of bodies to which naphthyl belongs, and covers only the first step in the reaction. It does not profess to give a resulting color product. * * * When the patentees undertake to describe the complete process, and to claim the resulting product, they confine the application of the process to a single body, and the tests and claim to a single product. It does not appear that a person skilled in the art, upon reading the patent, would have been misled into supposing that all the compounds covered by the general formula would produce the patented color, or, upon an examination of the whole patent, would have understood that it purported to describe all the bodies included under the general formula. The patentees say that 'the present invention relates to a new method for manufacturing blue to a violet coloring matter belonging to the azo group.' They then say: 'We take one of the compounds corresponding to the general formula,' etc., and treat and convert it. Then follows the special process for obtaining one of the various 'coloring matters belonging to the azo group,' namely, naphthol-black, with appropriate tests, and a claim limited to the single product of the special process upon the special body 'naphthyl.'"

Referring to the rule of interpretation that a patent must be construed in conformity with the self-imposed limitations contained in the claims, the court proceeds:

"In the case at bar the case is confined by 'the herein-described dye stuff, * * * as set forth.' The only dye stuff described is the filtered coloring matter delivered to the trade as a black paste or in solid form, of the special process.

The general statement contains no reference to a product. Manifestly, the claim could not be construed to cover any body other than naphthyl of the special process, either upon the question of infringement or validity."

And the conclusion arrived at is that the patent may fairly be construed as a patent for the definite product of the special process. Such construction would, of course, naturally reduce the range of equivalents within extremely narrow limits. The conclusion we have reached as to the question of infringement, however, renders it unnecessary to decide this question of construction upon this appeal.

It must be borne in mind that, in the practical determination of questions of alleged infringement, the problem is very different when we are dealing with a chemical compound than it is when we are dealing with a machine. Such observation as the eye can give to the machine at rest and in action, illuminated by a comparison of the co-ordination of its parts with that of like parts in other machines, will be ordinarily sufficient to determine its classification. Far different is it with a chemical compound. No mere observation by the eye, supplemented even by the taste and touch, can go very far towards a solution of the problem. The same mysterious forces through whose action and reaction the compound was produced must be availed of to disintegrate and disrupt, before there can be any assurance of what it is we have before us. Hence it is that so-called "tests" are devised by those skilled in the art and science of chemistry, which, in their opinion, as experts, will reveal the secrets of the composition sufficiently to make the answer to the question positive enough to support the judgment of a court.

An inventor takes certain starting materials, and subjects them to a process he has devised. The result is a product. If he sufficiently describes the starting materials and the process in his patent, he may claim the product, being new; but, if he simply defines what he claims as the "product of his process," he might find it an extremely difficult matter to prove infringement. "Every patent for a product or composition of matter must identify it so that it can be recognized, aside from the description of the process for making it, or else nothing can be held to infringe the patent which it not made by that process." *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455. Now, there are many tests that may be applied to two bodies which are being compared in order to determine whether they are or are not identical. The number of these tests may be multiplied indefinitely, for the skill, the experience, the scientific ingenuity of the chemist, will ever devise new ones in the future, as they have the old ones in the past. Some of these tests will be of great significance; some, almost crucial; others will be of but minor importance. Their relative value, no doubt, may change as science goes sweeping on from point to point; but it must be sound law, as it is reasonable common sense, to hold that the tests of prime importance in a suit for infringement are those which the patent itself prescribes. The inventor certainly may be assumed to know what it is that he has invented. If any one is able to describe the product of his inventive

skill, it is himself. He surely knows the earmarks of the thing he seeks to patent, and when, out of the multitudinous qualities which his product may exhibit under varying conditions and in different relations, he has selected and set forth in his patent a chosen few, surely these should be accepted as the distinguishing earmarks,—the characteristic stigmata of the product his patent is to cover. It may be that, after it is found that the body under investigation responds to all the tests of a patent, science may yet be able to demonstrate by other tests that, nevertheless, it is not the new product therein patented; that the patentee had selected identifying tests broader than he was entitled to, and which would cover products not within the range of his discovery. But, when the body under investigation fails to respond to the specific tests the patentee has himself selected, he certainly cannot fairly insist that it is identical with his product.

In framing the patent in suit, care was taken to avoid the difficulty pointed out in *Cochrane v. Badische Anilin & Soda Fabrik*, supra. Certain identifying tests were set forth, so that the inventors might be able to contend that a chemical compound which responded to them all was, prima facie at least, an infringement of their patent. The tests of the patent are:

First. The dye stuff is a black paste or in solid form; and, though the patent does not say so, this test would be fairly responded to if the black solid had been mechanically transformed into a black powder.

Second. It produces on the fiber, in an acidulated bath, dark-blue shades.

Third. It is very soluble in water.

Fourth. It is insoluble in spirit.

Fifth. It dissolves in strong sulphuric acid with green color.

Sixth. Reducing agents destroy the color-forming alpha-naphthylamine besides other products.

The dye stuff as to which it is to be determined whether or not it infringes is the dye stuff sold by defendant, of which a can was, by stipulation, put in evidence, as "Complainant's Exhibit, Defendant's Color." There is no evidence at all in the case by what process the dye stuff was made. Complainant therefore undertook to prove infringement by the application of "tests." His expert testified that he had applied 34 tests, and that of those tests 5 are named in the patent. We have carefully examined his enumeration of the tests he applied, and fail to find therein more than 4 of the tests of the patent, viz. the third, fourth, fifth, and second. In applying the fourth test, he used both methylic alcohol, in which it was soluble, and ethylic alcohol, in which it was not; but he evidently does not mean to imply that these are to be taken as two tests under the patent, for, if the various double and triple tests of his enumeration are to be thus split up, the list will number more than 34. The evidence supports the conclusion of the circuit court that the words "insoluble in spirit" refer to ethylic alcohol, not to methylic alcohol. To the four tests of the patent which complainant's experts applied, the defendant's dye stuff responded.

The testimony as to the first test of the patent is not very satisfactory, but, in view of the sense in which the word "black" appears to be used in this art, we are not prepared to say that de-

fendant's color failed to respond fairly to this test. The sixth test above quoted from the patent brings up a question of construction. It reads "reducing agents destroy the color-forming alpha-naphthylamine besides other products." Even without any evidence, it is apparent that the sentence is awkwardly expressed. It seems to imply that the black paste or solid consists of alpha-naphthylamine, which forms the color, and of other products, and that reducing agents destroy them all. The proof shows conclusively (all the experts agreeing) that there is no alpha-naphthylamine in the black paste or solid. The alpha-naphthylamine perished long before the ultimate black paste of the patent appeared. Complainant's expert suggests that the sentence means that, "by reducing agents, alpha-naphthylamine, which was used to form the color of the patent in suit, and therefore in the patent is named the color-forming alpha-naphthylamine, is destroyed." But this is not materially helpful, for he says that reducing agents would not change alpha-naphthylamine at all, and he most certainly concedes that, in the ultimate product of the patent, alpha-naphthylamine does not exist as such. The sum of his testimony is that the reducing agents are to be applied to the color. In the light of the testimony, the sentence, as it stands, is, if not meaningless, at least ambiguous. It is apparent that the awkwardness of the sentence arises from the use of the hyphen between "color" and "forming." If that were eliminated, all concede that the plain meaning of the sentence would be that reducing agents would destroy the color, and alpha-naphthylamine would be formed. And the same result would follow if the hyphen were made a little longer, so as to become a printer's dash. It is not necessary, however, to theorize upon this point, or to guess at the meaning of the sentence. It is demonstrable by evidence well recognized as competent in patent causes that the presence of the hyphen is due to a printer's error.

The file wrapper shows that as to tests the original specification read as follows:

"These new dye stuffs produce on wool and silk, in an acidulated bath, violet to dark-blue shades. They are very soluble in water, insoluble in spirits, and dissolve in strong sulphuric acid with green color. They are destroyed by reducing agents, forming alpha-naphthylendiamine besides other products."

Subsequently this part of the specification was amended so as to read as follows:

"Naphthol-black produces on the fiber, in an acidulated bath, dark-blue shades. It is very soluble in water, insoluble in spirit, and dissolves in strong sulphuric acid with green color. Reducing agents destroy the color, forming alpha-naphthylamine, besides other products."

And in this form it was allowed by the patent office. That the hyphen was inserted in the printed copies issued by the office through a printer's blunder is manifest. It is apparent, then, that the inventors prescribed, as one of the tests which would disclose the identity of any body with their product, the action of reducing agents thereon. This action must be such as to destroy the color, and form certain products. The characteristic product of

those thus formed, the one which they selected as determinative under this test, they originally declared to be "alpha-naphtylendiamine." Subsequently, and before patent issued, they changed that declaration to "alpha-naphthylamine." There is no evidence that one skilled in the art would know, when he saw "alpha-naphthylamine" named as the identifying product, that it was a misnomer for "alpha-naphtylendiamine." We know no reason why they should not be held to the selection they thus declared to the public as one of the characteristic tests of their product. If this were a blunder of an ignorant solicitor, they had ample opportunity to correct it by reissue; but, having allowed it to stand in their patent, they must be held to their declaration that reducing agents will produce this result. It has been suggested that since the evidence shows that alpha-naphthylamine would not be formed out of the product of the patent by reducing agents, and that persons skilled in the art would know that fact, the entire test may be rejected as nonsensical surplusage. But there must be some limit to a court's functions in rewriting patents. Assuming that all the imperfections in this patent were due to an ignorant solicitor, remote from his clients,—and it may be noted that there is no evidence of this,—it does not follow that all should be disregarded. We held, as to the error and omission of paragraph 4, that the omission was really supplied elsewhere in the patent; that the error was harmless, since the skilled workman would himself substitute "nitrite" for "nitrate"; and that, although the error must stand in the patent where the patentee's careless solicitor had placed it, we would not infer from its presence that it was due to a fraudulent design to mislead, formed and carried out by the patentees. But here there has been an identifying test put into the patent by the solicitor; the patentee accepts such patent, and applies for no reissue, alleging no mistake; and the court is asked to strike out the test altogether, as ridiculous surplusage. In the absence of any authority for such action, we are unwilling to establish the precedent. By what their solicitors do, patentees should abide. If they are dissatisfied with the letters patent their solicitors obtain, they may, in proper cases, apply for a reissue; but, when they accept their original patents without objection, they must be assumed to have assented to such changes as were made by their solicitors in specification or claim while their application was on its way through the patent office.

When the defendant's coloring matter is treated with reducing agents, it is destroyed, but no alpha-naphthylamine is formed. We have, then, a case where the inventor has prescribed six tests in his patent, and an alleged infringing body responds to five of them, but fails to respond to the sixth. Manifestly, it is not absolutely identical with the product of the patent, as the inventor has defined that product by distinguishing characteristics. It may be that the variance results from some immaterial change in the process, from the use of starting material, which is within the fair range of equivalents; but, having failed to prove identity by the prescribed tests, the burden is on the holder of the patent to show

that the variances in process are immaterial, or the starting materials equivalents of those of the patents. There being no such proof here, the complainant must stand or fall by the results of the tests of the patent; and, since the defendant's color does not respond to these, it cannot be held to be an infringement. The conclusion thus reached renders it unnecessary to discuss the other points raised in the case. The decree of the circuit court is reversed, with costs, and cause remanded, with instructions to dismiss the bill.

On Rehearing.

PER CURIAM. In the patent, as it was finally amended in the patent office, and in the form in which that office notified the patentees that it was prepared to issue it upon payment of the fees, the sixth test was phrased as follows: "Reducing agents destroy the color, forming alpha-naphthylamine besides other products." In the printed copies as they were subsequently issued, the same test is phrased as follows: "Reducing agents destroy the color-forming alpha-naphthylamine besides other products." The record does not disclose which of these forms appeared in the original letters patent, "issued in the name of the United States of America under the seal of the patent office, and signed by the secretary of the interior, and countersigned by the commissioner of patents," as provided in section 4884 of the United States Revised Statutes. We assumed, perhaps erroneously, that the original letters patent conformed to the text of the amendments as allowed; but, if such original letters patent were phrased in the alternative, the situation is not materially changed. In the brief filed with this petition, it is asserted that the statement, "Reducing agents destroy the color-forming alpha-naphthylamine besides other products," is not untrue as to either complainant's or defendant's color. We do not find this assertion to be supported by the proof. The complainant's expert did, under cross-examination, make the following statements:

"My view is that by reducing agents alpha-naphthylamine, which was used to form the color of the patent in suit, and therefore in the patent is named the color-forming alpha-naphthylamine, is destroyed."

"Your interpretation that reducing agents are applied to the color is the right one. The meaning of this sentence is very clear. Reducing agents are applied to the color. The reaction which takes place destroys the alpha-naphthylamine besides other products."

"Alpha-naphthylamine is the most characteristic constituent of the so-called 'naphthol-black color compound.' Therefore that sentence, perhaps only to emphasize that alpha-naphthylamine is so important in the process, states that alpha-naphthylamine is destroyed by the reduction process."

None of these accurately states the fact. It is not true that any "alpha-naphthylamine is destroyed by reducing agents," nor that "the reaction which takes place [when reducing agents are applied to the product] destroys the alpha-naphthylamine," nor that "alpha-naphthylamine, * * * the most characteristic constituent of the * * * compound, * * * is destroyed by the reduction process," for the very good reason, as pointed out in the original opinion, that the alpha-naphthylamine had ceased to exist before the product was obtained, having perished in the process of chemical

combination which gave birth to the product. Certainly, in defendant's color there is no alpha-naphthylamine for reducing agents to destroy. If the same is true of a color produced according to the "example" set forth in the patent, as the evidence shows, then the sixth test is a false one, and must have been known to the patentees to be a false one when they received their patent. Their proper course would have been to correct this false statement by reissue.

Inasmuch as complainant now contends that a highly meritorious discovery and a patent otherwise valid has been wrecked by holding the inventors to a rigid construction of tests which they were under no obligation to insert in their specification, it may be appropriate to decide the question, which was not passed upon in the original opinion. It was contended that although the patent could not be sustained for the broad discovery set forth in the specification, that "any sulpho acid of any radical," when treated according to the process described, would give the result indicated, because no such broad discovery had been made, it might yet be valid for the definite product of a special process set forth in the specification as an "example." Reference may be had to our former opinion for a brief statement of the argument in support of this contention. A majority of this court, whose opinion is hereinafter set forth, are unable to assent to the conclusion sought to be sustained. To do so would be practically to rewrite the patent. Such a restriction of it to the product of the special process conforms neither to what the patentees have asserted to be their invention, nor to what they undertook to claim. Even upon this appeal it was still insisted by their counsel that their patent covers such sulpho acids of the general formula as might, when subjected to their process, produce naphthol-black. Their expert advanced this theory of a narrow construction only as a last resource, when the inherent defects of the patent were made apparent. We are unable to find in the patent or elsewhere any evidence that paragraph 3 was inserted merely as a "help to a better comprehension of the special process." On the contrary, it is the special process which is given "as an example" or helpful elucidation of the general process. Moreover, the statement is hardly accurate that paragraph 3 "only describes the class of bodies to which naphthol belongs," nor are we able to see that it "covers only the first step in the reaction." Manifestly, it does more than describe a class of bodies; it gives a recipe:

"First. Take one of a group of compounds which have been obtained by the reaction of certain acids upon a named substance. Second. Convert this into the diazo-azo compound, with a nitrous acid. Third. Take the compound thus formed, and allow it to react upon naphthol or naphthol-sulphonic acids. Fourth. Keeping it during this reaction in an alkaline solution."

And the following out of this recipe will take the experimenter from the first to the last step of the process. We do not understand from the testimony that any one skilled in the art would have any difficulty in applying the process of paragraph 3 seriatim to every sulpho acid in the group corresponding to its general formula. Certainly, he would not when further assisted as to details

by the "example" given of how to treat one of this general group. That paragraph 3 states what the patentees declare to be their invention seems to us beyond doubt, and the only fair interpretation of the patent is that originally given by complainant's expert, that their invention is, broadly, the formation by their process of the product sought to be patented from any sulpho acid of any radical; any one radical being susceptible of use interchangeably with any other, being the equivalent of that other and the products of all technically the same. The evidence shows conclusively that the statement that they had discovered that "any sulpho acid of any radical," treated according to their process, would give the product they said it would, was untrue. Briefly stated, the "discovery" which the inventors profess to disclose is that all mono-sulpho acids and all di-sulpho acids, treated in a prescribed way, will give a specific result; while the fact is that, so far as appears, no mono-sulpho acid thus treated will give such result; and, when they professed thus to disclose their "discovery," they either knew that the mono-sulpho acids will not give such result, or else knew nothing about the reaction of mono-sulpho acids under such process. In either case the "discovery" which they disclosed is not the "discovery" they made, and it is for the discovery or invention which the patentee makes and discloses that patent issues. Petition for rehearing is denied.

MEMORANDUM DECISIONS.

BEACH v. INMAN et al.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

PATENTS—INFRINGEMENT—PAPER-BOX MACHINE.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Edmund Wetmore, for appellants.

John Dane, Jr., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the judge who heard the motion in the circuit court that the grooved roller of defendant's machine is substantially the upper clamping die of the patent, for the mechanical reasons set forth in the opinion below. That being so, defendant's machine is an infringement, and the order of the circuit court (75 Fed. 840) is affirmed, with costs.

THE CHICAGO.

THE ALVENA.

ATLAS S. S. CO. v. THE CHICAGO.

PENNSYLVANIA R. CO. v. THE ALVENA.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

COLLISION—FERRYBOAT—TUG AND TOW.

Appeal from the District Court of the United States for the Southern District of New York. See 78 Fed. 819.

Chas. C. Burlingham, for the tugs.

Everett P. Wheeler, for Atlas S. S. Co.

Henry G. Ward, for Pennsylvania R. Co.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. In these cases the fundamental questions are the distance of the Alvena and tugs from the piers, and the rate of speed of the ferryboat. Upon the evidence contained in the record, much of which was put in in the presence of the district judge, we concur in his conclusion that the collision was occasioned solely by the fault of the tugs in towing the Alvena so near to the slip of the ferryboat that the latter, when about to leave the slip, on discovering the tug was unable to avoid collision by the exercise of reasonable care.

FIDELITY & CASUALTY CO. v. RANDOLPH. STANDARD L. & ACC.
INS. CO. v. SAME. PREFERRED ACC. INS. CO. v. SAME.
UNION C. & S. CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

Nos. 440-443.

ACCIDENT INSURANCE—VOLUNTARY EXPOSURE—NEGLIGENCE.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

J. K. Flippin and Luke E. Wright, for plaintiffs in error.

Geo. Randolph, Samuel Holloway, and Wm. M. Randolph, for defendant in error.

Before HARLAN, Circuit Justice, LURTON, Circuit Judge, and SAGE, District Judge.

HARLAN, Circuit Justice. These were separate actions upon accident insurance contracts. They were tried with the case of Insurance Co. v. Randolph (just decided) 78 Fed. 754. The evidence in these cases was the same as in that case.

The Fidelity & Casualty Company by its contracts insured against "bodily injuries sustained through external, violent, and accidental means," and against death resulting within 90 days from such injuries independently of all other causes. But the contract did not cover (among other excepted cases) "voluntary exposure to unnecessary danger"; and "in case of injuries, fatal or otherwise, wantonly inflicted upon himself by the accused," the measure of the company's liability was a sum equal to the premium paid.

The Standard Life & Accident Insurance Company by its contracts insured against "immediate, continuous, and total disability or death resulting from bodily injuries" caused "solely by external, violent, and accidental means." But its contracts did not cover (among other excepted cases) "intentional injury (inflicted by the insured or any other persons), voluntary overexertion,

wrestling, lifting, racing, voluntary and unnecessary exposure to danger, entering or trying to enter or leave a moving conveyance using steam as a motor (cable cars excepted), riding in or on any conveyance not provided for the transportation of passengers, or walking or being on the roadbed or bridge of any railway."

The Preferred Accident Insurance Company by its contracts insured against "immediate, continuous, and total disability or death resulting from bodily injuries," effected during the term of the insurance, "through external, violent, and accidental means." But those contracts did not cover (among other excepted cases) "intentional injury (inflicted by the insured or any other person), nor voluntary and unnecessary exposure to danger, nor wrestling, or fighting, or racing or competitive games, nor entering or leaving, or attempting to enter or leave, a moving conveyance using steam, cable, or electricity as a motor (except street cars), nor travel on any conveyance not provided for transporting passengers"; the extent of the liability for "injuries, fatal or otherwise, purposely inflicted upon the insured by himself," to be the sum paid for the insurance ticket.

The Union Casualty & Surety Company by its contracts insured against bodily injuries happening to the assured, as well as death, caused solely by external, violent, and accidental means. But the contracts did not cover (among other excepted cases) "injuries intentionally inflicted on the assured by himself or by any other person, not being an unprovoked assault," nor "voluntary exposure to avoidable danger, except where incurred in an attempt to save human life," nor "any violation of law or municipal ordinance or of the rules of any corporation, entering or trying to enter or leave a moving conveyance (other than street cars) using steam or electricity as a motive power," nor "riding in or upon a conveyance not provided for the transportation of passengers, or walking or being on the roadbed or bridge of any railway."

The defense in each of these cases was substantially the same as in the case against the Travelers' Insurance Company.

The words, "voluntary and unnecessary exposure to danger," in the contracts with the Standard Life & Accident Insurance Company and the Preferred Accident Insurance Company, and the words, "voluntary exposure to avoidable danger," in the contract with the Union Casualty & Surety Company, mean the same as the words, "voluntary exposure to unnecessary danger," in the contracts with the Travelers' Insurance Company and Fidelity & Casualty Company.

For the reasons stated in the opinion in *Insurance Co. v. Randolph* (just decided), the judgment in each of these cases is affirmed.

KING v. McCLINTOCK et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1897.)

No. 184.

INJUNCTION—DISSOLUTION.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Maynard F. Stiles, for appellant.

Z. T. Vinson, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case presents precisely the same facts and the same questions as that of *King v. Buskirk* (just decided) 78 Fed. 233. The appellant is the same person as the appellant in that case, and the appellees were defendants in the injunction suits as well as in the action at law. The verdict of the jury was in their favor, and their motion to dissolve the injunction was based on that verdict. The decree of the circuit court is affirmed.

YPSILANTI DRESS-STAY MANUF'G CO. v. VAN VALKENBERG et al.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

PATENTS—NOVELTY—INVENTION.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Edmund Wetmore, for appellant.

C. H. Duell, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of circuit court (72 Fed. 277) affirmed, with costs, upon the opinion of court below.

CARTER-CRUME CO. v. BLOOMINGDALE.

(Circuit Court, S. D. New York. February 6, 1897.)

PATENTS—INFRINGEMENT—ANTICIPATION.

In Equity.

Bill brought by Carter-Crume Company against Lyman G. Bloomingdale for infringement of reissue letters patent No. 10,359, issued July 24, 1883, for an improvement in manifold copying books. The defenses were: (1) Noninfringement; (2) invalidity of the reissue; (3) anticipation by prior use; and (4) lack of equity in the complaint. On motion for preliminary injunction. Granted.

Charles H. Duell, for complainant.

Kerr, Curtis & Page and Benjamin Barker, Jr., for defendant.

LACOMBE, Circuit Judge. All the defenses urged here, save one, appear to have been presented before Judge Coxe. The new one is the "prior use" of a particular book now produced by C. O. Boyles. The evidence touching the authenticity of this book, and to what extent its use anticipated the patent, is of a character which may best be passed upon on final hearing. Following Judge Coxe's decision, the motion for preliminary injunction is granted; injunction not to take effect until 30 days from date, so as to give defendant, who is a user, opportunity to provide himself with noninfringing order books.

DAVIS v. CAMMEYER.

(Circuit Court, S. D. New York. January 30, 1897.)

PATENTS—PRELIMINARY INJUNCTION—DENIAL.

Motion for preliminary injunction. Suit on patent No. 242,382, dated May 31, 1881, to Michael Shuter and Abraham Davis, for "tip for insoles," and sustained on final hearing in Shuter v. Davis, 16 Fed. 564. Denied.

Edwin H. Brown, for complainant.

Philip J. O'Reilly, for defendant.

LACOMBE, Circuit Judge. The articles used in the defendant's shoes are not in all respects like those which, in the former suit, were held to be infringements of the patent. While the variances are not perhaps great, the patent is a narrow one, and the determination of the question whether these particular tips are also infringements may best be reserved for final hearing.

GOLDBERG & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES.

TOWNSEND, District Judge (orally). The decision of the board of general appraisers, affirming the action of the collector of customs, is affirmed, under the rulings of the circuit court of appeals in *Merwin v. Magone*, 17 C. C. A. 361, 70 Fed. 776, *U. S. v. China & Japan Trading Co.*, 18 C. C. A. 335, 71 Fed. 864, and *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394.

THE RESTLESS.

BURTIS v. THE RESTLESS. MOQUIN-OFFERMAN-HEISSENBUTTEL COAL CO. v. SAME. TRAHEY et al. v. SAME. RUTHER v. SAME. SEEMANN v. SAME. GUINAN et al. v. SAME. SULLIVAN v. SAME. HURLEY v. SAME.

(District Court, E. D. New York. December 2, 1896.)

ADMIRALTY—SALE OF VESSEL—LIENS UNDER STATE LAWS.

Macklin, Cushman & Adams, for Burtis and Trahey.

Peter S. Carter, for Ruther, Seemann, and Guinan.

Alexander & Ash, for Moquin-Offerman-Heissenbittel Coal Co.

James Troy, for Sullivan and Hurley.

BENEDIOT, District Judge. In this case the same questions arise as in the case of *The Glen Iris*, 78 Fed. 511, except that there is no claim for damage by negligent towing, and no necessity for making a rest in any of the monthly bills on that account. Let the fees of the officers of court be first paid, and then the claims for which libels had been filed within 40 days of the date of each monthly bill, with costs pro rata, if there be not enough for all.

END OF CASES IN VOL. 78